

**SHARED RESPONSIBILITY FOR THE ENFORCEMENT
OF
INTERNATIONAL CRIMINAL LAW**

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CANDIDATE'S SUMMARY OF THESIS

This thesis is concerned with 'international criminal law'. It examines the historical development of this body of law. This thesis also examines the record of enforcement of international criminal law. Historically the enforcement of international criminal law has primarily been a matter for states. States possess the capacity and lawful means of coercion necessary to enforce the criminal law. On occasions states have acted in concert with other states to enforce international criminal law by means of international criminal tribunals. However the enforcement of the decisions of these tribunals has been by the use of co-opted state coercive power.

The thesis set out to prove that states through their representatives do at times perpetrate international crimes upon humanity. International criminal law prohibits this conduct. The argument of the thesis is that the role of law enforcer cannot properly be performed by a state that has a common interest with the perpetrator of the crime. This conflict of interest has been responsible for a poor record of enforcement of international criminal law by states. However states often assert that the enforcement of the criminal law (including international criminal law) is exclusively their sovereign right, especially if the crimes are committed upon their territory or by their citizens.

This thesis addresses this conflict of interest and argues that exclusive state dominion over international criminal law is incongruent with the achievement of justice. The thesis asserts that humanity has a superior claim to states when human interests are threatened by the 'criminal conduct' of states. The thesis considers the role of 'global civil society' and postulates a role for 'global civil society' when states should be disqualified from exercising exclusive authority over the enforcement of international criminal law because of their irreconcilable conflict of interest.

The thesis considers the position of the International Criminal Court (ICC) and argues that this court, as presently constituted, is greatly dependant upon states in order to fulfil its prosecutorial role. This dependency can at times influence whether or not the ICC prosecutor is permitted to investigate international crimes. The thesis proposes a means whereby global civil society might apply pressure upon states in order to ensure that international criminal law is properly enforced by either the ICC or by states themselves.

SIGNED DECLARATION

I CERTIFY THAT THIS THESIS DOES NOT INCORPORATE WITHOUT ACKNOWLEDGEMENT ANY MATERIAL PREVIOUSLY SUBMITTED FOR A DEGREE OR DIPLOMA IN ANY UNIVERSITY; AND THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF IT DOES NOT CONTAIN ANY MATERIAL PREVIOUSLY PUBLISHED OR WRITTEN BY ANOTHER PERSON EXCEPT WHERE DUE REFERENCE IS MADE IN THE TEXT.

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Grant Robert Niemann

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SHARED RESPONSIBILITY FOR THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW

CHAPTER 1

Introduction

1.1 The Core Argument of the Thesis

International criminal law controversially challenges traditional precepts of state sovereignty in that it questions the exclusivity of national claims to jurisdiction. This thesis critically examines the history of enforcement of international criminal law by states¹ and contends that there are some fundamental weaknesses in the enforcement mechanism applicable to this law. The central argument of this thesis is that *exclusive* state control over the enforcement of international criminal law is incongruent with the achievement of justice.² The thesis argues that the proper administration of international criminal law requires states to share the enforcement function with the international community, especially in circumstances where exclusive enforcement is compromised by conflicting interests.³

The term ‘exclusive’ in the context of this thesis relates to attempts by states to exclude uninvited actors such as the international community of states or civil society when they attempt to participate in the enforcement process. In these circumstances states often argue that these other actors have no role in the enforcement of international criminal law especially when the international crimes are alleged to have occurred on their

¹ The term ‘state’ for the most part means ‘that body or organisation that possesses international personality - in that it has international rights and responsibilities’ (see I A Shearer, *Starke’s International Law* (11th ed, 1994) 117) but for the purposes of the thesis it may from time to time also include the government of that state in terms of its body politic as well as the people of that state.

² UN Secretary General, *Implementing the responsibility to protect*, UN GAOR, 63rd sess, Agenda Item 44 and 107, UN Doc A/63/677 (12 January 2009) 15.

³ *Ibid.* While logically the very existence of international criminal law implies that some part of state sovereignty has already been surrendered, states still regularly contest the issue claiming that sovereignty gives them an exclusive right to jurisdiction. This claim to exclusivity is based on a flawed argument because at least since Nuremberg and even earlier, states have not had the exclusive right to deal with citizens who breach international criminal law. See Anthony J Colangelo, ‘Universal Jurisdiction as an International “False Conflict” of Laws’ *SMU Dedman School of Law Legal Studies Research Paper No. 00-35*, 2 <<http://ssrn.com/abstract=1337777>> at May 2009; Maogoto argues that ‘by establishing individual accountability for violations of international law, the Nuremberg and Tokyo judgements explicitly rejected the argument that State sovereignty was an acceptable defence for unconscionable violations of international criminal law’: J N Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) 3.

territory or by their citizens.⁴ Resisting the involvement of the international community in these circumstances may be seen by the relevant state as important for their ‘national interests’, because permitting international involvement may be perceived as a ‘sign of weakness’ or a ‘loss of territorial control’.⁵ However in other cases the resistance appears to be motivated by the fact that the government officials of that state are themselves implicated in the crimes.

While states do not always succeed in excluding the involvement of the international community in these circumstances, the thesis takes issue with those who would assert that states are ‘entitled’ to make this assertion or that states are always best placed to assume this enforcement function.⁶ As Bassiouni notes, international criminal law can be enforced ‘directly’ by international criminal tribunals or ‘indirectly’ by states taking enforcement action.⁷ The thesis is not critical of legitimate enforcement of international criminal law by states but of perverse enforcement or a failure to enforce or attempts to prevent other legitimate actors enforcing international criminal law.⁸ The thesis validates this claim by examining the historical record of persistent failure by states to satisfactorily perform this function, thereby depriving them of a legitimate claim to ‘exclusivity’.

The thesis argues that states at times improperly assert the right to exclusively enforce international criminal law in preference to international tribunals⁹ by misconstruing the ‘sovereign – citizen

⁴ Colangelo, above n 3, 6; Alexander Somek, ‘Administration Without Sovereignty’ *University of Iowa Legal research paper No. 09-04 2009*, 11 <<http://ssrn.com/abstract=1333282>> at July 2009; see also *The Case of the SS Lotus (France v Turkey)*, 1927 P.C.I.J. (ser.A) No.10 at 18 where the doctrine of the supremacy of ‘state sovereignty’ is supported by the ICJ.

⁵ E K Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (2005) 1; This claim made by states, it is not justified as a matter of law. Examples of where the claim has been made include: The United States of America under the G W Bush administration in opposition to the International Criminal Court; the government of Indonesia in opposition to an ICTY style ad hoc International War Crimes Tribunal for East Timor; Cambodia in opposition to a similar International War Crimes Tribunal for Cambodia concerning the Khmer Rouge genocide; and Germany in opposition to an International War Crimes Tribunal following World War I. All of these examples will be expanded on during the course of the thesis, see in particular Chapter 7.

⁶ John Laughland, ‘The Dangers of the Politicisation of International Justice or *quis custodiet ipsos custodiet?*’ in H Roggemann and P Sarcevic (eds), *National Security and International Criminal Justice* (2002) 83, 85; see also M Cherif Bassiouni, *Introduction to International Criminal Law* (2003) 577; Maogoto, above n 3, 283; Leonard, above n 5 1.

⁷ *Ibid* Bassiouni, above n 6, 23.

⁸ *Ibid*.

⁹ J Kochan, ‘Sovereignty and the American courts at the Cocktail Party of International Law: the Dangers of Domestic Judicial Invocations of Foreign and International law’ (2006) 29 *Fordham International Law Journal* 506, 512.

compact'.¹⁰ Under national criminal law there is an understanding between the government of the state and the citizen, whereby the government provides a secure environment in which the citizen can live in exchange for the citizen surrendering to the government the power to rule and if necessary to punish.¹¹ However this compact does not always fit well with international crimes, especially where state officials are themselves implicated in the crimes and the citizens are the victims.

While it is argued that this claim to exclusivity, with respect to the jurisdictional ambit of international criminal law no longer has a basis in law, it is conceded that the claim did have some substance in the past. Previously when a citizen of a state committed a war crime during the course of an armed conflict, that citizen could not be held criminally liable for that offence by any entity other than the state itself. Only the state to which that citizen belonged could prosecute the citizen for that offence.¹²

The jurisdictional contest between states and the international community over the enforcement of international criminal law goes back to at least the period following World War I, but featured during the Nuremberg and Tokyo Tribunals trials and more recently with Indonesia's rejection of an international tribunal for East Timor (2000), Cambodia's objection to an independent international Khmer Rouge Tribunal (2003), Sudan's refusal to accept the jurisdiction of the International Criminal Court (2008) and Uganda's preference for excluding the International Criminal Court so that a 'peace deal' might be brokered with Kony's Lords Resistance Army (2008).¹³

International enforcement of international criminal law is controversial because it 'transcends'¹⁴ the exclusive jurisdiction of any one particular state,¹⁵ and introduces the concept of 'universal jurisdiction',¹⁶ where the international community of states or any state, may exercise jurisdiction

¹⁰ Jason Ralph, *Defending the society of states: Why America Opposes the International Criminal Court and its vision of world society* (2007).

¹¹ Paul Hegarty, 'Doubling Legitimacy: Reading Rousseau's *Contract Social* After Pateman's *Sexual Contract*' *University College Cork* (Unpublished) 292.

¹² M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 *Human Rights Review* 203, 209; Shearer, above n 1 307 – 310.

¹³ See discussion in Chapters 6 and 7.

¹⁴ D Orentlicher, 'The Future of Universal Jurisdiction' in S Macedo (ed), *Universal Jurisdiction: National courts and the Prosecution of Serious crimes under International Law* (2004) 233.

¹⁵ Leonard, above n 5, 61.

¹⁶ Eugene Kontorovich, 'The Inefficiency of Universal Jurisdiction' *University of St Gallen Law Research Series Working Paper 2007-13* 1, 3; see also *Democratic Republic of Congo v Belgium - Arrest Warrant of 11 April 2000* Judgement, 14 February 2002 ICJ.

over international crimes.¹⁷ However when states ambiguously reserve to themselves the exclusive right to apply international criminal law in their national jurisdictions to the exclusion of international enforcement,¹⁸ they undermine the credibility of this law and seriously inhibit the development of this branch of jurisprudence.¹⁹

In this thesis, the unsatisfactory ‘track record’ of state enforcement of international criminal law by states is contrasted with the enforcement of international criminal law by international tribunals. While international tribunals have been far from perfect, it is argued that (when permitted) they have fared better in circumstances where individual states are faced with a conflict of interest. However, states have only permitted the international community to enforce this law in relation to tightly controlled individual incidents, specifically identified on an ad hoc basis or by special treaty.²⁰ General enforcement authority of international criminal law by the international community has not been approved by states. States are in a good position to assert this influence because they for the most part, control the only coercive enforcement mechanisms available, namely the police and the military.

It is argued in the thesis that because states (especially powerful states), have generally ‘won the day’ on where, when and against whom international criminal law could be enforced, this has had a ‘flow on effect’ with respect to the enforcement powers of the International Criminal Court (ICC). It is contended in the thesis that when it came to the creation of the ICC, the negotiating states effectively shackled the ICC’s enforcement authority.²¹ Euphemistically labelling the jurisdiction ‘complementary’ it was in reality intended that it would be state controlled.²² The purpose of ‘complementarity’ was to ensure that the ICC would only be allowed to deal with cases where it was in the interests of states to allow this to happen, or where the relevant state was too weak to resist international pressure.²³ Accordingly when a

¹⁷ Colangelo, above n 3, 4.

¹⁸ Ibid 2.

¹⁹ Orentlicher, above n 14 234; B R Roth, ‘Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and The Limits of International criminal Justice’ *Wayne State University Law School Legal Research paper N0.09-17*, 8 <<http://ssrn.com/abstract=1441962>> at November 2009.

²⁰ The ad hoc tribunals (ICTY and ICTR) were created by a Chapter VII Resolution of the UN Security Council and the ICC was created by the Rome Treaty (see discussion in Chapter 6).

²¹ Maogoto, above n 3, 226.

²² W A Schabas, ‘Introduction’ in W A Schabas & S Darcy (eds) *Truth Commissions and Courts* (2004) 2; Leonard, above n 5 58; Orentlicher, above n 14 219; B N Schiff, *Building the International Criminal Court* (2008) 68.

²³ Bassiouni, above n 6, 500. Bassiouni notes that state jurisdictions always have primacy over the ICC. Jenia Iontcheva Turner ‘Nationalizing International Criminal Law’ (2004) 41 *Stanford Journal of International Law* 1 1.

prosecution was contrary to the interests of a state, the ICC (which is dependant on the 'host state' for the gathering of evidence and the arrest of the accused),²⁴ would be severely obstructed or prevented from undertaking this function.²⁵ As Simpson argues, 'it is only in cases of national paralysis that the ICC fills the jurisdictional lacuna'.²⁶

While some scholars may take a less pessimistic view,²⁷ it is the argument of the thesis, that unless other forces are brought to bear,²⁸ the ICC (for the most part), is only ever likely to exercise jurisdiction when the particular state involved 'consents' to jurisdiction or where more powerful states force this result.²⁹

States (at times) justify this duplicitous approach to the enforcement of international criminal law by claiming that they are merely protecting their citizens' best interests which in turn they assert as their 'sovereign' right.³⁰ During the course of the thesis the issue of sovereignty is examined from both the historical and modern perspectives. However, it is also argued that with the combined effect of the international expansion of the 'democratic principle' and 'globalisation',³¹ the rights of human beings to express their views beyond the confines of the sovereign state is now having an impact.³² The sovereign state is no longer the exclusive player on the international stage.³³ Sovereignty of humanity has found a new dimension.³⁴ This expression of 'power by people' is achieved at least in part through their membership of international civil society.³⁵

²⁴ Schiff, above n 22, 68.

²⁵ William H Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' (2008) 19 *Criminal Law Forum* 5 33; see also *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 91 (entered into force 1 July 2002) ('Rome Statute') arts 16, 17 and 19.

²⁶ Gerry Simpson, 'Politics Sovereignty, Remembrance' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 55; M Glasius, *The International Criminal Court: A Global Civil Society Achievement* (2006) 3. *Contra* William W Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Journal* 59.

²⁷ Burke-White, above n 26; Schabas, above n 25, 5; Casten Stahn, 'Complementarity: A Tale of Two Nations' (2008) 19 *Criminal Law Forum* 87; Joanna Kyriakakis, 'Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare' (2008) 19 *Criminal Law Forum* 115.

²⁸ Burke-White, above n 26

²⁹ Turner, above n 23, 2.

³⁰ Colangelo, above n 3, 22; Roth, above n 19, 7.

³¹ Leonard, above n 5, 41.

³² Frank J Garcia, 'Globalization and the Theory of International Law' *Boston College Law School Research Paper 75- 2005* <<http://ssm.com/abstract=742726>>; D B Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (2007) 40.

³³ Glasius, above n 26, 3.

³⁴ See Hersch Lauterpact, *International Law and Human Rights* (1950).

³⁵ H J Steiner & P Alston, *International Human Rights in Context: Law, Politics, Morals* (2000) 951; Goldman, above n 32, 37.

The thesis proposes that there is scope for ‘international civil society’ to play an important role in improving the enforcement practices of international criminal justice by means of a civil society mechanism. The mechanism advanced in the thesis is a ‘people’s court’ which would not purport to take over the enforcement function now exercised by states and the international community but rather to apply pressure to these bodies so as to ensure that international criminal law is enforced consistently and in a manner which is fair to both victims and accused persons alike.

Just how much progress can be made in achieving reform in this area remains to be seen. However the protection of humanity through the application and enforcement of international criminal law is one way to work towards making the planet a safer place for humanity to survive. The enforcement of international criminal law will not guarantee humanity’s survival, but it will provide a means by which attempts to destroy human beings on a massive scale can be declared illegal and hopefully curtailed.³⁶

1.2 *Locating the Research Focus*

A discussion of international criminal law requires some understanding of how the criminal law works. While this is not a thesis on national criminal law, some aspects of national criminal law are assumed. The criminal law of a state or regional community within a state is directed to regulating the control of the inhabitants of that state or region, so as to limit anti-social behaviour thus making the community safer for all inhabitants.³⁷ The criminal justice system is the means whereby an impartial umpire may sit between the perpetrator and victim of the crime so that parties do not resort to self-help, thus potentially destroying themselves in the process.³⁸ Within the society of that state or region, the criminal law provides a means of overall protection and as such endeavours to ensure that that society survives.³⁹ Needless to say, the impartial enforcement of the criminal law within that society is extremely important and in particular with crimes that can erode the fabric of that society, the society itself is committed to the enforcement of that criminal law.⁴⁰ If national criminal law is important for a state or regional community, the importance of that law pales when one considers the

³⁶ Leonard, above n 5, 61.

³⁷ L Waller & C R Williams, *Criminal Law* (11th ed, 2009) 16.

³⁸ Mark Findley, *Problems for the Criminal Law* (2001) 3.

³⁹ *Ibid* 3-18.

⁴⁰ *Ibid*.

importance and significance of international criminal law where the crimes are of a much greater magnitude.

International criminal law is not concerned so much with the protection and preservation of a particular society but with humanity itself.⁴¹ During the course of the 20th century humankind discovered the means by which humanity could be destroyed in whole or in part. In light of this discovery the need arose to create a law which would preserve humanity itself. At the end of World War II the world took stock after an event so devastating that the resolve of states to act so as to prevent the reoccurrence of such an event prevailed over traditional claims to paramount sovereign rights.⁴² For the first time, these leaders, or at least some of them, began to perceive the possibility of the destruction of humanity itself. It was from these 'ashes' that grew the international crimes of genocide, crimes against humanity and crimes against peace.⁴³ It was also out of this devastation and the massive destruction of millions of innocent human beings that the Nuremberg principles emerged.

The post World War II war crimes trials were a 'ray of hope' that commonsense would finally prevail and that mankind would seek to develop a means through use of the criminal justice system, whereby humanity could be preserved and protected. Sadly this enthusiasm waned all too quickly as states opted for military solutions to the problem of self preservation. The importance of the international criminal justice system diminished during the period of the 'Cold War'.⁴⁴ The Nuremberg ideal was placed 'on the back burner' and did not emerge again until the late 20th century when Europeans in Yugoslavia were once again confronted with an example of human destruction smaller but similar to that which had occurred during the course of the Second World War.⁴⁵

The inter-ethnic conflict in the former Yugoslavia reinvigorated the international community which, in relation to that particular state, endeavoured to ensure that there was a means of protection introduced in order to preserve humanity. By the time the International Criminal Tribunal for the former Yugoslavia (ICTY) was created in 1993, weapons technology had reached a level where the entire destruction of humanity was not just frightening thought but a reality.⁴⁶

⁴¹ A Cassese, *International Criminal Law* (2nd ed, 2008) 8.

⁴² *Ibid* 31.

⁴³ *Ibid* 30.

⁴⁴ K Kittichaisaree, *International Criminal Law* (2001) 22.

⁴⁵ *Ibid*.

⁴⁶ Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Tribunal for the Former Yugoslavia* (1995) 40.

Drawing on the success of the ICTY and in a period of heightened optimism, the international community moved to create the ultimate mechanism whereby the whole of humanity could be protected - the permanent international criminal court.⁴⁷ Unfortunately in order to achieve this objective, the international criminal court had to be given the authority to challenge the sovereignty of individual nation states. However during the negotiation stages of the treaty, many states retreated behind their 'sovereign ramparts' and deprived the court of significant elements of jurisdictional authority.⁴⁸ As a consequence the international community gave birth to a weak organisation which, if not reinforced in the future, will always lack the means of effectively operating as an efficient contributor to international justice.

To understand these competing pressures it is necessary to analyse international criminal law in the context of the tension between state sovereignty and global civil society. The triangular forces of (1) *International Criminal Law*; (2) *Sovereignty* and (3) *Global Civil Society* play an important part in this thesis and will be the subject of more detailed discussion in subsequent chapters of the thesis.

1.2.1 International Criminal Law

International criminal law is not a settled area of law and contains element of other bodies of law such as international humanitarian law, international human rights law and national criminal law. Kittichaisaree contends that while international criminal law is the 'law that governs international crimes',⁴⁹ it is 'distinguishable from international human rights law' and 'national criminal law'.⁵⁰ Zahar and Sluiter describe international criminal law as the 'criminal law of the international community'.⁵¹ They contend that the extent to which human rights norms apply to international tribunals is procedural and interpretative.⁵² Expressed differently, rather than arguing that international human rights law forms a basis of international criminal law, they approach the question from the extent to which international tribunals are bound to interpret the law consistent with this body of principles. Of course they note that international tribunals are bound by international human rights

⁴⁷ Kittichaisaree, above n 27, 27.

⁴⁸ Ibid 36–38.

⁴⁹ Ibid 3.

⁵⁰ Ibid 4.

⁵¹ A Zahar and G Sluiter, *International Criminal Law* (2008) vii.

⁵² Ibid 278.

norms which form ‘part of customary international law’,⁵³ but to the extent that they affect legal construction and criminal procedure.⁵⁴ This conclusion is consistent with Article 21 of the International Criminal Court Statute which provides that:

Article 21
Applicable law

The Court shall apply:

In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

The Court may apply principles and rules of law as interpreted in its previous decisions.

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Bantekas and Nash also contend that international human rights norms that have achieved the status of customary law are binding upon international tribunals at least so far as criminal procedure is concerned.⁵⁵ Accordingly international tribunals must provide an accused with a ‘fair trial’, the prohibition of retroactive legislation and the like. To this end, Bantekas and Nash conclude that the ‘international criminal process is inextricably linked with the development and application of human rights’⁵⁶ but this ‘obligation to comply’ does not mean that international criminal law is a branch of international human rights law. International criminal law is emerging as a body of law in its own right.

Cassese defines international criminal law as a ‘body of international rules designed both to proscribe certain categories of conduct (war crimes and crimes against humanity) and to make those persons who engage in

⁵³ Ibid vii. Discussed in greater detail in Chapter 2 of this thesis.

⁵⁴ Ibid 280.

⁵⁵ I Bantekas & S Nash, *International Criminal Law* (2nd ed, 2003) 15.

⁵⁶ Ibid.

such conduct criminally liable'.⁵⁷ Cassese also sees international criminal law as comprising two parts, the first part he describes as the 'substantive law' – the international crimes as having their origins in national criminal law and international humanitarian law, and 'procedural criminal law' which derives from national criminal law and human rights law.⁵⁸

The most important body of law influencing international criminal law is international humanitarian law. Indeed when the first modern international criminal tribunal was established (ICTY) the United Nations Secretary General in his inaugural Report to the UN Security Council on the Tribunal, did not even use the term 'international criminal law' the expression he used and then understood as the appropriate body of law, was 'international humanitarian law'. The crimes referred to by the Secretary General in the ICTY Statute, were 'serious breaches of international humanitarian law'.⁵⁹ The Secretary General also took the view that international human rights law only applied to construction and procedural matters and then only if they were 'internationally recognised' human rights standards.⁶⁰

National criminal law has also had an influence over the development of international criminal law but as national criminal law varies from state to state, it can only influence international criminal law to the extent that the relevant provision falls within internationally recognised standards.

As a consequence when discussing international criminal law throughout the thesis, references to international law, international humanitarian law, human rights law and national criminal law will be limited to the context of international criminal law where they are directly relevant. Similarities and differences between these various bodies of law and international criminal law will not be discussed unless such comparative analysis is used as an aid to that discussion or furthers the specific point being made.

1.2.2 Sovereignty

Sovereignty is a diverse topic and has been the subject of a great deal of academic discussion.⁶¹ While state sovereignty is an important part of the discussion in this thesis, in relation to national criminal law for example, this thesis is not a thesis on state sovereignty. Accordingly the discussion

⁵⁷ Cassese, above n 41, 3.

⁵⁸ Ibid 6.

⁵⁹ UN Secretary General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704, 3 May 1993, paras 10, 18, 29, 32.

⁶⁰ Ibid para 106.

⁶¹ *Josse v Australian Securities and Investment Commission* (1998) 159 ALR 260 per Hayne J par 16.

on state sovereignty in the thesis will be limited to that which is necessary in order to mount the thesis argument. However Kittichaisaree is quite right when he argues that:

Compared to other branches of law, international criminal law has been slow in crystallization as a viable legal system. Foremost among the reasons hindering its development is the shield of State sovereignty and its attendant ramifications.⁶²

Simpson notes that the tension between sovereignty and international criminal law is ‘a constant in the history of the field’.⁶³ McGoldrick argues that national criminal law is ‘closer to state sovereignty than say the environment’.⁶⁴ As a consequence a thesis that argues that ‘exclusive state dominion over international criminal law is incongruent with the achievement of justice’ must of necessity touch on the issue of state sovereignty.

In Chapter 3 this question of state sovereignty is examined from a historical perspective. The thesis proceeds on the basis that in order to properly understand the foundation of the claim by states ‘that there is a sovereign right to exclude other states or the international community from interfering in their internal affairs’ (the criminal law being one such affair), some discussion of the sovereignty principle is necessary. However the thesis does not attempt to canvas all aspects of the sovereignty discourse.

1.2.3 Global Civil Society

The thesis postulates possible avenues for reform. In this context it is argued that civil society is an appropriate ‘driver of change’.⁶⁵ Historically the intervention of a neutral mechanism in order to separate warring states engaged in an international armed conflict so that wounded soldiers, prisoners of war and civilians might be protected, has traditionally fallen to civil society. The *Red Cross Society* and later *International Committee of the Red Cross* have willingly accepted this role from the time of the ratification of the first Geneva Convention of 1864.⁶⁶ Kaldor argues that civil society ‘has always been linked to the notion of minimizing violence in social relations, to the public use of

⁶² Kittichaisaree, above n 27, 4.

⁶³ Simpson, above n 26, 53.

⁶⁴ Dominic McGoldrick, ‘Political and Legal Responses to the ICC’ in D McGoldrick, P Rowe and E Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 441.

⁶⁵ UN Secretary General, *Implementing the responsibility to protect*, UN GAOR 63rd sess, Agenda Item 44 and 107, UN Doc A/63/677 12 January 2009 31.

⁶⁶ Glasius, above n 26, 6.

reason as a way of managing human affairs in place of submission based on fear and insecurity...’⁶⁷

This thesis promotes the intervention of a civil society mechanism to oversee the enforcement of international criminal law, so that states can be held accountable in those circumstances where a conflict of interest deters them from properly enforcing international criminal law.⁶⁸ A significant part of the thesis will be devoted to describing historical examples of where states have had a conflict of interest when attempting to enforce or prevent the enforcement of international criminal law. The purpose of this descriptive content is to provide evidence of why the exercise of exclusive jurisdiction by states over the administration and enforcement of international criminal law can result in an injustice being caused to, not only the victims but persons accused of these crimes as well.⁶⁹

In the thesis, the expression ‘global civil society’ is preferred over ‘civil society’ so as to avoid any confusion with the civil society confined to the borders of a single state. Global civil society, it is argued, is more closely aligned to the interests of all of humanity, whereas the civil society of a particular state may not necessarily have the interests of all humanity at heart.⁷⁰ The global civil society mechanism advanced by the thesis to perform a monitoring role over the behaviour of states when it comes to the enforcement of international criminal law is the ‘people’s court’. How this proposed court would function is discussed in detail in Chapter 9. Again this is not a thesis devoted to a discussion of global civil society or people’s courts, accordingly not all of the available literature on either of these topics is covered in the thesis, rather a sufficient coverage of the material is provided in order to mount the central argument in favour of diversifying responsibility for the enforcement of international criminal law.

1.3 *Significance of Research*

International criminal law deals with the most serious offences on the criminal calendar – war crimes, crimes against humanity and genocide; hence the significance of the research is its importance to the preservation of humanity. Humanity has an interest in seeing that international

⁶⁷ Mary Kaldor *Global Civil Society: An Answer to War* (2003) 3.

⁶⁸ Glasius, above n 26, 3.

⁶⁹ The thesis does not argue that states always have a conflict of interest, the problem addressed is: what happens when they do?

⁷⁰ Kaldor, above n 67, 2.

criminal law is administered and enforced effectively. Henkin argues that ‘enforcement has always been seen as the weak link in the international legal system’.⁷¹ This dichotomist approach to the enforcement of international criminal law has resulted in an unsatisfactory, sporadic and ad hoc enforcement record.⁷² The further significance of this research is that it addresses the uneven enforcement practices of states with respect to international criminal law.⁷³ This research attempts to discredit claims by states that they, on the basis of their past performance, should have exclusive control over the enforcement of international criminal law and proposes a mechanism whereby states can be held accountable when they attempt to manipulate the proper administration and enforcement of international criminal law in order to further some national and or political interest.

What is distinctive about the dissertation is the nature of the evidence based argument leading to a proposal for a ‘global civil society’ mechanism that may aid in influencing states to effect change. While this is not the first research project on this topic, nor is it likely to be the last, it adds to the research and to that end maintains the momentum of the discussion on this important question that so directly affects humanity.

1.4 *Research Method*

As the thesis relates to the enforcement or lack of enforcement of international criminal law, it is of necessity based on specific examples of these events. The empirical underpinnings of this jurisprudence are for the most part the cases themselves.⁷⁴ The thesis is based on the traditional hierarchical authority of sources for international legal interpretation as contained in Article 38 of the *Statute of the International Court of Justice*,⁷⁵ namely – international conventions, treaties, statutes national legislation; then the judicial decisions of international and national tribunals and courts; followed by the practice and *opinio juris* of states.⁷⁶ The thesis is also based on academic writings, mostly legal academics. A considerable amount of the legal domain traversed by the

⁷¹ Louis Henkin, ‘Human Rights and State “Sovereignty”’ (1995) 25 *Georgia Journal of International and Comparative Law* 31, 41.

⁷² Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (1999) xvii.

⁷³ Glasius, above n 26, 17.

⁷⁴ As noted in the ‘Acknowledgements’, in some of the cases discussed in the thesis the author has had personal involvement.

⁷⁵ *Statute of the International Court of Justice*. See also F F Martin et al, *International Human Rights & Humanitarian Law: Treaties, Cases, & Analysis* (2006) 22.

⁷⁶ M Cherif Bassiouni, ‘The History of Universal Jurisdiction and Its Place in International Law’ in S Macedo (ed), *Universal Jurisdiction: National courts and the Prosecution of Serious crimes under International Law* (2004) 45.

thesis has already (albeit recently) been dealt with by leading international criminal law academics such as Bassiouni,⁷⁷ Cassese,⁷⁸ Sunga,⁷⁹ Kittichaisaree,⁸⁰ Robertson,⁸¹ McCormack,⁸² and others. In *State Sovereignty and International Criminal Law: Versailles to Rome*⁸³ Maogoto uses many of the same examples that are also relied on in the thesis to demonstrate the historical conflict between state sovereignty and the enforcement of international criminal law. When an assertion is made (as is done by this thesis) that states prefer their 'sovereign interests' over the interests of humanity or that because of this preference states have a 'conflict of interest' when it comes to the enforcement of international criminal law, it is easy to respond by saying 'Well that is obvious' but proof of the obvious is not so easily assembled. What this thesis attempts to do is to produce that evidence and in so doing construct an argument in favour of the conclusion.

The thesis was also inspired by the Women's International War Crimes Tribunal for the Trial of Japanese Military Sexual Slavery which took place in Tokyo, Japan in 2000. This impressive 'people's initiative' has influenced the concluding part of the thesis where the mechanism of a 'permanent people's tribunal' is proposed as a means by which the necessary pressure to compel states to comply with their international obligations pertaining to the enforcement of international criminal law can be achieved.

Finally the author participated in some of the early cases dealing with international criminal law and to that extent the exposure to those cases has undoubtedly influenced some of the reasoning and conclusions articulated in this document.⁸⁴ As senior trial attorney at the ICTY from 1994 to 2000 the author, as prosecuting counsel and ably assisted by other counsel, lawyers and investigators, argued *Prosecutor v Tadic*; *Prosecutor v Delalic et al ('Celebici')*; *Prosecutor v Erdemovic*; *Prosecutor v Dokmanovic*; *Prosecutor v Alexoviski*. Prior to this the author, as Commonwealth Deputy Director of Public prosecutions for South Australia, was also counsel in Australia in *R v Polyukhovic* and *R v Wagner*. The cases of *R v Polyukhovic* and *R v Wagner* were brought

⁷⁷ Bassiouni, above n 6, 691.

⁷⁸ Antonio Cassese, *International Criminal Law* (2003).

⁷⁹ L S Sunga, *The Emerging System of International Criminal Law* (1997).

⁸⁰ Kittichaisaree, above n 27.

⁸¹ Robertson, above n 72.

⁸² T L H McCormack & G Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997).

⁸³ Maogoto, above n 3.

⁸⁴ The cases of *Polyukhovic*, *Tadic* and the *Peoles' Court Trial* relating to comfort women, feature significantly in Chapter 8 of the thesis.

under the *War crimes Amendment Act* 1989 of the Commonwealth of Australia.⁸⁵

1.5 *Structure of Thesis*

The thesis consists of nine chapters. Chapter 2 defines international criminal law. It sets the legal framework for the thesis. It is concerned with defining what are the Laws and Customs of War and crimes against humanity. The distinction between Geneva Law, commonly understood in terms of the Geneva Conventions and The Hague Laws, or Laws and Customs of War are also discussed. The chapter is concerned with explaining under what circumstances these laws come into effect, namely the international character of their application in terms of an international conflict or the involvement of two or more states. In relation to crimes against humanity these laws are characterised as the laws protecting humanity itself and are intended to exceed the interests of any one particular state in favour of the preservation of humankind. The most serious crime, genocide, is defined and discussed.

The evolution of the notion of head of state responsibility is also discussed as this feeds into the central argument of the thesis in that states have tried to prevent international interference in their domestic affairs by use of the ‘sovereign immunity’ principle. To similar effect is the ‘international armed conflict’ limitation on the application of the Laws and Customs of War. Finally in discussing ‘genocide’ the chapter deals with the question of the anticipated surrender or sharing of jurisdiction by states.

Chapter 3 considers state sovereignty. The thesis argument concerning the preference given to national security by states in terms of enforcement of their sovereign rights over humanitarian interests is examined and demonstrated by reference to specific examples. The chapter argues that states have often not performed well when it comes to the protection of their citizens under international law. It will demonstrate by example how they have at times even manipulated international organisations and criminal tribunals in order to advance their individual sovereign interests.

⁸⁵ *Polyukhovich v The Commonwealth of Australia* (1991) 101 ALR 545; *Prosecutor v Tadic*, ICTY AC, Case No IT-94-I-AR72, Jurisdictional Appeal Decision (2 Oct 1995); *Prosecutor v Tadic* (Judgement of the Trial Chamber) ICTY- IT-94-I-T; 7 May 1997; *Prosecutor v Delalic et al* (Trial Chamber) ICTY IT-96-21-T (1998);

This lends weight to the argument that the primacy of international jurisdiction needs to be unambiguous.

Chapter 4 demonstrates how the enforcement of international law by states has failed to properly and effectively protect the interests of the victims of international crimes especially women and children. The chapter discusses the case of child soldiers and how children are often exploited by states during the course of armed conflict. The chapter then goes on to address the sexual exploitation of women during the course of armed conflict. This question is examined in historical context but emphasises the fact that notwithstanding some progress having been made in this area, women and children are still vulnerable during the course of armed conflict - their protection is sacrificed in favour of the protection of the state. The chapter concludes on a slightly more optimistic note by demonstrating progress that has been made in recent years on an international level to improve the enforcement of international crimes relating to the sexual exploitation of women and the recruitment of child soldiers during the course of armed conflict.

Chapter 5 argues that if 'unchecked', states can manipulate the enforcement of international criminal law by using national military commissions. In many instances these commissions are created by states to further some domestic political agenda, rather than endeavouring to achieve international justice. The chapter develops the argument by reference to specific examples that have occurred during the course of the 20th and 21st centuries. The chapter starts by discussing the immediate post-World War II Australian trials of Japanese war criminals carried out under the *Australian War Crimes Act 1945* (Cth). The use of military commissions by the USA is discussed from a historical perspective concluding with an analysis of the Guantanamo Bay Military Commission.

In Chapter 6 it is argued that states often exercise jurisdiction over international criminal law in an attempt to shield themselves from international condemnation (and those accused of having carried out their criminal enterprise) and from the scrutiny of the international community consequent upon the proper enforcement of international criminal law. In most instances this occurs in circumstances where international pressure has been placed upon a state to 'do something' following breaches of international criminal law that have occurred on their territory or upon territory under their control. In these cases states prefer the option of prosecuting their 'own' rather than allowing the international community to do it for them. Rarely do the prosecutions succeed, the offender/s are

either acquitted or escape being punished. In these circumstances it is argued that the states involved corrupt the prosecution process by failing to seriously punish the offenders thus allowing impunity for the crimes committed. In these circumstances states often employ immunities or amnesties in an effort to 'shield' the perpetrators. Two examples of where this has occurred are discussed in detail but again these are not isolated instances. The first case study is the Leipzig trials and the second is the more recent trials in Indonesia following the commission of crimes against humanity in East Timor by the Indonesian military in 1999.

Chapter 7 moves onto a discussion of international criminal tribunals starting with the Nuremberg and Tokyo Tribunals. While international tribunals are not perfect it will be shown that they are more impartial when delivering international criminal justice than their state counterparts, especially national military commissions. The chapter will examine the attempts made during the Cold War period of the 1950s to 1990s to establish a permanent international tribunal. The tribunals for the former Yugoslavia and Rwanda are considered, as is the jurisprudence of these tribunals. The concept of jurisdictional primacy is examined and discussed. The strengths and weaknesses of the ad hoc tribunals for the former Yugoslavia, Rwanda and the hybrid Timor Leste Special Panels are considered. There then follows an analysis of the permanent International Criminal Court especially with respect to jurisdictional complementarity. This chapter picks up and applies that part of the central argument of the thesis where it is asserted that international tribunals have such a distinct advantage over state tribunals that ultimately the enforcement of this area of the law by the international community should be based on jurisdictional primacy.

Chapter 8 is essentially an analysis of three trials – *Polyukhovic*, *Tadic* and the people's trial of the Women's International War Crimes Tribunal. The author directly participated in each of these trials. The chapter introduces the three alternative means of enforcement of international criminal law as a basis for the later development of the overall argument of the thesis. The first trial considered is that of Ivan Timofeyovic Polyukhovic which was conducted before an Australian court. Polyukhovic was charged with having committed war crimes and crimes against humanity in the Ukraine during the course of the Second World War. The next trial considered is the trial of Dusko Tadic. Tadic was the first trial to be conducted before the International Criminal Tribunal for the former Yugoslavia. The trial tested the jurisdiction of that tribunal for subsequent trials. The trial is discussed in terms of the facts of the case and the issues that were raised in particular the question of whether or not

there existed an international armed conflict and the application of the grave breach provisions of the Geneva Conventions. Also discussed is the prosecution of crimes against humanity. The final case considered is a people's trial conducted in Tokyo, Japan arising out of the practice by the Japanese military during the Second World War of forcing young women to provide sexual services to the Japanese soldiers. Although the practice was nothing short of sexual slavery, the practice is sometimes referred to as the 'comfort women' system. The charges and facts of the case are considered, so too is the functioning and operation of a people's tribunal. This case represents an analysis of the enforcement of international criminal law by means of a people's tribunal which again sets the basis for the final argument of the thesis concerning the need to develop and strengthen the mechanisms for enforcement of international criminal law. While this chapter will contrast the three modes of enforcement of international criminal law from the empirical perspective of actual trials, it will also importantly introduce the concept of the involvement of 'civil society' in this area of law enforcement.

Chapter 9 is the final chapter of the thesis. It is in this chapter that the central argument of the thesis is finally developed drawing upon all the other chapters of the thesis as evidence in support of the arguments mounted in the earlier chapters. This chapter proposes a means by which international law can be reinforced by the influence of 'civil society'. The proposition advanced is that 'it is difficult to conceive of a situation where very serious crimes such as murder, rape and torture would be acceptable behaviour, such that the community would tolerate the commission of these crimes on a regular basis'. The rhetorical question then posed is: 'Why then is the breach of international criminal laws which prohibit murder, rape and torture when committed by representatives of the state or persons in authority, treated so differently by the community?'. The question is answered by arguing that, in a sense, the responsibility for the enforcement of international criminal law has often 'fallen between the two stools' - that of the nation state and that of the international community. Individual nation states have been reluctant to take on the enforcement role, often preferring it to be done by the international community, while the international community has expected states to conduct these prosecutions. It is at this point that the limited intervention of 'international civil society' is proposed as a means of ensuring that this branch of international law is effectively enforced.

The point is made that while we should make the 'most of what we have', a model needs to be developed where the International Criminal Court can be reinforced by 'international civil society' acting through an

international people's court so as to protect the International Criminal Court from being undermined or sidelined by those states opposed to its existence.

1.6 *Conclusion*

As noted above, the discussion in this thesis is multi faceted. While it is a legal discussion, it also embraces aspects of political science and philosophy. Again discussion of these matters is of necessity limited. While it is preferable to limit political interference in the criminal justice process, seldom is it possible to completely eliminate political interference. However preventing political interference at the national level is certainly more successful than what can be achieved internationally. International war crimes trials are inherently political and this is perhaps not surprising when one considers the parties involved and the issues being litigated. International criminal lawyers are often shocked (at least initially) at the degree of political involvement in the criminal trial process, but in time come to accept that inevitably direct comparisons between national and international trials on this issue cannot be made. Nevertheless when political interference by states rises to the level of corrupting the process, then steps need to be taken to prevent this from happening. At the moment this aspect of the international criminal justice system is weak and undeveloped. The thesis examines this problem.

CHAPTER 2

The Emergence of International Criminal Law (ICL) – ICL Defined

2.1 Introduction

In Chapter 1 we located the thesis in the discourse relevant to international criminal law. International criminal law is in turn located within international law. However international criminal law (which purports to regulate the affairs of individuals) does not sit easily within international law because international law is traditionally concerned with the affairs of states, whereas national law is concerned with the affairs of individuals (as opposed to regulating the affairs of other states).⁸⁶ The exercise of criminal jurisdiction over the individual by states is a central tenet of Westphalian sovereignty.⁸⁷ Until disturbed by international criminal law, this sovereign prerogative was accepted as a norm of international law. Some states claim exclusive jurisdiction over all criminal offences committed on their territory including international crimes.⁸⁸ International criminal law challenges the ‘exclusivity’ of this claim.⁸⁹ Consequently national criminal law and international criminal law (at times) compete for jurisdiction within the same territorial space.

While states regulate the affairs of individuals through their national criminal law they often seek to exempt the sovereign head and

⁸⁶ Milena Sterio, ‘The Evolution of International Law’, *Cleveland State University Research Paper 08-150*, 3 <<http://ssrn.com/abstract=1104723>> ; *Commissioner of Police for the Metropolis and Others; Ex Parte Pinochet* [1999] UKHL 17, [2000] 1 AC 147, per Lord Browne-Wilkinson ‘Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939-45 World War, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity’; D B Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (2007) 53.

⁸⁷ *Treaty of Westphalia*, 24 October 1648, between the Holy Roman Emperor, the King of France and its allies where the warring European Princes agreed in a peace treaty to recognise the independent sovereignty of each of the newly recognised European states, each having equal legal standing and each being mutually bound by international treaties. Often referred to as the ‘birth of the sovereign state’.

⁸⁸ J Laughland, in H Roggemann & P Sarcevic (eds), *National Security and International Criminal Justice* (2002) 84; Kochan, above n 3, 512; Philippe Sands, *From Nuremberg to The Hague* (2003) 82.

⁸⁹ Anthony J Colangelo, ‘Universal Jurisdiction as an International “False Conflict” of Laws’ *SMU Dedman School of Law Legal Studies Research Paper No. 00-35*, 8 <<http://ssrn.com/abstract=1337777>> at May 2009.

representatives of the sovereign from this law.⁹⁰ International criminal law (at least in part) purports to regulate the conduct of all individuals, including the ‘sovereign head’ and ‘official representatives’ of states.⁹¹ Put differently, national criminal law is one of the instruments of protection employed by the sovereign to provide security for the citizen in compliance with the ‘social contract’,⁹² whereas international criminal law shields humanity from criminal injury inflicted by anyone, including the official representatives of the sovereign state. The reasoning behind national criminal law is that the sovereign cannot commit a criminal offence because it is the sovereign who punishes criminal conduct in fulfilment of the obligation to provide security to the subject.⁹³ With international criminal law there is no sovereign. As international criminal law protects humanity from criminal harm including that inflicted by the sovereign, it is logical that sovereign immunity should not pertain. For the purposes of this argument, the limitation imposed on the sovereign authority of states is confined within the parameters of international criminal law – hence the need to first define what is understood by the term ‘international criminal law’.

The body of law referred to as ‘international criminal law’ is not settled and is still the subject of debate by legal scholars.⁹⁴ As noted in Chapter 1 it contains elements of international humanitarian law and international human rights law as well as national criminal law.⁹⁵ What is argued in this thesis is that states cannot legitimately claim *exclusive* jurisdiction over international crime because they cannot logically implement policies which constitute breaches of international criminal law and at the same time be solely responsible for punishing their officials for carrying out

⁹⁰ Ibid 4; *Pinochet*, above n 1, per Lord Browne-Wilkinson: ‘It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself. The diplomatic representative of the foreign state in the forum state is also afforded the same immunity in recognition of the dignity of the state which he represents. This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted *ratione personae*.’ See also R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) Oxford U.P.

⁹¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 91 (entered into force 1 July 2002) (‘Rome Statute’), art 27 applies to all persons regardless of their official capacity, including heads of state, members of government or parliament.

⁹² The ‘social contract’ is a legal fiction discussed in Chapter 3.

⁹³ Antonio Cassese, *International Criminal Law* (2nd ed, 2008) 310.

⁹⁴ M Cherif Bassiouni, *Introduction to International Criminal Law* (2003) 114.

⁹⁵ Cassese, above n 8, 6.

those policies on their behalf.⁹⁶ Nevertheless some scholars would still argue that if ‘international criminal law’ exists at all, it is merely an extension of national criminal law.⁹⁷ If however international criminal law is being enforced by an international criminal tribunal exercising universal jurisdiction,⁹⁸ then logically it must be a separate and distinct body of international law because it cannot be the law of any one state.

When the Secretary General reported to the Security Council on the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) he said that the Security Council would not be ‘... creating or purporting to legislate that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law’.⁹⁹ In conformity with this approach the Secretary General then continued ‘...the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise’.¹⁰⁰

In *Polyukhovich* Brennan J acknowledged that:

War Crimes [and he subsequently included crimes against humanity] being violations of the laws and customs of war, thus consist in acts which transgress the limitations imposed by those laws and customs. Such transgressions are universally condemned and are internationally recognised as crimes which can be tried according to international law by the courts of any nation into whose hands the offender falls.¹⁰¹

While the principles of international criminal law may be adopted as part of a national law, where international criminal law is being applied

⁹⁶ As noted by Hobbes, ‘he that is bound to himself only, is not bound’. Thomas Hobbes, *Leviathan*, (J C A Gaskin ed, 1996) 176 – 177; The principle of natural justice ‘*nemo debet esse iudex in propria causa*’ (no one can be a judge in his own cause) also operates to prohibit such conduct, see *Dimes v Grand Junction Canal Co.* (1852) 3 HL Cas 759.

⁹⁷ Kochan, above n 3, 515, 540-542.

⁹⁸ F F Martin et al, *International Human Rights & Humanitarian Law: Treaties, Cases, & Analysis* (2006) 6; Alexander Zahar & Goran Sluiter, *International Criminal Law* (2008) 29; *contra* Eugene Kontorovich, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’ (2004) 45 *Harvard international Law Journal* 184, 188 see also *Democratic Republic of Congo v Belgium - Arrest Warrant of 11 April 2000* Judgement, 14 February 2002 ICJ.

⁹⁹ UN Secretary General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* UN Doc S/25705 & add I, para 29.

¹⁰⁰ *Ibid.* The point being that International Humanitarian Law was considered at that time to be the appropriate body of law as international criminal law had not evolved to the point where it was generally accepted as a separate and distinct body of law.

¹⁰¹ *Polyukhovich v The Commonwealth of Australia* (1991) 101 ALR 545, 579; see also Donald R. Rothwell, Chapter 4 ‘International Law and Legislative Power’ in B.R. Opeskin & D.R. Rothwell (eds) *International Law and Australian Federalism* (1997) Melbourne U.P., 117; and R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) Oxford U.P. 216.

internationally and where they have achieved the status of *jus cogens*,¹⁰² then such a law would, according to international law, be binding on the legislature of a state.¹⁰³ The grave nature of universally recognised international crime makes it a matter of international concern¹⁰⁴ thus removing it from the exclusive jurisdiction of individual states.¹⁰⁵ Henkin argues that *jus cogens* ‘does not require the consent of every state: it reflects “general” consensus, not unanimity: it binds the exceptional “eccentric” dissenter; the “persistent objector” principle does not apply’.¹⁰⁶

Since the focus of the thesis is in relation only to international criminal law, traditional norms of international law and sovereign rights pertaining to national criminal law are not developed in this discussion. The emphasis is on the changes that have occurred to these norms as a consequence of international criminal law. International criminal law is primarily concerned with ‘the Laws and Customs of War or war crimes and crimes against humanity including genocide’.¹⁰⁷

The Laws of War at the international level invoke principles of international humanitarian law which apply during the course of an armed conflict. Integral to an understanding of war crimes is the distinction between Geneva Law, commonly understood in terms of the Geneva Conventions¹⁰⁸ and The Hague Laws, or Laws and Customs of War.¹⁰⁹ Previously these war crimes could only be committed during the course of an international armed conflict between two or more nation states. A

¹⁰² Bassiouni, above n 9, 121.

¹⁰³ UN Secretary General, *Implementing the responsibility to protect*, UN GAOR, 63rd sess, Agenda Item 44 and 107, UN Doc A/63/677 (12 January 2009) 23; Colangelo, above n 4, 7; Illias Bantekas & Susan Nash, *International Criminal Law* (2nd ed, 2003) 3; see also F F Martin, above n 13, 33; Sterio, above n 1, 14.

¹⁰⁴ C L Sriram, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (2005) 15; S Macedo (ed), *Universal Jurisdiction: National courts and the Prosecution of Serious crimes under International Law* (2004) 4; *Democratic Republic of Congo v Belgium - Arrest Warrant of 11 April 2000* Judgement, 14 February 2002 ICJ.

¹⁰⁵ *Re List and Others (Hostages)*, US Military Tribunal Nuremberg, 19 February 1948 (1953) 15 Ann Dig. 632, 636; *Pinochet*, above n 1, per Lord Browne-Wilkinson: ‘International law provides that offences *jus cogens* may be punished by any state because the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution”’; *Demjanjuk v Petrovsky* (1985) 603 F Supp 1468; 776 F 2d 571.

¹⁰⁶ Colangelo, above n 4, 7; Louis Henkin ‘Human Rights and State “Sovereignty”’ (1995) 25 *Georgia Journal of International & Comparative Law* 31, 34. This also often applies generally to international customary law.

¹⁰⁷ E K Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (2005) 51.

¹⁰⁸ The four *Geneva Conventions of 12 August 1949* developed from earlier conventions which had been adopted progressively by states during the 19th and 20th centuries - see subsequent discussion in this chapter.

¹⁰⁹ These laws had their origins in the Regulations attached to the *Hague Conventions* of 1907 – see subsequent discussion in this chapter.

significant recent development is the extension of the application of the Laws and Customs of War to an internal armed conflict within the borders of one state where the participants in the conflict are not themselves states.¹¹⁰

Accordingly modern international criminal law has for the moment two main divisions: [1] the Laws and Customs of War, and [2] crimes against humanity and genocide.¹¹¹ Crimes against humanity are different to war crimes because they do not require an armed conflict as an essential ingredient of the offence. In the Rome Statute of the International Criminal Court, crimes against humanity include the crimes of ‘Enforced Disappearance and Apartheid’ while these are treaty law there is some doubt as to whether these crimes form part of customary international law.¹¹²

International criminal law has developed more since World War II than at any previous time in history but by far the greatest period of development has been since the creation of the ICTY in 1993.¹¹³ As noted above, national criminal law is very much concerned with the conduct of individuals within a defined community, but as human intercourse and communication has moved from the primitive printing press to satellite conveyed television images and cyberspace, so too has the concept of what constitutes the ‘community’.¹¹⁴ As the ability of the criminal to disturb human peace and security has moved geographically from the local village, region, town, city or state, to the whole of the world, human concern for peace and security now extends beyond the nation state.¹¹⁵ Accordingly, regulating human conduct by use of the criminal law, beyond the borders of the nation state has become a matter of international concern.¹¹⁶

¹¹⁰ *Hamden v Rumsfeld* 548 US 557 (2006); *Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977 1125 UNTS 609 (entered into force 7 December 1978) (‘Additional Protocol II’); *Prosecutor v Tadic*, ICTY AC, Case No IT-94-I-AR72, Jurisdictional Appeal Decision (2 Oct 1995).

¹¹¹ UN Secretary General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, above n 14, para 35.

¹¹² Rome Statute, art 7(1)(i) and (j). Note Antonio Cassese in *International Criminal Law* (2003) does not consider that apartheid is an international crime because it has not achieved customary international law status, at 25.

¹¹³ L S Sunga, *The Emerging System of International Criminal Law* (1997) 2; Henkin, above n 21, 38.

¹¹⁴ Mary Kaldor, *Global Civil Society - An Answer to War* (2003) 111 – 112; David Barnhizer and Daniel Barnhizer, ‘Myth Magic and Mystery: Defending the Hidden Order of the Rule of Law’ *Research Paper 07 – 149 October 2007 Working Paper Cleveland State University* 16.

¹¹⁵ David Felson and Akis Lalaitzidic, ‘A historical Overview of Transnational Crime’ in Philip Reichel (ed), *Handbook of Transnational Crime & Justice* (2005) 5.

¹¹⁶ M D Kirby, ‘Criminal Law – The Global Dimension’ (Keynote Address to International Society for Reform of the Criminal Law Conference, Canberra, 27 August 2001) 4.

Prior to World War I the situation was clearer. Generally national criminal law applied to ‘individuals’, and international criminal law had not solidified into a body of law as such because the Laws and Customs of War only applied to ‘states’, which were not criminally liable for their breach.¹¹⁷ However, in the period since World War II, more and more, the international community has applied international criminal law to individuals disregarding the sovereign priority of states.¹¹⁸ Consequently states cannot, in theory, simply ignore international criminal law, at least in so far as such laws have achieved *jus cogens* status.¹¹⁹ However national courts have been reluctant to override their legislatures when domestic law conflicts with international law.¹²⁰

The international prosecution and punishment of war criminals following the Second World War did not put an end to this type of criminal behaviour.¹²¹ Like all forms of criminal behaviour, making the conduct illegal, or the prosecution and punishment of the offenders, does not completely deter further offending. The continual repetition of criminal misconduct is a feature of the human condition. What is comparatively new is the determination of the international community to use international criminal law to address criminal offending, where this offending disturbs international peace and security.¹²²

A significant part of international criminal law invokes principles of international humanitarian law because it pertains to what soldiers can and cannot do during the course of military operations. Breaches of these laws may constitute war crimes and for the most part are covered by the Laws and Customs of War. The Laws and Customs of War also regulate the means of warfare and military conduct during armed conflict, and have as their central focus the participants of battle.¹²³ The Laws and Customs of War are part of international humanitarian law.

¹¹⁷ Bassiouni, above n 9, 37.

¹¹⁸ *Tadic*, above n 25, para 62.

¹¹⁹ Bassiouni, above n 9, 49; Sterio, above n 1, 14; Colangelo, above n 4, 7.

¹²⁰ *Kruger v Commonwealth* (1997) 190 CLR 1 and *Nulyarimma v Thompson* (1999) 165 ALR 621; Ivan Shearer, ‘Australia, The United States and The Rule of Law in International Affairs: Comparisons and Contrasts’ (2005) 26 *Adelaide Law Review* 191; Kochan, above n 3.

¹²¹ The role of the UN Security Council in creating the ad hoc tribunals of the ICTY and ICTR illustrated belatedly that the ‘once only’ events of Nuremberg and Tokyo was insufficient to stem the tide of this type of offending.

¹²² UN Secretary General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, above n 14; ICTY Basic Documents 1995 paras 10-14; J N Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) 72; Bassiouni, above n 9, 11.

¹²³ *Tadic*, above n 25, paras 113-116 per decision of Sidhwa J (paraphrasing) ‘The Laws and Customs of war... have two sources... the laws of war and the customs of war... the laws of war are the rules and regulations setting forth the norms constituting the modes, methods and conduct of warfare and

Crimes against humanity are not restricted to periods of armed conflict, and have as their central focus, the victims of such crimes.¹²⁴

Consequently, Bassiouni suggests that crimes against humanity and genocide relate more to breaches of fundamental human rights rather than serious breaches of humanitarian protection during the course of armed conflict.¹²⁵

The different components of international criminal law and their evolution will now be considered separately.

2.2 *The Influence of National Military Laws on International Criminal Law*

The logical starting place for analysing the origins of international crimes is national military law because it forms the original foundation underpinning international criminal law. National military codes have been part of military law for a very long time and in some cases are still in force. The Laws of War date back to ancient Greece and possibly even earlier.¹²⁶ McCormack suggests that the writings of the 6th century BC Chinese warrior Sun Tzu, may have ‘influenced’ the development of the Laws of War.¹²⁷ Chivalry codes of conduct regulating the course of battle have also existed for centuries.¹²⁸ The first comprehensive national modern war crimes code was drafted in 1863,¹²⁹ after President Lincoln had ordered the War Department to settle a suitable code for the United States Army to use in the field of battle.¹³⁰ This code was prepared by a

prohibitions connected therewith. They include [1] treaties, conventions, agreements, declarations and protocols, [2] constitutions and Statutes of international tribunals, [3] decisions of international tribunals. The customs of war are those which arise out of State practices extending over a period of time, coupled with *opinio juris*...’

¹²⁴ UN Secretary General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, above n 14, para 47.

¹²⁵ Bassiouni, above n 9, 126; see also Martin, above n 13, 452.

¹²⁶ Adriaan Lanni, ‘The Laws of War in Ancient Greece’ *Harvard Law School Research Paper No. 07-24*, 4 <<http://ssrn.com/abstract=1069874>>.

¹²⁷ T L H. McCormack and G J Simpson, *The Laws of War Crimes – National and International Approaches* (1997) 33.

¹²⁸ L C Green, *The Contemporary Law of Armed Conflict* (1993) 18-19 cited in K Kittichaisaree, *International Criminal Law* (2001) page 129 footnote 1. See also Alex Moseley, ‘Just War Theory’ *The Internet Encyclopedia of Philosophy* (2004) 1 <<http://www.utm.edu/research/iep/j/justwar.htm>> and Timothy McCormack, ‘Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law’ (1997) 60 *Albany Law Review* 681, 684.

¹²⁹ Theodor Meron, *War Crimes Comes of Age* (1999) Ch 5.

¹³⁰ A P V Rodgers, *Law on the Battlefield* (1996) 1. Lieber wrote his code in response to a letter written to him by General Halleck on behalf of the President on 6 August 1862, see discussion in Michael A Newton, ‘Modern Military Necessity: The Role and Relevance of Military Lawyers’ (2007) 12 *Rodger Williams University Law Review* 869, 873; M Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy* (2008) 19.

former Napoleonic War veteran and academic, Professor Francis Lieber, from the School of Law and Political Science at Columbia University.¹³¹ The code contained 159 articles covering such matters as ‘military necessity’ punishment of crimes against the inhabitants of hostile countries, prisoners of war and spies.¹³²

Lieber drafted his code for use in the American Civil War and parts of it are still to be found in the USA military code.¹³³ While national codes are not a part of international criminal law they have contributed to customary international law and constitute evidence of customary law.¹³⁴ Further, the express opinion of states, particularly in cases where such opinion is generally accepted by other states, can not only evidence the existence of customary international law but also demonstrate a change in what was previously accepted as customary international law.¹³⁵ Many countries have similar codes and international tribunals often refer to these national laws when determining whether or not a particular law of war has formed part of customary law.¹³⁶ National codes can operate effectively when applied by states to their own military forces but they are less effective when two states are involved in an international armed conflict and one state applies its code and the other does not. In these circumstances the ‘victors generally prevail over the vanquished’ and the more powerful states often do not respect the national military codes of the weaker defeated state. Hence the need for a third body of law – international humanitarian law – so that the Laws of War can be applied evenly between warring states. While the utility of having a body of international humanitarian law which applied to two or more states engaged in international armed conflict may have been recognised for a long time, it did not gain momentum until the 19th century. It is to this body of law that we will now briefly turn.

2.3 *History of the Beginnings of IHL*

The fundamental underpinning of the national codes which has now evolved into an international humanitarian law principle is that ‘war’ is not unlimited and should be regulated by law.¹³⁷

¹³¹ Rodgers, above n 45, 1.

¹³² R Piotrowicz and S Kaye, *Human Rights – In International and Australian Law* (2000) 97 – 98.

¹³³ Ibid.

¹³⁴ *Tadic*, above n 25, para 113 per Sidhwa and the *Hostages Case*.

¹³⁵ *Tadic*, above n 25, para 83.

¹³⁶ *Tadic*, above n 25.

¹³⁷ This involves the *proportionality principle* which decrees that the use of force is not unlimited and must be proportional to the military objective. Echoes of this principle can be seen from ancient times and applied during the course of an armed conflict. The norms of *jus in bellam* has ancient historical roots.

International humanitarian law is a ‘body of internationally recognised legal prescriptions’ pertaining to the conduct of military operations and is predicated on the assumption that the right to inflict injury upon the enemy is not unlimited.¹³⁸ In the 18th century, Vattel laid the foundations for the modern codification of the Laws and Customs of War.¹³⁹ He dealt with the question of armed conflict and the minimum guarantees that should be afforded to the participants of battle.¹⁴⁰ However for the most part, the laws that formed the basis of international humanitarian law evolved during the course of the 19th and 20th centuries.¹⁴¹ The main sources of international humanitarian law were the treaty based Hague and Geneva Law as well as customary international law.

2.3.1 Hague Law

While Lieber was drafting his code in the United States, in Europe, Czar Alexander II of Russia proposed the idea of holding an international conference to ban the use of lightweight bullets, which exploded upon contact with human flesh. As a consequence, the Declaration of St Petersburg 1868 prohibited the use of explosive projectiles under 400 grams in weight.¹⁴² This was the first international convention in modern times to prohibit the use of a particular weapon of war, although it must be said that crossbows and the like had been prohibited in earlier times.¹⁴³ The St Petersburg Declaration provided that the ‘only legitimate objective which states should endeavour to accomplish during war is to weaken the

¹³⁸ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep 226, para 76.

¹³⁹ E De Vattel, *The Laws of Nations* (1758) (C G Fenwick trans, 1916 ed) in James Brown Scott (ed), *Classics of International Law*, Vol 3 see, generally, book iii, ‘War’ 235-398 where he deals with such diverse topics as ‘international armed conflict’ 235; ‘the right of self defence of states’ 236; just war and unjust wars 243-244; the principle of necessity 247; the balance of power 251; peace on just terms 254; defensive wars need no declaration 255; the fair treatment of enemy aliens 256; occupation and the treatment of civilians 256; treatment of women children the sick and elderly 259, 282; auxiliaries 261; neutrality 268; rights of passage 274; the distinction between *jus in bellum* and *jus ad bellum* 279; the means of war are limited to military necessity 279; the principle of *hors de combat* 280; the illegality of giving no quarter 280-281; the protection of the clergy and civilians who are taking no part if hostilities 283; the humane interment of civilians but for only as long as is necessary 283-284; the humane treatment of prisoners of war 284; release of POWs on parole 284-285; limitation on the use of weapons that cause unnecessary pain and suffering 289; the poisoning of water supplies 289; prohibition on pillaging 292; limitation on the destruction of civilian property 294; perfidy 298; treatment of spies 299; he also considered the question of sovereign immunity and individual criminal responsibility for war crimes although he did not come to any firm conclusion other than to lay down the responsibility of the sovereign state to pay reparations 302.

¹⁴⁰ *Ibid* 336-340.

¹⁴¹ ‘A Glance at the History of Humanitarian Law’ in Hans-Peter Gasser, *International Humanitarian Law: An Introduction* (1993) 6.

¹⁴² ‘Rules on the Limits of Warfare’ in Gasser, above n 56.

¹⁴³ A Roberts & R Guelff, *Documents on the Laws of War* (2nd ed, 1989) 29. See *Declaration Renouncing the Use, in Times of War, of Explosive Projectiles Under 400 Grammes Weight*, opened for signature 11 December 1868, LXIV UKPP (1869) 659 (entered into force 11 December 1868).

military forces of the enemy and that the unnecessary use of weapons which uselessly aggravate suffering were contrary to the laws of humanity'.¹⁴⁴

In 1899 Czar Nicholas II of Russia proposed the holding of another international conference.¹⁴⁵ The purpose of this conference was to consider banning the dropping of bombs from balloons, the use of poisonous gases and expanding bullets, known as 'dumdum' bullets, during war.¹⁴⁶ The Hague Conventions which were the result of the 1907 Conference, adopted these prohibitions but significantly also introduced the first Laws and Customs of War on Land. The Laws and Customs of War (originally adopted in 1899 and further modified in 1907) provided for the care of prisoners of war, flags of truce, treatment of the inhabitants and property of occupied territories, prohibited rape and pillage.¹⁴⁷ The *1907 Hague Convention Regulations, Respecting the Laws and Customs of War* applied the laws to armies as well as militia and volunteer corps. Article 23 limited who may be killed under what circumstances and prohibited the use of poison and weapons which cause unnecessary suffering. This article is generally reproduced as the modern basis of crimes against the Laws and Customs of War.¹⁴⁸

Other Conventions settled upon at The Hague in 1907 included Conventions dealing with *Enemy Merchant Ships at the Outbreak of Hostilities*;¹⁴⁹ the *Conversion of Merchant Ships into War Ships*;¹⁵⁰ the *Laying of Automatic Submarine Contact Mines*;¹⁵¹ *Bombardment by Naval Forces*;¹⁵² and *Neutrality*.¹⁵³

This attempt to contain the use of excessively destructive weapons of war formed the basis upon which numerous conventions were agreed during the course of the 20th and now 21st centuries. Such further conventions and declarations included the *Geneva Gas Protocol 1925* which banned the used of poisonous gases as a weapon of war.¹⁵⁴ This protocol was replaced by the *Biological Weapons Convention* of 1972. Other arms control conventions included the *Conventional Weapons Convention*

¹⁴⁴ Roberts, above n 58, see Preamble to 1868 St. Petersburg Declaration.

¹⁴⁵ 'Rules on the Limit of Warfare' in Gasser, above n 56, 11.

¹⁴⁶ Roberts, above n 58, 35.

¹⁴⁷ Ibid 44.

¹⁴⁸ See *Statute of the ICTY*, 32 ILM 1230 (1993), ('ICTY Statute'), art 3 and included as part of art 8 of the Rome Statute.

¹⁴⁹ Roberts, above n 58, 72.

¹⁵⁰ Ibid 80.

¹⁵¹ Ibid 86.

¹⁵² Ibid 94.

¹⁵³ Ibid 63.

¹⁵⁴ Ibid 139.

1980 and the additional protocols of 1995 and 1996; the *Chemical Warfare Convention 1993*; the 1997 *Ottawa Treaty* banning the use of anti personnel land mines¹⁵⁵ and most recently in Dublin (2008) the proposed treaty banning the use of cluster munitions.¹⁵⁶

The Laws and Customs of War have been supported by states because of their utility. They tend to be useful when engaged in armed conflict because they constitute ‘common ground’ between warring states and provide a mechanism whereby the excesses of war can be curtailed. As originally perceived no one could be held criminally accountable for their breach, (at least not by an international court) so they rarely posed much of a threat to state sovereignty. However as we will see later this attitude began to change when state representatives were seen as potential candidates for prosecution and the principle of sovereign immunity came under challenge.

The Hague Laws are generally referred to as the Laws of War, whereas the Geneva Laws are known as humanitarian laws, when combined they are referred to as international humanitarian law applicable in armed conflict.¹⁵⁷

2.3.2 Geneva Law

Again in the middle of the 19th century, Henry Dunant, a Swiss banker observed the cruelty of war at Solferino in northern Italy. This was a war between France, Italy and Austria. There were about 40 000 casualties to the conflict, and what shocked Dunant most was the total lack of regulation concerning removal of the dead and wounded after the battle. He returned to Switzerland and in 1862 wrote ‘Memory of Solferino’.¹⁵⁸ In his book he suggested that neutral ‘relief societies’ should be formed to care for the sick and wounded in times of war. He further suggested that an international conference should be held to enable representatives of different countries to consider and adopt an international agreement on how to care for the soldiers wounded in battle.¹⁵⁹

¹⁵⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2005) Vol 1, Part IV ‘Weapons’ Ch 20 – 31, 237 – 292.

¹⁵⁶ *Convention on Cluster Munitions* - Dublin Treaty 2008.

¹⁵⁷ *Tadic*, above n 25, para 87; see also G Kewley, *Even Wars Have Limits* (2nd ed, 2000) 35.

¹⁵⁸ Henry Dunant, *A Memory of Solferino* (1986). For a general history of the development of the Red Cross movement see: Pierre Bossier, *History of the International Committee of the Red Cross from Solferino to Tsushima* (1985) or Jean Pictet, *Development and Principles of Humanitarian Law* (1985).

¹⁵⁹ Kewley, above n 72, 16-19.

In 1864 a conference was held in Geneva, Switzerland and was attended by the representatives of 16 countries. The international conference concluded by agreeing upon a short convention which focussed on providing a means by which medical attention could be provided to the soldiers wounded in battle.¹⁶⁰ It also saw the creation of the Red Cross Society, with its distinctive Red Cross emblem, and enshrined the Red Cross principles of neutrality, humanity, impartiality and respect for the individual.¹⁶¹ The Red Cross is an early example of an international organisation tasked with ‘watchdog’ responsibilities during the course of an armed conflict to remind the participating states of their obligations under international humanitarian law.

The Geneva Conventions first proposed by Henry Dunant, were modified and updated throughout the course of the 20th century.¹⁶² The Geneva Conventions of 1906 made greater provision for the care of wounded and sick soldiers. After World War I, the Geneva Conventions of 1929 (1) *Relative to The Treatment of Prisoners of War* and (2) *For the Amelioration of the Condition of the Wounded and Sick in Armies in the Field* were updated to include provision for the protection of medical aircraft, and the adoption of the red crescent and red lion emblems for Muslim countries.¹⁶³

Following World War II, the Geneva Conventions were again extensively overhauled at a conference in 1949. As a result of this conference four new Geneva Conventions were adopted, each dealing with a specific subject area: 1) wounded and sick in armed forces; 2) wounded and sick at sea; 3) treatment of prisoners of war; 4) treatment of civilians.¹⁶⁴ However as World War II was an international armed conflict, the 1949 Geneva Conventions were primarily directed at the regulation and control of participants in the course of an international armed conflict.¹⁶⁵ At this time, internal armed conflicts within a state were still very much a matter for the individual states concerned.¹⁶⁶ Even now, this limitation on other states becoming involved in the internal affairs of another state is still very strong, albeit that it is going through a process of change.¹⁶⁷

¹⁶⁰ B N Schiff, *Building the International Criminal Court* (2008) 19.

¹⁶¹ Bossier, above n 73; Pictet, above n 73.

¹⁶² ‘Rules on the Limits of Warfare’ in Gasser, above n 56, 9.

¹⁶³ Kewley, above n 72, 32. This has now been further developed to include the Red Crystal emblem. See *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem* (‘Third Additional Protocol’), 8 December 2005.

¹⁶⁴ ‘Rules on the Limits of Warfare’ in Gasser, above n 56, 12.

¹⁶⁵ Kewley, above n 72, 33.

¹⁶⁶ ‘Rules on the Limits of Warfare’ in Gasser, above n 56, 21.

¹⁶⁷ *Tadic*, above n 25, para 96.

Nevertheless this limitation on the application of the 1949 Geneva Conventions was modified in 1977 to cater for the greater protection of civilians in both internal and international armed conflict. The 1977 Additional Protocols: [I] International armed conflict and [II] Internal armed conflict; when coupled with the 1949 Conventions, now constitute the most important source of Geneva law.¹⁶⁸

Like the Hague Conventions, the Geneva Conventions applied to states. States were encouraged to criminalise ‘grave breaches’ of the Geneva Conventions of 1949 by incorporating offence provisions in their domestic criminal law. At the time of the drafting of the Conventions, the prosecution function was (for the most part) considered to be a matter for the relevant state, although the possibility of international prosecution was left open. As will be discussed subsequently, it was not until 1993 when the ICTY was established, that the idea of making ‘grave breaches’ of the Geneva Conventions an international crime that could be prosecuted internationally finally emerged. Much of the reluctance to permit international prosecution of these crimes was attributable to considerations of ‘state sovereignty’.

2.3.3 Customary Law

Customary law is the oldest source of international humanitarian law because it emerged from the practice of states and a belief that such practice determined the limits of permissible conduct during the course of armed conflict. The 1899 and 1907 Convention on the Laws and Customs of War expressly recognised that they were not exhaustive of this area of law and provided for the development of further laws according to ‘usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience’.¹⁶⁹

The Laws and Customs of War settled upon at the Hague Conferences of 1899 and 1907 have now been embodied as customary international rules of war applicable to this day.¹⁷⁰ Thus the killing of innocent civilians;¹⁷¹ the use of poisonous weapons;¹⁷² killing the enemy after they have laid

¹⁶⁸ Kewley, above n 72, 35.

¹⁶⁹ Roberts, above n 58, 45 - Referred to as the ‘Martens Clause’ after the Russian Foreign Minister, this clause has become a common provision in international treaties and conventions, as it facilitates the development of international customary law.

¹⁷⁰ UN Secretary General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, above n 14, para 41. See also Henckaerts, above n 70, Introduction xxv.

¹⁷¹ *Ibid* Vol 1 Rule 1 p 3.

¹⁷² *Ibid* Vol 1 Rule 72 p 251.

down their arms;¹⁷³ declaring that no quarter be given;¹⁷⁴ sentence without trial;¹⁷⁵ employing weapons causing unnecessary suffering (principle of proportionality);¹⁷⁶ mistreatment of prisoners of war;¹⁷⁷ and deceptive use of flags of truce or distinctive emblems are all prohibited,¹⁷⁸ according to customary international humanitarian law.

Customary international law is not prescribed by treaty or convention nor does it have to be ratified by individual states in order for it to be binding. This has from time to time led to uncertainty because some states have asserted that a particular act or conduct was not binding as a matter of customary international law. In an attempt to address this uncertainty the international community of states commissioned the International Committee of the Red Cross to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflict. The report was completed and published in 2005,¹⁷⁹ and is still under review by states. However it is a comprehensive document, carefully written and will in time almost certainly be accepted as a reliable statement on customary international humanitarian law. However, unlike treaty law, customary law will continue to evolve over time, so in a sense the report begins to become 'out of date' from the moment of its publication.

2.4 *State Responsibility for Breaches of International Humanitarian Law*

The Laws of War prohibiting the use of excessively destructive weapons during armed conflict, (gas, bombs, and bullets) and the conduct of soldiers, (rape, murder and pillage) were not (as discussed above) intended to apply to individuals, but only to the responsible state as a basis for claiming compensation or reparations. Thus although the conduct was prohibited, the above norms did not give rise to individual criminal responsibility at the international level.¹⁸⁰ A modern example of this principle of 'state responsibility' is the *Hague Protocol of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*.¹⁸¹

¹⁷³ Ibid Vol 1 Rule 87 p 306.

¹⁷⁴ Ibid Vol 1 Rule 46 p 161.

¹⁷⁵ Ibid Vol 1 Rule 100 p 352.

¹⁷⁶ Ibid Vol 1 Rule 70 p 237.

¹⁷⁷ Ibid Vol 1 Rule 106 p 384.

¹⁷⁸ Ibid Vol 1 Rule 58 p 205 and Roberts, above n 58, 44-69; *1907 Hague Convention IV Respecting the Laws and Customs of War on Land*.

¹⁷⁹ Henckaerts, above n 70.

¹⁸⁰ Kittichaisaree, above n 43, 7.

¹⁸¹ Article 1 of the *Hague Protocol of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*.

This protocol was designed to safeguard cultural property during armed conflict.¹⁸² During the 1990s Yugoslav conflict this protocol was frequently breached but prosecution under the protocol was not available because it did not attach individual criminal responsibility for its breach.¹⁸³

International humanitarian law has a broader base than international criminal law because it regulates a whole range of activities, such as the treatment of prisoners of war and civilians during the course of hostilities without attaching to those regulations any form of criminal sanction. Most of the provisions of Geneva and Hague Law apply directly to states and the articles of the Conventions do not bind individuals. Many states have enacted domestic legislation that apply identical responsibilities to individual soldiers and in many cases a breach of this domestic legislation could constitute a criminal offence, but this is not the effect of the relevant international humanitarian law. Accordingly it is only a very small part of international humanitarian law that attaches criminal liability for its breach. It is this small part of international humanitarian law that now forms part of international criminal law.

Over time Geneva and Hague Law have merged forming the corpus of law known as ‘international humanitarian law’.¹⁸⁴ However the expression ‘international humanitarian law’ was not used until the 1950s.¹⁸⁵ The payment of war reparations by states for their wrongful acts has a long history and frequently arose in the context of peace treaties negotiated between warring states after the cessation of hostilities. While compensation for property damage was a feature of these treaties, other damages such as the ‘wrongful waging of war’ and war crimes committed during the course of the war, were also included in the reparations that states paid. The payment of reparations in these circumstances is still part of state practice.¹⁸⁶ Accordingly it is not surprising that when the early conventions dealing with the ‘Laws and Customs of War’ came to be negotiated, states considered that breaches of these laws would be resolved by the payment of reparations. In other words the notion of making individual perpetrators criminally liable for these acts did not find their way into the international treaties. To many states this was a

¹⁸² Roberts, above n 58, 340.

¹⁸³ Prosecution action was available as a ‘war crime’ under art 3(d) of the ICTY Statute.

¹⁸⁴ *Nuclear Weapons Case*, above n 53, para 75.

¹⁸⁵ William Schabas, *The UN International Criminal Tribunals: The former Yugoslavia Rwanda and Sierra Leone* (2006) 77 fn 20, citing Dietrich Schindler, ‘Significance of the Geneva Conventions for the Contemporary World’ (1999) 836 *International Review of the Red Cross* 715, at fn 4.

¹⁸⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Jurisdiction and Admissibility)* [1986] ICJ Rep 392, 14.

question of their sovereignty and not the business of the international community.

2.5 Sovereignty

The tension between the application of international criminal law and competing principles of sovereignty is a major issue for the universal enforcement of international criminal law. This issue will be discussed in greater detail in chapter 3 but it is important to note that the sovereignty principle came first and still has considerable resonance in international law. Following the 30 Years War and the dissolution of the Holy Roman Empire at the Peace of Westphalia in 1648, it was declared that ‘every King was sovereign in his own domain’.¹⁸⁷ With this declaration the mutual recognition of state sovereignty, which respected the right of each state to conduct its internal affairs, was seen as vital to peace and stability of the world. This respect for state sovereignty persists to this day and has been incorporated into such fundamental international treaties as the Charter of the United Nations.¹⁸⁸ The ‘sovereignty principle’ still has great practical utility and few would seriously argue that it should not be upheld and respected. The issue is how far should it operate and should it exclude international humanitarian interests?

The ‘sovereignty principle’ may be internal or external, it is internal in the sense that it is the right of the state to make laws and enforce those laws upon its own territory and upon its own citizens whether they are upon its territory or not; it is external in the sense that states respect the rights of other states not to be interfered with in relation to the regulation of their internal affairs.¹⁸⁹ Accordingly states are free to organise their internal political structure, so long as the state has the capacity to represent its people at an international level.¹⁹⁰

Even to this day, states will (at times) rely on the ‘sovereignty principle’ to assert that they have the ‘exclusive’ right to decide what acts may take place on their territory and with respect to their citizens.¹⁹¹ Sometimes states will assert this as an ‘absolute’ right to which no other state is entitled to interfere. They contend that this ‘supreme authority’ is part of the ‘trappings’ of an independent political society that has the right of self

¹⁸⁷ M Griffiths and T O’Callaghan, *International Relations - The key Concepts* (2002) 239.

¹⁸⁸ Charter of the United Nations 1945, art 2(4).

¹⁸⁹ *R v Christian* [1924] SALR (AD) 101, 106.

¹⁹⁰ *United States Curtis-Wright Export Corp* (1926) 299 US 316-318.

¹⁹¹ Colangelo, above n 4, 6.

determination, of autonomy and independence.¹⁹² The sovereign head of government was sole authority over the territory of the state.¹⁹³ The sovereign was the manifestation of the law itself, in a sense ‘above the law’ and generally not bound by the criminal law.¹⁹⁴ As a consequence the ‘sovereignty principle’ and ‘sovereign immunity principle’ are interlinked.¹⁹⁵

The position of the sovereign was akin to the sovereign state and this immunity from criminal liability applied to the sovereign state and the human representatives of the state which were immune from the criminal law both at a national and international level when carrying out an act of state.¹⁹⁶ The head of a sovereign state could not be brought to trial for domestic or international crimes, no matter how egregious their crimes might have been.¹⁹⁷

This widely held view of the ‘sovereignty principle’ excluded the possibility of making state representatives (or especially, the head of state) criminally liable for the breaches of the Laws and Customs of

¹⁹² Kochan, above n 3; *Report of Senate Standing committee on Constitutional and legal affairs*, 13 September 1983 (PP no 107/1983).

¹⁹³ Kittichaisaree, above n 43, 5. See also *The Schooner ‘Exchange’ v McFaddon* 11 US 7 116 at 137 (1812); see also Alebeek above n 5, Chp. 5.

¹⁹⁴ G Robertson, *Crimes Against humanity – the Struggle for Global Justice* (1999) 197. See also *The Schooner ‘Exchange’ v McFaddon* (1812) 11 US 7 116, 137, Marshall CJ married the ‘doctrine [of state immunity] with the absolute jurisdiction of the territorial sovereign’.

¹⁹⁵ *Congresso del Partido* [1983] A C 244, 262C per Lord Wilberforce. The fact that acts done for the state have involved conduct which is criminal does not remove the immunity. Indeed the whole purpose of the residual immunity *ratione materiae* is to protect the former head of state against allegations of such conduct after he has left office. A head of state needs to be free to promote his own state's interests during the entire period when he is in office without being subjected to the prospect of detention, arrest or embarrassment in the foreign legal system of the receiving state: see *United States v Noriega* (1990) 746 F Supp 1506, 1519; *Lafontant v Aristide* (1994) 844 F Supp 128, 132. ‘The conduct does not have to be lawful to attract the immunity’ cited with approval by Lord Hope of Craighead in *Pinochet*, above n 1.

¹⁹⁶ *Pinochet*, above n 1, per Lord Goff of Chieveley: ‘There can be no doubt that the immunity of a head of state, whether *ratione personae* or *ratione materiae*, applies to both civil and criminal proceedings. This is because the immunity applies to any form of legal process. The principle of state immunity is expressed in the Latin maxim *par in parem non habet imperium*, the effect of which is that one sovereign state does not adjudicate on the conduct of another. This principle applies as between states, and the head of a state is entitled to the same immunity as the state itself, as are the diplomatic representatives of the state’; see also R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) Oxford U.P. 195.

¹⁹⁷ Robertson, above n 109, 351. *Pinochet*, above n 1, per Lord Browne-Wilkinson: ‘The question then which has to be answered is whether the alleged organisation of state torture by Senator Pinochet (if proved) would constitute an act committed by Senator Pinochet as part of his official functions as head of state. It is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity *ratione materiae*.’ It is also to be noted that the ‘Sovereign rights of Kings’ gave rise to two distinct regimes of immunity under international law [i] the immunity of states as legal persons and [ii] the immunity of state officials.

War.¹⁹⁸ Nevertheless some sort of retribution by the ‘victorious over the vanquished’ at the end of an armed conflict was inevitable. Hence the notion that the state was responsible in terms of its collective guilt and could be ordered to pay reparations for breaches of the Laws and Customs of War.¹⁹⁹ However in time it was realised that this form of ‘punishment’ did little to redress the pain and suffering caused to the victims of such atrocities. Reparation payments went to the injured state, not to the individuals concerned.²⁰⁰

Prior to the 20th century, there were occasional international trials for war crimes, but the sovereign head of state was not seriously considered as a candidate for war crimes prosecutions.²⁰¹ After World War I, the Allied Powers attempted to introduce individual criminal responsibility for violations of the Laws and Customs of War,²⁰² and to override sovereign immunity by calling for the trial of Kaiser Wilhelm II of Germany for the atrocities his armies committed during World War I.²⁰³ However this call for prosecution action soon passed when the Kaiser took asylum in The Netherlands (now the seat of the new International Criminal Court) and no international prosecutions ever followed.²⁰⁴ This case will be discussed in greater detail in Chapter 6.

This failure to prosecute state leaders for international crimes prior to the end of the 20th century²⁰⁵ was not because the relevant governments and heads of state were innocent, but because there was a reluctance to take this action. In many instances wars were prosecuted on behalf of and at the instance of the sovereign head of state. Even where their acts offended Hague or Geneva Law, responsibility for prosecution still primarily rested with the sovereign authority of that state pursuant to their national criminal laws and if the relevant state did nothing, the international community (although empowered to prosecute) generally resisted taking prosecutorial action. Justification for refusing to take action at the international level was often based on an argument that to do otherwise would breach the sovereign rights of that state. However this proved to be a controversial matter because the victims of these enormous crimes were

¹⁹⁸ Colangelo, above n 4, 4.

¹⁹⁹ Roberts, above n 58, see art 3 *1907 Hague Convention IV*.

²⁰⁰ Piotrowicz, above n 47, 160.

²⁰¹ Robertson, above n 109.

²⁰² See art 229 *Peace Treaty of Versailles* (1919) Parry’s Consolidated Treaty Series.

²⁰³ See art 227 *Peace Treaty of Versailles* (1919).

²⁰⁴ Robertson, above n 109, 197.

²⁰⁵ The Prosecution of Slobadan Milosovic before the ICTY was the first prosecution of a ‘sovereign head of state’, while the legal possibility to prosecute a sovereign head of state was recognised by the London Agreement (Nuremberg Charter) no prosecution action was even taken against a head of state following World War II.

left without any form of redress and it was against this background that ‘civil society’ demanded that the offenders be held responsible for serious breaches of international criminal law.

2.6 Individual Criminal Responsibility at the International Level

The predilection for exacting war reparations from defeated states in preference to imposing individual criminal liability for war crimes committed during the course of hostilities began to lose favour after World War I, when the German Weimar Republic crumpled under the burden of reparations imposed by the *Treaty of Versailles*.

After World War II, the sheer magnitude of the war crimes committed and the fact that a defeated Germany could not pay reparations in any event meant that reliance on reparations as the sole means of settlement became impractical. Accordingly the idea that only the state which exercised sovereignty over the citizen had the authority to attach individual criminal liability to that citizen was fundamentally weakened.²⁰⁶ The Nuremberg Charter of 1945 attached individual criminal responsibility for violations of the Laws and Customs of War and ensured that sovereign heads of state could not shelter behind sovereign immunity.²⁰⁷ While imposing criminal liability upon the citizen of another state for breaches of the law either by the international community of states or by the victorious states was not completely unknown to international law, as pirates had been prosecuted for centuries prior to 1945, the notion of individual criminal liability for war crimes formulated under Hague and Geneva Law had not been attempted. Attaching international criminal responsibility to individuals for breaches of international criminal law constituted a partial surrender by states of their ‘sovereign authority’.

While the introduction of individual criminal responsibility for war crimes in 1945 may in theory have weakened the ‘sovereignty principle’, it must be said that it probably did not seem that way to the victorious Allies. To countries such as the United States, Britain, France and Russia such a concept amounted to no more than the ‘victorious prevailing over the vanquished’. The sovereignty of the defeated Germany was of little consequence.

²⁰⁶ Maogoto, above n 37, 72.

²⁰⁷ Nuremberg Charter art 6; see also Maogoto, above n 37, 114.

The removal of ‘head of state immunity’ was potentially more significant because both the Nuremberg Charter and the Charter for the International Military Tribunal for the Far East (the Tokyo Tribunal) conclusively abolished head of state immunity. However neither the Emperor of Japan, Hirohito, nor Adolph Hitler was prosecuted. Of course by the time of the Nuremberg Trials, Adolph Hitler was dead.²⁰⁸ Accordingly, head of state immunity²⁰⁹ was to remain relatively untested until 1998 when the extradition of General Augusto Pinochet was sought by Spain for crimes against humanity that he had allegedly committed in Chile.²¹⁰ The British House of Lords after two hearings accepted the argument that for crimes against humanity, which attracted universal jurisdiction, there can be no immunity from prosecution, but did not determine which courts had jurisdiction to try.²¹¹ However Pinochet avoided prosecution due to allegations of ill health and the other main contender, Slobodan Milosevic, died before his trial concluded.²¹² Saddam Hussein’s trial may be another precedent but this case was a state prosecution and problematic,²¹³ so it may be only of limited value.²¹⁴ Accordingly we will have to await the outcome of the prosecution of the Sudanese President Omar al Bashir by the International Criminal Court (ICC) to know if the sovereign head of state immunity principle has in reality been truly abolished at the international level. Certainly it still exists as between states because in *Democratic Republic of Congo v Belgium*²¹⁵ (*Arrest Warrant Case*) the International Court of Justice (ICJ) found that a head of state could only be tried by an international criminal tribunal such as the ICTY, the International Criminal Tribunal for Rwanda (ICTR) or ICC but not by a national court.²¹⁶ This case denied the right of one state to attach individual criminal responsibility to the sovereign head of another state, but supported the contention that state sovereignty is subordinate to international criminal law (as enforced by international tribunals), because only international tribunals have the authority to challenge the

²⁰⁸ Robertson, above n 109, 347.

²⁰⁹ Sriram, above n 19, 31.

²¹⁰ Sands, above n 3, 89.

²¹¹ *R v Bow Street Magistrates ex parte Pinochet Ugarte* (No. 3) (1999), 2 All E R 97. See also Robertson, above n 109, 347.

²¹² *The Prosecutor v. Slobodan* (Milosevic – Case) No IT-02-54-T; Milosevic died in 2006 at the conclusion of the prosecution case and just before the defence case was due to commence.

²¹³ M Cherif Bassiouni, ‘Prosecuting Sadam Hussein’.

<http://www.foreignpolicy.com/story/cms.php?story_id=3120> accessed at October 2009, 128; see also Library of Congress - USA at <http://www.loc.gov/law/help/hussein/> accessed February 2010.

²¹⁴ Peter Quayle, ‘New ringmaster won’t let Saddam’s trial be a circus’, *Times*, 7 February 2006 <http://www.timesonline.co.uk/article/0,,27969-2024496,00.html> accessed 2007

²¹⁵ *Arrest Warrant of 11 April 2000 (Congo v Belgium) (Judgment)* [2002] ICJ Rep 2001, para 61.

²¹⁶ Sriram, above n 19, 32.

sovereign head of state notwithstanding immunity being given under any national law.

As can be seen from above, international criminal law has evolved in a 'vertical sense' arising upwards from national laws, be they criminal laws or national military laws. It has also been influenced on a 'horizontal plane' by other international laws such as international humanitarian law where treaties between states have often directly created new laws. Other horizontal influences include international human rights law and this has particular resonance because of 'crimes against humanity' which (as we will see) do not fit easily within the Laws and Customs of War or international humanitarian law generally.

2.7 Locating International Criminal Law (ICL) within International Human Rights Law and International Humanitarian Law

While international criminal law was originally perceived as 'serious breaches of international humanitarian law',²¹⁷ this may no longer accurately describe this body of law, as it fails to recognise the role of international human rights law. Determining precisely where international criminal law sits in either international humanitarian law or international human rights law is uncertain but as discussed in Chapter 1 international human rights law may be restricted to determining criminal procedure and as an aid to interpretation. The rapid emergence of international criminal law since 1993 has exacerbated this uncertainty.²¹⁸ According to Sunga, ICL has not reached the status of a fully self sufficient coherent body of law - it is still emerging. Opinions do differ as to its interpretation and application.²¹⁹ This does not mean however that there is no fundamental 'core' of basic international laws, which are universally accepted as binding on all humankind. Cassese argues that international criminal law is a 'hybrid branch of law' being made up of a combination of public international law, national criminal law and human rights law. He maintains that with the creation of the International Criminal Court, a distinct independent body of law known as international criminal law is still emerging.²²⁰

Bassiouni is of the view that international criminal law is a 'complex legal discipline that consists of several components' including

²¹⁷ *Tadic*, above n 25, para 87.

²¹⁸ Henkin, above n 21, 36. In relation to human rights law Henkin says it is all new 'at most half a century old'.

²¹⁹ Sunga, above n 28, 2-9.

²²⁰ Cassese, above n 27, 19.

international law, national criminal law and human rights law which although ‘not easily reconciled... constitute a functional whole’.²²¹ Maogoto traces elements of human rights law in international criminal law as early as the Nuremberg Charter by referring to the prohibition of ‘persecution on political racial and religious grounds’ as being echoed in the UN Charter which promoted ‘respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’, and more recently in the founding principles of the European Court of Human Rights.²²² Heintze notes that international conventions such as the *Convention on the Rights of the Child 1989* incorporate human rights protections and international humanitarian law obligations all in the one instrument.²²³ Human rights law appears to have had its origins in international humanitarian law of which international criminal law forms a part.²²⁴

While it is true to say that international criminal law contains elements of human rights law²²⁵ there are nevertheless some distinguishing features. In the traditional sense, human rights law involves a transaction between the citizen and the state, notably the citizen has certain fundamental rights which the state may not interfere with or remove. In the event of the state being in breach of its obligations to the citizen, the citizen as an individual may be able to remedy the breach by taking a civil action against the state or seeking redress before an international body. International criminal law does not directly involve the state as a respondent to the proceedings at all. An independent prosecutor may institute criminal proceedings against the defendant or accused, which may or may not be a representative of the state or it could even be the head of state, but the state is not criminally liable even if the state representative accused, acted at the behest of the state. The individual victim of the crime is not a party to the proceeding in the same way as the prosecution and defence.²²⁶ Traditionally the victim provides evidence of the commission of the crime. With international criminal law, generally the individual victim of the crime is a representative of a larger group

²²¹ Bassiouni, above n 9, 1; see also Martin, above n 13, 3.

²²² Maogoto, above n 37, 110, 113, also at page 240 Maogoto refers to the fact that at the Rome Conference for the negotiation of the ICC Treaty, human rights groups such as Amnesty International argued that human rights violations should have been included in the ICC Statute. See also Martin, above n 13, 3.

²²³ Hans-Joachim Heintze, ‘On the Relationship between Human rights Law protection and International Humanitarian law’ (2004) 86 *International Review of the Red Cross* 789, 792.

²²⁴ Martin, above n 13, 2; Heintze, above n 138, 798.

²²⁵ Heintze, above n 138, 793.

²²⁶ While this has traditionally been the case, the position of the victim before the International Criminal Court is different. The Rome statute makes provision for the victim to appear before the court, be represented and make submissions. See *Prosecutor v Thomas Lubanga Dyilo* ICC -01/04-01/06-T-3 (20 March 2006).

such as a ‘national, religious, ethnic or political group or part of the civilian population or a specifically protected class of individuals such as prisoners of war or wounded or sick soldiers in battle’. International crimes in the context of this thesis are those crimes specified in the charters or statutes of the various international criminal tribunals from Nuremberg to the International Criminal Court. Further that part of international humanitarian law dealing with the special status of combatants in the course of armed conflict is a legal feature separate and distinct from human rights law.²²⁷

The Secretary General of the United Nations, when addressing the creation of the ICTY, was able to conclude with some degree of certainty that the ‘grave breaches’ of the Geneva Conventions of 1949, the violation of the Laws and Customs of War, genocide and crimes against humanity were undoubtedly part of customary law thereby avoiding any breach of the principle of *nullem crimen sine lege*.²²⁸ Certainty of the customary law status of these crimes was essential, otherwise any prosecutions undertaken by the then fledgling Tribunal may have been invalidated on this basis.²²⁹ For the most part the Secretary General was content to refer to these crimes collectively as ‘serious breaches of international humanitarian law’.

While there is an ongoing debate as to the *lex specialis* nature of international humanitarian law when considering overlapping provisions of international human rights law,²³⁰ the interesting ‘newcomer’ on the field is international criminal law. The Rome Statute of the International Criminal Court adds a whole new dimension to the discussion because there is a very good chance that a new body of law – international criminal law – will emerge and where that will leave provisions of international humanitarian law and international human rights law which gave birth to this new body of law remains to be seen. As we will see below the overlapping nature of these laws has had a more significant impact on crimes against humanity than on war crimes but new war crimes incorporated into the Rome Statute mean that international humanitarian law is not immune from this process of change.

²²⁷ Heintze, above n 138, 797.

²²⁸ Translated means: ‘There can be no crime without a law’. The S-G was not at the time referring to ICL.

²²⁹ UN Secretary General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, above n 14, para 34.

²³⁰ A E Cassimatis, ‘The Fragmentation of International Law’ (2007) 56 *International and Comparative Law Quarterly* 623.

Having discussed the sources of international criminal law we will now examine in greater detail each of the principal international crimes that make up the body of law referred to as international criminal law. The international crimes examined will be those crimes which form part of customary law and have as such achieved *jus cogens* status. As will be noted, the Rome Statute has by treaty created additional crimes which are not *jus cogens* but these will not be discussed in any great detail in the context of this thesis. Specifically the crimes now considered in turn are – war crimes and crimes against humanity which include genocide.

2.8 War Crimes

A war crime as understood in the context of international criminal law, is the violation of the laws of warfare (usages or customs of war) committed by any persons military or civilian.²³¹ There is a distinction to be made between the rules of warfare and war crimes.²³² Lauterpacht defines war crimes as offences against the Laws of War that are criminal in the ordinary and accepted sense of the word. They are to be distinguished from traditional criminal laws by reason of their ‘heinousness, their brutality their ruthless disregard for the sanctity of human life and their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity’.²³³ However in modern parlance, reference to ‘violations of the Laws and Customs of War’ when defining war crimes has largely been subsumed into the broader category of serious breaches of ‘international humanitarian law’.²³⁴

The Nuremberg Charter defined war crimes as violations of the laws or customs of war including murder; ill-treatment of the civilian population; prisoners of war; the killing of hostages; plunder and wanton destruction of cities or villages not justified by military necessity.²³⁵

This definition did not significantly depart from Hague Law and Geneva Law as it pertained to the civilian population and the treatment of prisoners of war.

The Statute of the ICTY took a different approach in that Geneva Law and Hague Law were separated. Article 2 incorporated Geneva Law and

²³¹ Richard Falk, Gabriel Kolko, & Robert Lifton, *Crimes of War* (1971) 68.

²³² Christopher Greenwood, ‘The Relationship between *ius ad bellum* and *ius in bello*’ (1983) 9 *Review of International Studies* 221, 228.

²³³ H Lauterpacht, ‘The Laws of Nations and the Punishment of War Crimes’ (1944) 21 *British Yearbook of International Law* 58, 79.

²³⁴ *Tadic*, above n 25, 49.

²³⁵ Article 6(b) of the *Charter of the International Military Tribunal at Nuremberg 1945*.

provided that persons or property protected by the Geneva Convention could not be subjected to wilful killing; torture; inhuman treatment; biological experiments; great suffering or serious injury or extensive destruction and appropriation of property not justified by military necessity or compelling a prisoner of war or a civilian to serve in the forces of a hostile power; or wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation or the taking of hostages.

Whereas Article 3 of the ICTY Statute incorporated Hague Law and provided that persons violating the laws or customs of war included the use of poisonous weapons or other weapons calculated to cause unnecessary suffering; wanton destruction of cities or towns not justified by military necessity; the destruction of institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; and plunder.²³⁶

Under the Rome Statute of the ICC not only does the war crime provision incorporate Hague and Geneva Law (including Additional Protocol I of 1977) but in some respects it expands or goes beyond Hague and Geneva Law. While the Security Council acting under Chapter VII of the UN Charter necessarily confined itself to customary law when creating the ICTY Statute, (as the Security Council at that time believed that it had no legislative authority) it was entirely proper for the sovereign states negotiating the Rome Statute to incorporate new criminal provisions as they saw fit (because states are not constrained in the same way as the Security Council).

Article 8 of the Rome Statute provided that (the text of the newly created provisions are in bold) ‘war crimes’ means a Grave breaches of the Geneva Conventions namely killing; torture; causing great suffering, or serious injury to body or health; destruction of property, not justified by military necessity; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; depriving a prisoner of war or other protected person of the rights of fair and regular trial; deportation; and the taking of hostages. The provisions then deals with other serious violations of the laws and customs of war applicable in international armed conflict including:- attacks against the civilian population or civilian objects; **intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian**

²³⁶ ICTY Statute, arts 2, 3

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; 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; attacking towns which are not military objectives; killing a combatant who has surrendered; improper use of a flag of truce; transfer of the civilian population; attacks against buildings dedicated to religion, education, art; subjecting persons to physical mutilation or to medical or scientific experiments; declaring no quarter; suspending courts of law or the rights and actions of the nationals of the hostile party; compelling nationals of the hostile party to take part in the operations of war; pillaging; use of poisoned weapons or other gases; bullets which expand or flatten easily in the human body; weapons which cause superfluous suffering; 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; intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions; Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

In the case of an armed conflict not of an international character, serious violations of article 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 armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: murder of all kinds, mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable; intentionally directing attacks against the civilian

population as such or against individual civilians not taking direct part in hostilities; intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; **Intentionally directing attacks against personnel, installations, material, 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;** intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; pillaging; **committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 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; conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;** and 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 demand.

As can be seen, the ICC Rome Statute war crimes provision significantly expanded the text of previous war crimes provisions. While many of the offences articulated in Article 8 of the ICC Statute were previously inferred when prosecutions were launched (particularly in the case of the ICTY), the complex and uncertain process of inferring such crimes can now be avoided. The expansion of the ambit of conduct which now amounts to a war crime under the ICC provisions lends weight to Cassese's argument that the ICC is likely to be the vehicle whereby the new body of law known as 'international criminal law' will ultimately emerge. As this 'new law' is founded on its own treaty, the new law is likely to emerge separate and distinct from international humanitarian law and international human rights law.

In terms of influencing the development of international criminal law, the offences most influenced by international human rights law were crimes against humanity and the most serious of all crimes - genocide. These crimes will now be considered.

2.9 Crimes Against Humanity

While a war crime was in first instance a national crime that subsequently became an international crime, a crime against humanity is by its very nature an international crime and is distinguished from a domestic crime on the basis that its breach is of concern to the whole of humanity.²³⁷ When it is enforced by an international tribunal the jurisdiction invoked is universal.²³⁸ The victims of a crime against humanity are not only those persons directly affected by the commission of the offence but all of humanity.²³⁹ A crime against humanity is expressed as ‘murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political racial or religious grounds; enforced disappearance; apartheid; or other inhumane acts’.²⁴⁰

Crimes against humanity had their origins in the Laws of War. The ‘Martens’ Clause of the 1907 Hague Convention first spoke of the ‘laws of humanity’ in the context of developing international customary law. Although referred to in the 1907 Convention, it was not until the end of World War II that these vague and undefined references were formed into a new species of international crime.²⁴¹ The Charter of the International Military Tribunal for Nuremberg expressly created crimes against humanity. The crimes were to attract individual criminal liability for the perpetrator.²⁴² While international human rights law has had a profound influence over the development of ‘crimes against humanity’, this influence, like international human rights law itself, is comparatively recent and certainly post dated the original Nuremberg crimes against humanity.

2.9.1 Links to Armed Conflict

The fact that crimes against humanity had their origins in Hague Law meant that they (like war crimes) were initially viewed as being limited to criminal conduct arising or committed during the course of an armed conflict. The drafters of the Nuremberg Charter had to grapple with the ‘non-intervention’ principle which provided that international law had no application to events that occurred internally within the national borders of a country.²⁴³ In other words international law only applied to events

²³⁷ *R v Finta* (1994) 1 SCR 701 at 812; see also Margaret McAuliffe de Guzman, ‘The Road from Rome: The Developing Law of Crimes against Humanity’ (2000) 22 *Human Rights Quarterly* 335, 338; Bassiouni, above n 9, 127; S Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (2004) 21.

²³⁸ McAuliffe de Guzman, above n 152, 338; Zahar & Sluiter, above n 13, 29.

²³⁹ *Prosecutor v Erdemovic* (Hearing) ICTY IT-96-22-T 29 Trial Chamber (1996) paras 27 – 28.

²⁴⁰ See art 5 ICTY Statute.

²⁴¹ Kittichaisaree, above n 43, 85-89.

²⁴² Charter of the International Military Tribunal at Nuremberg 1945.

²⁴³ Maogoto, above n 37, 89.

that had occurred during the course of an international event such as an armed conflict.²⁴⁴ This meant that the atrocious crimes committed by the Nazis against their own people, the Jews of Germany, prior to the outbreak of the Second World War could not be punished by an international tribunal.²⁴⁵ Accordingly, before the Nuremberg Tribunal, ‘crimes against humanity’ were linked to offences committed during the course of an armed conflict, which in this case was international in character.²⁴⁶

No such restrictions limited prosecutions under Control Law No. 10.²⁴⁷ This law applied to prosecutions conducted by the occupying powers. An occupying power assumes many of the same powers of the former sovereign state.²⁴⁸ For the period of the occupation the occupying power is for all ‘intents and purposes’ the sovereign authority of that state.²⁴⁹ The fact that Control Law No. 10 did not impose an ‘armed conflict’ limitation, meant that this offence was less like Hague Law and more like international human rights law although it would not have been understood as such at the time.

The shift towards international human rights law did not take place immediately (at least at the international level), because even as late as 1993, the Statute for the International Criminal Tribunal for the former Yugoslavia limited jurisdiction for crimes against humanity to offences ‘committed in armed conflict’.²⁵⁰ As noted when the Secretary General drafted the ICTY Statute he only wanted to include crimes in the Statute which were ‘beyond doubt part of customary law’.²⁵¹ However the Secretary General in his Report on the Statute expressly stated that crimes against humanity are prohibited ‘regardless of whether they are

²⁴⁴ Kai Ambos and Steffen Wirth, ‘The Current Law of Crimes Against Humanity’ (2002) 13 *Criminal Law Forum* 4.

²⁴⁵ *Prosecutor v Tadic* (Judgement of the Trial Chamber) ICTY- IT-94-I-T; 7 May 1997 para 627. See also K D Askin, *War Crimes Against Women* (1998) 142.

²⁴⁶ This restriction was not placed on crimes against humanity in *Control Council Law No 10*, or the *International Law Commission Draft Code of 1954*, the *Genocide Convention* and the *Apartheid Convention*.

²⁴⁷ *Control Council Law No 10* where the ‘war crimes laws’ applied by each of the occupying victorious Allies (USA; UK; USSR & France) in Germany following World War II. Although some prosecutions were conducted by the International Military Tribunal at Nuremberg, most of the prosecutions were conducted by the individual occupying states in their own sector of influence.

²⁴⁸ While the occupying powers of United States, United Kingdom, Russia and France (at times) insisted that they were not an occupying power, this was more a political statement than the legal reality.

²⁴⁹ See Section III – Military Authority Over the Territory of the Hostile State - arts 42 to 56 of the Regulations Annexed to the Convention Respecting the Laws and Customs of War - *1907 Hague Convention IV and Regulations*.

²⁵⁰ Kittichaisaree, above n 43, annex 1 - art 5 of the ICTY Statute.

²⁵¹ UN Secretary General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, above n 14, para 34.

committed in armed conflict...’.²⁵² As a consequence, the ICTY Appeals Chamber acknowledged that except for the ICTY (where there existed a historical exception), crimes against humanity no longer required the jurisdictional limitation of an ‘armed conflict’. The Appeals Chamber in the *Tadic Jurisdiction Appeal*, declared that it was ‘now a settled rule of customary international law that crimes against humanity do not require a connection to... armed conflict...’.²⁵³ In the final *Tadic Appeal Judgment*, the Appeals Chamber essentially disposed of the matter altogether when it held that the ‘armed conflict requirement is a jurisdictional element, not “a substantive element of the mens rea of crimes against humanity” (i.e., not a legal ingredient of the subjective element of the crime),’²⁵⁴ thereby essentially declaring that crimes against humanity were no longer confined to their Laws and Customs of War origins.

The Statute of the International Criminal Tribunal for Rwanda and the Rome Statute of the International Criminal Court did not retain the Hague Law (or IHL) link to ‘armed conflict’.²⁵⁵ Accordingly it is now settled that under customary international law there is no need to establish a nexus with armed conflict be it international or internal when prosecuting a crime against humanity.²⁵⁶

2.9.2 State and non-state actors

Once crimes against humanity were removed from the ‘armed conflict’ limitation of international humanitarian law, the issue that then arose was whether there was any longer a need to prove links to states or state actors. Originally when crimes against humanity were part of Hague Law, the prosecution had to prove the link to states or state actors in order to secure a conviction. This limitation was very significant, especially in the latter part of the 20th century because many conflicts that were occurring around the world were not international armed conflicts between states, but more internal conflicts where at least one of the parties to the conflict was a non-state actor. Consequently when it came to the drafting of the Rome Statute the ‘state nexus’ limitation was removed. The Rome Statute expanded the jurisdictional reach of the crime to incorporate organisations. Hence organisational involvement in widespread and/or systematic attacks upon the civilian population can now amount to a

²⁵² Ibid para 47.

²⁵³ *Tadic*, above n 25, para 141.

²⁵⁴ *Prosecutor v Tadic* (Appeal Decision) ICTY AC 15 July 1999 IT-94-1 A para 249.

²⁵⁵ Kittichaisaree, above n 43, *Statute of the ICTR*, 33 ILM 1598 (1994), art 3; art 7 of the Rome Statute.

²⁵⁶ *Tadic* (Appeal Decision) above n 169, para 78.

crime against humanity.²⁵⁷ Accordingly if the attacks are part of an organisational policy without involving the state itself, then crimes against humanity charges could now be preferred. This could not have occurred if the crimes against humanity offence remained part of Hague Law.

According to the modern definition of crimes against humanity, if the attacks were part of a widespread and/or systematic campaign carried out pursuant to the organisational policy of (for example) a known terrorist organisation,²⁵⁸ then the prosecution of this conduct as a crime against humanity is now possible.

On the other hand, even when state actors are involved, the state itself is not prosecuted, but the individual perpetrator. Of course, states must use agents to implement their policies and to carry out their crimes. As noted above, the state itself cannot be held criminally liable as liability will only ever attach to 'natural persons'.²⁵⁹ In a few cases, states directly employ their official organs such as the police or army to commit the crimes against humanity but it is more likely to be carried out on behalf of the state by unofficial actors such as militia or criminal gangs.²⁶⁰

Of course it is possible that the government of a state may lose control over an organ of the state, such as the army or police, or the state infrastructure may collapse altogether.²⁶¹ In such circumstances criminal liability for the crimes committed could attach only to those individuals within the renegade police or army. Members of the civilian government would not be liable on a 'superior responsibility' basis, provided they could demonstrate that they had no ability at the relevant time to prevent the perpetrators from carrying out the crime or to punish them later for the crimes committed. Further, in these circumstances the policy of perpetrating the widespread and/or systematic attack may emanate from rogue elements of the army and or police and not the government.²⁶² However, what a responsible state official cannot do is disassociate him/herself from a crime against humanity after the event by purporting

²⁵⁷ McAuliffe de Guzman, above n 152, 368.

²⁵⁸ *Tadic* (Judgement of the Trial Chamber) above n 160 para 654; Bassiouni, above n 9, 71.

²⁵⁹ Article 6 of the ICTY Statute provides: 'The International Tribunal shall have jurisdiction over natural persons'.

²⁶⁰ M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1992) 248-249.

²⁶¹ McAuliffe de Guzman, above n 152, 369.

²⁶² *Prosecutor v Nikolic* (1995) (Rule 61) IT-94-2-R61 para 26.

to shift blame onto the agency that carried out the widespread and/or systematic attack on his/her behalf.²⁶³

In most instances the government of the state is involved because wholly destructive crimes of this nature are rarely in the interests of the state, unless the crimes are carried out in furtherance of a particular policy of the state.²⁶⁴

2.9.3 *Widespread or Systematic Attack*

For a crime to be a crime against humanity it must be directed at a civilian population. It can be ‘any’ civilian population, it does not have to be specifically identified as a group by the perpetrators. There is a need for the crime to exhibit the characteristics of system or organisation and be of a certain scale and gravity.²⁶⁵ Although if ‘scale’ is present, the gravity may be in the acts of scale rather than the individual acts themselves.²⁶⁶

While the crime cannot be the work of an isolated individual acting alone and not being part of a wider plan or policy, there is no requirement to prove that the perpetrator was aware of the particulars of the policy of the state.²⁶⁷ However the perpetrator of a crime against humanity must know that his/her act is part of a widespread or systematic attack against the civilian population.²⁶⁸ Although there is nothing which prevents a perpetrator from being motivated by personal reasons, provided the act forms part of a larger plan or policy.²⁶⁹ The widespread or systematic attack is to be distinguished from random acts of violence unconnected to any system or organisation.²⁷⁰ While the prosecution need only prove that the attack was widespread or systematic and not both, often the proof of one might be the proof of the other.²⁷¹ In other words, proof that an act of violence was systematic may be demonstrated by the fact that it has

²⁶³ Article 7(3) ICTY Statute: ‘The fact that any of the acts... [were] committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know...’ (Superior responsibility).

²⁶⁴ Contrast the terrorist bombings in the US on September 11, 2001.

²⁶⁵ *The Nikolic Indictment* (Rule 61 Hearing) IT-95-2-R61 ICTY 20 October 1995 para 26.

²⁶⁶ Note for example the ‘political denunciation’ cases committed as part of the persecution of the Jews in Nazi Germany. The prosecutions under Control Law No 10 invariably involved one person informing the Gestapo that certain persons were Jews. Individually each crime was not so serious, but the court held that a crime against humanity had been committed due to the scale of the persecution. See discussion in *Tadic* (Appeal Decision) above n 169, paras 255-263.

²⁶⁷ *Nikolic*, above n 77, para 26.

²⁶⁸ *Prosecutor v Erdemovic* (Appeal Judgement) IT-96-22A October 1997 paras 21-23.

²⁶⁹ *Tadic* (Appeal Decision) above n 169, para 141, para 248.

²⁷⁰ *Prosecutor v Akayesu* (Hearing) ICTR-96-4-t Trial Chamber 1 (2 Sept 1998).

²⁷¹ *Ibid* para 579.

occurred systematically in a geographically widespread area. The term ‘widespread’ has been defined as ‘massive frequent, large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims’.²⁷² Systematic is something which is ‘thoroughly organised and following a regular pattern on the basis of common policy involving substantial public or private resources’.²⁷³ There is no requirement that the policy must be adopted formerly as a policy of state. There must however be some preconceived plan or policy.²⁷⁴

The ‘attack’ may be one or more of the enumerated acts in crimes against humanity, such as murder, enslavement, rape or torture or it may be the implementation of a discriminatory policy.²⁷⁵ The enumerated acts are not exhaustive and may include any inhumane act, provided the other elements are met.²⁷⁶ It would be incorrect to characterise crimes against humanity as only consisting of a multiplicity of different criminal acts committed by the same perpetrator at different times and places.²⁷⁷ Invariably offenders are charged with individual acts which form part of a widespread or systematic attack, there being a link to the policy.²⁷⁸ However, a single act can be a crime against humanity particularly if the one act is carried out pursuant to an organised policy.²⁷⁹ The bombing of Hiroshima and Nagasaki during World War II were single acts but part of an attack directed at the civilian population.²⁸⁰ Similarly the attack on the Twin Towers in New York on September 11, 2001 were attacks directed against the civilian population and forming part of an organised and systematic plan. Having regard to the other attacks in the USA on that day, these acts were also widespread.

In the *Vukovar Case* before the ICTY the court considered that the one act of taking some 200 wounded and sick from their hospital beds and shooting them at a mass grave, was a crime against humanity. The court held:

Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be liable. Although it is correct that isolated random acts should not be included in the

²⁷² Ibid para 580.

²⁷³ Ibid para 580

²⁷⁴ Ibid para 580.

²⁷⁵ Ibid para 581.

²⁷⁶ Ibid para 585.

²⁷⁷ *Tadic* (Judgement of the Trial Chamber) above n 160 para 649.

²⁷⁸ Ibid para 625.

²⁷⁹ Ibid para 649.

²⁸⁰ Robertson, above n 109, 174.

definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian population and thus “[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution.”²⁸¹

2.9.4 Discriminatory Intent

A crime against humanity includes ‘persecution of the targeted civilian population based on political racial and religious grounds’.²⁸² When introducing the Statute of the ICTY, the Secretary General said that: Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic racial or religious grounds.²⁸³

Because the Secretary General attached ‘on national political ethnic racial and religious grounds’ to all the enumerated acts such as murder, rape and torture, the early decisions of the ICTY concluded that discriminatory intent had to be proved in all of the enumerated acts, not just paragraph (h) - ‘persecution’. This interpretation was contrary to an ordinarily reading of Article 5 of the Statute.²⁸⁴

When this matter was subsequently considered by the Appeals Chamber, the Appeals Chamber noted that discriminatory attacks on the civilian population based on ‘national, political, ethnic, racial or religious grounds’ for all of the enumerated acts including persecution, was not a requirement of the Nuremberg Charter or Control Law No. 10, nor was it part of customary international law. The Appeals Chamber noted the importance of the Report of the Secretary General for the purposes of interpreting the Statute, but said that his comments should not prevail over the clear words of the Statute, and where possible (unless some very clear contrary intention is expressed), the Tribunal should interpret the Statute in a manner consistent with customary international law. The Appeals Chamber observed that there was no justifiable basis to restrict the ambit of crimes against humanity in this way. The Appeals Chamber went on to say:

For example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity. A fortiori, the object and purpose of Article 5 (crimes against humanity provision) would be

²⁸¹ *Vukovar Case* (Rule 61 Hearing) ICTY IT-95-13-R61 (3 April 1996) para 649.

²⁸² Article 5 of the ICTY Statute.

²⁸³ UN Secretary General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, above n 14, para 48.

²⁸⁴ *Tadic* (Judgement of the Trial Chamber) above n 160 para 649.

thwarted were it to be suggested that the discriminatory grounds required are limited to the five grounds put forth by the Secretary-General in his Report....²⁸⁵

2.9.5 Spreading terror among the civilian population

Unlike crimes against humanity which attract universal jurisdiction and have achieved the status of *jus cogens*, there does not exist a universally recognised definition of terrorism.²⁸⁶ However, acts of terrorism in the context of ‘spreading terror among the civilian population’²⁸⁷ has been considered by the International Tribunal for the former Yugoslavia as coming within the definition of both war crimes²⁸⁸ and crimes against humanity.²⁸⁹ The fact that an act terrorising the civilian population can be a crime against humanity has been recognised at least since 1948 and has been reaffirmed as good law in 1997. In *Prosecutor v Erdemovic*²⁹⁰ in the joint judgment of McDonald and Vohrah JJ, their Honours cited with approval the *Albrecht Case*²⁹¹ where the court held in relation to crimes against humanity that:

Crimes of this category are characterised either by their seriousness and their savagery, or by their magnitude, or by the circumstance that they were part of a system of terrorist acts, or that they were a link in a deliberately pursued policy against certain groups of the population.

However a separate and distinct crime of terrorism has not achieved international acceptance. This inability to reach international consensus on what is terrorism deprives it of legitimacy as an international crime. If the definition of ‘what it is’ cannot be settled then the legitimacy of its prohibition is undermined.²⁹² One of the fundamental principles of international humanitarian law, *nullem crimen sine lege*, dictates that there must be certainty in international crimes before persons are tried for their breach.²⁹³ It is indeed this very controversy over the definition which led to the Nazi criminals being tried for crimes against humanity

²⁸⁵ *Tadic* (Appeal Decision) above n 169, para 285.

²⁸⁶ Jenny Hocking, *Terror Laws* (2004) 4. See also Stephen P Marks ‘Branding the “War on Terrorism”’: Is there a “New Paradigm” Of International Law?’ (2006) 14 *Michigan State Journal of International Law* 71, 77.

²⁸⁷ *Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977 1125 UNTS 3 (entered into force 7 December 1978) (‘Additional Protocol I’) art 51(2); Roberts, above n 58, 386 at 415.

²⁸⁸ *Prosecutor v Stanislav Galic* (Judgement of Trial Chamber) 5 December 2003 IT-98-29-T par 133.

²⁸⁹ *Erdemovic* above n 183, para 23.

²⁹⁰ *Ibid* para 23.

²⁹¹ *Albrecht Case*, Special Court of Cession in The Netherlands (11 April 1949) *Nederlandse Jurisprudentie* (1949) No 425, 747.

²⁹² M Cherif Bassiouni, ‘Assessing Terrorism into the New Millennium’, (1999/2000) 12 *De Paul Business Law Journal* 9.

²⁹³ *Prosecutor v Stanislav Galic* (Judgement of Trial Chamber) IT-98-29-T (5 December 2003) para 92.

offences. The final international crime now to be considered is the crime of genocide.

2.10 Genocide

The Genocide Convention of 1948 was celebrated as one of the most important developments of international criminal law.²⁹⁴ The crime of genocide is the ‘denial of the right of existence of human groups’ and offends the most basic ‘aims of the United Nations’.²⁹⁵ Prior to 1948 international criminal law did not define genocide as a specific international crime but considered it as an aggravated crime against humanity.²⁹⁶ Lemkin first used the term genocide during the Second World War,²⁹⁷ although the act of genocide existed in practice well before that date.²⁹⁸ Genocide is the intentional destruction of a national, ethnic, racial or religious group of people. The crime can be committed by killing, seriously harming (bodily or mental), inflicting conditions on life calculated to bring about the whole or partial destruction of the group, or by imposing measures intended to prevent births, or forcibly transferring children from the group, with the intention of completely or partially destroying the targeted group of people.²⁹⁹

Essentially genocide is concerned with the persecution of one group by another group, in circumstances where (at least) the persecuting group see themselves as different to the persecuted group.³⁰⁰ Sometimes both groups see themselves as different.³⁰¹ Hinton points out that all human beings are born with the ability to distinguish difference and ‘modernity thrives on the essentialisation of difference’.³⁰² Modern examples of the exploitation of difference include the destruction of one group by another within the same community³⁰³ or the attempted destruction of an

²⁹⁴ *Resolution on the Crime of Genocide*, GA Res 96(1), UN GAOR, 1st sess, 55th mtg, UN Doc A/64/Add.1 (1946).

²⁹⁵ *Ibid.*

²⁹⁶ Matthew Lippman, ‘The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty years Later’ (1994) 8 *Temple International and Comparative Law Journal* 1, 11; see also Martin, above n 13, 473.

²⁹⁷ R Lemkin, *Axis Rule in Occupied Europe* (1944) 79.

²⁹⁸ R J Rummel, ‘Genocide’ <<http://www.hawaii.edu/powerkills/Genocide.enct.htm>> 9.

²⁹⁹ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (‘Genocide Convention’) art 2.

³⁰⁰ Barnhizer, above n 29, 50.

³⁰¹ Christine Byron, ‘The Crime of Genocide’ in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 154.

³⁰² A L Hinton (ed), *Annihilating Difference - The Anthropology of Genocide* (2002) 12.

³⁰³ The Rwandan genocide; compare with this with the killing of Cambodians by the Khmer Rouge where a huge number of people were killed but doubts exist as to whether or not this falls within the definition of genocide; see Hurst Hannun, ‘International Law and Cambodian Genocide: The Sounds of Silence’ (1989) 11 *Human Rights Quarterly* 1, 112.

indigenous group by a new settling group or *visa versa*. However the most devastating genocides are those carried out by the nation state itself.

2.10.1 Genocide and the nation state

The concept of ‘nationalism’ often advanced as a policy of the nation state, is predicated on the need to achieve homogeneity.³⁰⁴ Hoffman argues that ‘nationalism’ requires a ‘notion of sameness’.³⁰⁵ Diversity and the nation state do not make ‘happy bedfellows’. In the past when confronted with social, religious and cultural diversity, the nation state has sought to achieve uniformity by assimilation.³⁰⁶ The nation state’s dependence on homogeneity is built on products such as the national anthem, the national flag and the national holiday. These symbols are harmless enough in a genuinely homogeneous society but when they are employed to highlight differences in minority groups within the community, especially when certain groups do not identify with the national anthem, the national flag or the national holiday, then forced assimilation problems can arise.³⁰⁷

States face a fundamental conflict of interest when they act as the guardian of the national interests but at the same time purport to be the sole protector of minority groups within that state, especially when the state is implementing a policy of cultural homogeneity. After all in most cases it is the official organs of the state such as the military, the police and state servants who are generally directly or indirectly responsible for the implementation of policies of genocide.³⁰⁸ Some of the worst genocides have been committed in the name of the state,³⁰⁹ especially where borders have been drawn by colonial powers and are relatively meaningless to the indigenous populations.³¹⁰ Some of the worst

³⁰⁴ J Hoffman, *Citizenship Beyond the State* (2004) 52 referring to Gellner.

³⁰⁵ *Ibid* 52.

³⁰⁶ Samuel Totten, William S Parsons, and Robert K Hitchcock, ‘Confronting Genocide and Ethnocide of Indigenous Peoples - Typologies of Genocide’ in Hinton, above n 217, 61.

³⁰⁷ Hinton, above n 217, 13. This could not be better illustrated than in the case of Australia. (See Stephen Alomes, *A Nation At Last?*(1988) 243) The Australian flag has for most of the life of the nation contained within it the British Union Jack, which by definition must exclude indigenous Australians who have no affiliation with Britain. The Australian Constitution did not recognise indigenous Australians as ‘peoples of the Commonwealth’ until 1967 (see Peter Hanks and Deborah Cass, *Australian Constitutional Law – Materials and Commentary* (6th ed, 1999) 74; Alomes, *A Nation At Last?* 190), the Australian national anthem was for the most part of the 20th century ‘God save the [British] King or Queen’ and the British Queen is still Australia’s head of state.

³⁰⁸ Hinton, above n 217, 338.

³⁰⁹ Rummel, above n 213, 9-10.

³¹⁰ For example, Pakistan-India, Afghanistan-Pakistan, Israel-Palestine just to mention a few; see also Bassiouni, above n 9, 579.

genocides not only involve the destruction in whole or in part of a group of people, but also the culture of those peoples.³¹¹

2.10.2 Cultural Genocide

Cultural genocide, which consists of destroying specific characteristics of the group such as language, literature, learning, religion and art,³¹² was expressly excluded from the Genocide Convention because it was considered to be an unjustified extension of the concept of genocide.³¹³ While the concept of cultural genocide was supposed to exclude attempted assimilation policies,³¹⁴ there is no escaping the fact that the implementation of assimilation policies did in fact bring about the partial physical destruction of the group.³¹⁵ It is hard to see why such assimilation policies would not offend the prohibition on ‘inflicting measures on the group calculated to bring about its physical destruction’.³¹⁶ Certainly ‘forcibly transferring children from one group to another’ as allegedly practiced on indigenous children in Australia, must suggest a genocidal expectation that by so doing the full blooded Aboriginal group would die out.³¹⁷

Colonial indigenous genocide is often characterised by intermittent genocidal massacres rather than a prolonged and sustained genocidal act such as that committed by the Nazis over the Jews of Europe. The intermittent nature of the crime gives it a less serious appearance than other massive genocidal acts. Therefore indigenous genocide is not seen to be somehow as bad as non indigenous genocide, rather it is seen as ‘the savages making way for civilisation’. Genocide has been committed on every continent on earth, with the exception of Antarctica. In the Congo some 40 million people lost their lives in genocidal massacres following

³¹¹ Totten, above n 221, 61.

³¹² *Commentary by the UN Secretary-General on the Draft Genocide Convention* UN Doc. E/477 (1947) note 71 at 6-7.

³¹³ Lippman, above n 211, 37.

³¹⁴ *Ibid.*

³¹⁵ Human Rights and Equal Opportunity Commission, *The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families ‘Bringing them Home’* (1997) <www.austlii.edu.au/special/rsiproject/rsjlibrary/hreoc/stolen/> 275.

³¹⁶ D F Orentlicher, *Genocide, Crimes of War* <<http://www.crimesofwar.org/The Book/Genocide.html>> 2 .

³¹⁷ C Tatz, ‘Genocide in Australia’ *AIATSIS Research Discussion Paper No. 8* (1999) <<http://www.aiatsis.gov.au/rsrch dp/Genocide.htm>> 33; Human Rights and Equal Opportunity Commission, above n 230, 275; although general acceptance of genocide having been committed against the Australian Aboriginal population is still contested.

European occupation.³¹⁸ Indigenous genocide is a '[s]low and insidious form of genocide...'.³¹⁹

2.10.3 What Makes the Crime Genocide?

Historically there were two schools of thought about genocide, some saw it as a unique event, such as the Holocaust, others saw it as having a much broader base. The narrow view could operate to exclude many victims of mass killings and would freeze the crime as an event in history. Fortunately the narrow view has not prevailed.³²⁰ However the existence of the 'narrow view' can be illustrated by the initial reluctance of the ICTY to accept various incidents in Bosnia Herzegovina as amounting to genocide.³²¹

There is a need to strike a middle ground; some conflicts in which many thousands of people may be killed are not genocidal as such. The Allies in World War II for the most part had no intention of killing the Germans or Japanese on racial, religious or ethnic grounds, yet many thousands of Germans and Japanese were killed at the hands of the Allies. Genocide, unlike domestic crime however, is a 'relatively open crime' – the motives are open and so too is the carrying out of the crime itself. The reasons for the killing based on racial, religious or ethnic grounds, are clearly articulated as part of government or organisational policy.³²²

In the *Akayesu Case*, the Rwanda Tribunal spoke of the four protected groups - national, ethnic, racial or religious - then opined that in circumstances where a group did not strictly fit the definition, the Convention should apply to any stable and permanent group whose membership is determined by birth. In so doing the Tribunal extended protection to the Tutsi of Rwanda, which would otherwise have been excluded by a narrow reading of the Convention.³²³ The question now is whether this extension by the Trial chamber might lead to the inclusion of other identifiable groups not necessarily determined by birth, such as homosexuals, or the mentally and physically impaired.³²⁴

³¹⁸ Hinton, above n 217, 47.

³¹⁹ Ibid, 49.

³²⁰ Nancy Scheper-Hughes, *Coming to our Senses: Anthropology of Genocide* cites Chaulk Frank, 'Redefining Genocide' in L Chorbajain and G Shirinian (eds), *Studies in Comparative Genocide* (19999); Hinton, above n 217, 369.

³²¹ *Prosecutor v Jelusic*, (Hearing) ICTY IT-95-10-T para 59 onwards. See also Orentlicher, above n 231, 3.

³²² Hinton, above n 217, 382.

³²³ Paul F Magnarella, 'Recent Developments in the International Law of Genocide – An Anthropological Perspective on the International Criminal Tribunal for Rwanda', in Hinton, above n 217, 317. See also *Akayesu*, above n 185, para 516.

³²⁴ Hinton, above n 217, 317.

Although the Genocide Convention does not specifically refer to rape, the Trial Chamber in *Akayesu* relying on the enumerated act of causing ‘serious bodily and mental harm’, concluded that rape and sexual violence were part of this enumerated act.³²⁵

Genocide is now generally recognised as a norm of *jus cogens* – in other words it forms part of customary international law binding upon all states.³²⁶ Tragically, acts of genocide are not limited to what occurred in Europe during the course of World War II, genocidal crimes have been found to have been committed in Rwanda, and Bosnia as well.³²⁷ Other modern incidences of what could arguably be labelled genocide include Burundi (1972); Cambodia (1975); Iraq (1963 – 2003); Myanmar (1962); Nigeria (1967 – 70); Sudan (1956 -).

2.10.4 The Causes of Genocide

Generally a community needs to be ‘primed’ for the commission of the genocidal act. Hinton refers to this as ‘*genocidal priming*’.³²⁸ Generally some politico-socio-economic calamity sparks off the genocidal ‘fire’ in a volatile population ‘primed for ignition’. The priming is often achieved by a prolonged period of state sponsored racist propaganda against the victim group. Examples of ‘igniting the spark’ abound, for example, Nazi propaganda citing the Treaty of Versailles and subsequent severe economic depression with respect to Nazi Germany; the death of Tito with respect to the former Yugoslavia, the death of President Habyarimana with respect to Rwanda. In each case there followed a period of state sponsored propaganda.

The cause of the volatility of the population is a much deeper issue. Often the target population in these circumstances has arrived in the country later in time than the persecuting population. In the case of the former Yugoslavia, the Muslim Bosniacs were seen as ‘outsiders’ who had seized control of Bosnia-Herzegovina during the rule of the Ottoman Empire. This occupation was much resented by the Orthodox Serbs and

³²⁵ Ibid 319.

³²⁶ Jordan J Paust, ‘Congress and Genocide: They’re Not Going to Get Away With It’ (1989) 11 *Michigan Journal of International Law* 90, 92; also, *Barcelona Traction Case (Belgium v Spain)* [1970] ICJ Rep 3, 32: although the court did not expressly state that genocide was a norm of *jus cogens*, evidence of *opinio juris* and general state practice support the conclusion that the rule against genocide is part of customary international law and most probably *jus cogens* as well. However in *Jelisić*, above n 236, the ICTY Trial Chamber at para 60 did make this conclusion.

³²⁷ *Karadzic and Mladic* (Rule 61 Hearing) ICTY IT-95-5-R61 para 95.

³²⁸ Hinton, above n 217, 29.

Catholic Croats who asserted original ownership of the land.³²⁹ In the case of Rwanda, the Tutsi were viewed by the Hutu as ‘foreigners from Abyssinia’.³³⁰

Generally the community can function effectively notwithstanding underlying ethnic hatreds, but if persons in authority stir up these community hatreds and if political and economic instability occurs, then genocide can follow. Bringa argues that the cause of genocide in Bosnia-Herzegovina was triggered by the collapsing political and economic structures. With the disappearance of life as it was previously known, insecurity and fear, especially if fanned by propaganda cause people to divide into ‘we groups’ where qualification and entry is determined by birthright and ethnicity. Bringa notes that ‘if persecution assaults and violence are heaped upon those other forces of disunification, then hatred is directed against the victim group’.³³¹ Bringa also points out that ‘responsibility for the genocide in the Balkans lay at the feet of the political leadership aided and abetted by the media that they controlled. By dwelling on past atrocities committed by the ‘other group’ the manipulation of fear is achieved’.³³²

Stanton articulates ‘Eight Stages of Genocide’: 1) Classification; 2) Symbolisation; 3) Dehumanisation; 4) Organisation; 5) Polarisation; 6) Preparation; 7) Extermination; and 8) Denial. *Classification* is where people are distinguished into ‘us’ and ‘them’ groups. This is followed by *symbolisation* where the ‘them’ group is given names: ‘Jews’ ‘Gypsies’ ‘Muslims’ and so on. *Dehumanisation* occurs when the ‘them’ group is equated with undesirable objects such as insects or disease. *Organisation* is where the state or organisation plans the genocide. *Polarisation* is the extensive propaganda program. The ‘them’ group is then prepared by being identified and separated from the ‘us’ group, which is followed by *extermination and denial*.³³³

2.10.5 Accepting Responsibility

Often the consequences of genocide carried out by one generation have to be dealt with by subsequent generations. This can take various forms. In

³²⁹ *Tadic* (Judgement of the Trial Chamber) above n 160 para 55 and following.

³³⁰ *Akayesu*, above n 185, para 120.

³³¹ Tone Bringa, ‘Averted Gaze: Genocide in Bosnia-Herzegovina 1992-1995’ in Hinton, above n 217, 212.

³³² Hinton, above n 217, 216.

³³³ G H Stanton, ‘Eight Stages of Genocide’ originally written for the US Dept of State in 1996, subsequently presented at *Yale University Center for International Studies* in 1998. <http://www.Genocidewatch.org/8stages.htm> 1.

the case of Germany, German youth in the 1960s saw the Holocaust as something that punished future German generations.³³⁴

The alternative approach is to ignore the genocide altogether. In many cases the genocide carried out against indigenous populations in numerous countries was not taught in schools until recent times, if at all.³³⁵ In Australia the reconciliation movement, which amounted to a citizen led ‘ground swell’ of support for the plight of indigenous people, really did not take place until the late 20th century.³³⁶

A feature of genocide is the tendency for apologists, especially state leaders, to explain away genocide as some terrible biologically determined event. Horrific but natural, something that could not be prevented and something that simply had to run its course.³³⁷ Nazi cleansing the German blood, the pure Aryan race; the Hutu expelling the ‘cockroach’; the Serbs removing the Islamic fundamentalist threat. In Australia the forcible removal of children was at best classed as ‘humanitarian’ in the best interests of the children or at worst as ‘misguided but well intentioned’.³³⁸ Linke notes that the Nazi genocide has been described as a horrific state sponsored experiment in modernity. Mass death was ‘facilitated by modern processes’ of science, technology and bureaucracy. Social engineering so as to create a new pure order required the extermination of those who ‘did not fit the new mould’.³³⁹

There is a danger in asserting that one particular community or nation state is immune from committing genocide. Genocide has been committed by the poor, the rich, the ignorant, the educated, the black, the white, and in the name of many different religions. However it is no doubt correct that a society can condition itself against the possibility of genocide for example Nagengast, referring to Kuper, notes that genocide does not usually occur in societies where (a) racial, religious or ethnic differences are insignificant or are not a source of deadly conflict, (b) there is a tolerance of and preparedness to share between the dominant and minority groups, (c) minority rights are legally guaranteed, (d) social

³³⁴ Hinton, above n 217, 26.

³³⁵ Totten, above n 221, 82.

³³⁶ This followed the decisions of the High Court in *Mabo v Queensland* (1992) 175 CLR 1, which had a significant effect on public opinion. Contrary to widespread public opinion in favour of ‘reconciliation’ the conservative Prime Minister John Howard, still refused to apologise on behalf of the Australian people for what had happened to Australia’s indigenous people. See also Tatz, above n 232, 41-42.

³³⁷ Hinton, above n 217, 202.

³³⁸ Tatz, above n 232, 36; but the existence of a state sponsored ‘stolen generation’ is still contested.

³³⁹ Uli Linke, ‘Archives of Violence – The Holocaust and the German Politics of Memory’ in Hinton, above n 217, 262.

relations or voluntary groups cut across racial, religious or ethnic differences, (e) there is a balanced accommodation between groups such as a willingness to share power.³⁴⁰

2.12 Conclusion

International criminal law is still very much in a developmental stage.³⁴¹ In some cases crimes such as torture and slavery, which are the subject of their own international conventions, are picked up and applied in the interpretation of traditional crimes against humanity. This demonstrates the overlapping nature of international human rights and international humanitarian law principles upon the development of international criminal law. This ‘borrowing’ or ‘cherry picking’ by courts of concepts from both international human rights law as well as international humanitarian law has been especially prevalent with respect to sexual assaults including rape, where sexual slavery during armed conflict has been characterised as both sexual slavery and torture.³⁴² As customary international law develops along side or in addition to treaty law it is likely that other crimes will ultimately form part of the body of international criminal law in their own right.

Following the formation of the United Nations in 1945, aspirations ran high that international criminal law, as a body of universally recognised and enforced laws, would become a permanent feature of the international legal landscape. The International Law Commission (ILC) was tasked with the responsibility of formulating principles of international law including a code of offences against the peace and security of humankind. Sadly the Cold War delayed much of this work by the ILC.³⁴³

After a fifty year delay (1947 to 1996), the ILC did eventually produce a code, which incorporated general principles of international criminal law.³⁴⁴ Unfortunately the ILC excluded crimes which did not have a political element or were not concerned with international peace or security.³⁴⁵ This had the effect of excluding transnational crimes such as trafficking in drugs and children, money laundering, fraud, counterfeiting money and the like. As a consequence, the ILC Code covered much the same territory as the traditional international criminal laws discussed

³⁴⁰ Hinton, above n 217, 342.

³⁴¹ Bassiouni, above n 9, 318.

³⁴² *Prosecutor v Delalic et al* (Trial Chamber) ICTY IT-96-21-T (1998) paras 475-497.

³⁴³ Kittichaisaree, above n 43, 213.

³⁴⁴ European Law Students’ Association, *Handbook on the International Criminal Court* (1997) 3-6.

³⁴⁵ Sunga, above n 28, 4.

above. What makes the ILC code of some importance is that what it did cover are now considered as norms of customary international law.³⁴⁶

With the ever increasing number of transnational issues affecting the world as a single global community, international criminal law will inevitably have to expand to address new questions which extend beyond the borders of any one sovereign state.³⁴⁷ Such issues may well include illegal international financial manipulation – ‘globalisation of the world economy’; global environmental crimes – the ‘climate change’³⁴⁸ and the international drug trade, just to mention a few.³⁴⁹

Crimes such as these can threaten the peace and security of humankind as much as war threatens human peace and security. The process of development of international criminal law is slow and intermittent, often only moving forward after some catastrophic international event. For so long as state sovereignty has ascendancy over the rights of humanity this process will continue to be slow.

At least the international criminal laws that we do have are a good start. As a body of laws, the international community may come to depend very heavily on international criminal law as a means of preserving the global community, in much the same way as traditional national criminal law protects the society of the nation state.³⁵⁰

As international criminal law gains strength and acceptance, the process of expansion of international criminal law so as to include other transnational crimes will inevitably follow. Global democratisation is the engine that drives the development of international laws protecting the welfare of humankind. With the expansion of democratisation, international laws, especially those protecting human rights, will ultimately gain ascendancy over sovereign interests, and the state will be subordinate to humanity – its servant rather than its master.

Today the Laws and Customs of War, crimes against humanity and genocide are the mainstay of international criminal law. These laws are no longer separate and distinct crimes as such, but form part of a package of laws, referred to as international criminal law.³⁵¹ The effect of the

³⁴⁶ Ibid 14.

³⁴⁷ Bassiouni, above n 9, 676.

³⁴⁸ Ibid 155.

³⁴⁹ Kirby, above n 31.

³⁵⁰ Bassiouni, above n 9, 737.

³⁵¹ Kittichaisaree, above n 43, app 1 - art 1 of the Statute of the International Criminal Tribunal for the former Yugoslavia.

Nuremberg Charter was to incorporate all these laws in the one charter and make them criminal.³⁵² This method of presentation was carried on in the criminal provisions of the Statutes for the ICTY, ICTR and the ICC. They are referred to as breaches of international humanitarian law, for which a criminal sanction applies.³⁵³ These crimes are now undoubtedly part of international customary law and their existence should not be ignored. Having now defined what is referred to in the thesis as ‘international criminal law’, consideration will be given to how it relates to the nation state and the individual.

³⁵² *Charter of the International Military Tribunal of Nuremberg (Nuremberg Charter)* - Article 6 of the Charter.

³⁵³ Sunga, above n 28.

CHAPTER 3

The Tension between the Sovereign Rights of States and the Rights of Humanity

3.1 Introduction

In the previous chapter the diverse sources and constituent elements of international criminal law were discussed from an historical perspective. In a similar way ‘state sovereignty’ will be discussed in this chapter. When introducing this thesis, it was noted that ‘one of the most significant factors hindering the development of international criminal law was the shield of state sovereignty’.³⁵⁴ However state ‘sovereignty’ came first and still plays a fundamentally important function in regulating the conduct of states. Accordingly it is not appropriate to simply argue that states should be required to completely surrender their sovereign authority in order to make international criminal law work effectively. After all states played a major role in the development of this branch of international humanitarian law. As states have the coercive authority to enforce the criminal law at a national level, and as that same coercive authority is also relied on by international criminal tribunals to arrest defendants, to forcibly seize evidence and ultimately to imprison persons found guilty of breaching international criminal law; there is (of necessity) a close link between states and international criminal law. In a positive sense, when states lend their ‘enforcement’ authority to international tribunals, they are acting as ‘agents’ for the international community.³⁵⁵ However as argued in Chapter 1 difficulties can arise when states, as a matter of national policy, become embroiled in breaches of international humanitarian law through the conduct of their officials, but still insist on ‘exclusive’ enforcement.³⁵⁶

³⁵⁴ K Kittichaisaree, *International Criminal Law* (2001) 4.

³⁵⁵ Anthony J Colangelo, ‘Universal Jurisdiction as an International “False Conflict” of Laws’ *SMU Dedman School of Law Legal Studies Research Paper No. 00-35*, 8 <<http://ssrn.com/abstract=1337777>> at May 2009.

³⁵⁶ UN Secretary General, *Implementing the responsibility to protect*, UN GAOR, 63rd sess, Agenda Item 44 and 107, UN Doc A/63/677 (12 January 2009) 5; See also M. Kumm; Chapter 10 ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in J.L. Dunoff and J.P. Trachtman (Editors) *Ruling the World? Constitutionalism, International Law and Global Governance* (2009) Cambridge U.P. 258.

States have had a long history of enforcing the criminal law.³⁵⁷ They are accustomed to exercising exclusive jurisdiction over national criminal law on their territory.³⁵⁸ Arguably this is to be expected because of the historical relationship between the citizen and the state and the obligation upon the state to maintain law and order.³⁵⁹ For instance Ralph argues that the USA opposition to International Criminal Court can be explained in terms of it constituting too great a ‘challenge to the social contract’ because it requires Americans to be bound by a law that they have not consented to.³⁶⁰ Social Contract theorists contend that the citizen surrenders freedoms naturally occurring in an unregulated environment to the state in exchange for the state providing security for the individual.³⁶¹ The authority of the state to control the individual by laws becomes the sovereign right of the state.³⁶² The citizen surrenders to the sovereign the authority to punish and in some jurisdictions the sanction for breach of the criminal law is life itself.³⁶³ However in a modern ‘globalised’³⁶⁴ world where the state simply cannot adequately assure the individual of this security especially beyond the borders of the state, the state cannot adequately provide this protection.³⁶⁵ This has always been a weak link in the security arrangement with states attempting to address the deficiency with diplomatic measures.³⁶⁶ This becomes particularly problematic in circumstances where the individual now frequently travels beyond the borders of the state. Accordingly, it is inappropriate³⁶⁷ for states to assert, on the basis of their sovereign authority, that the international community has no role when it comes to the application and enforcement of international criminal law.³⁶⁸ Schachter points out that ‘[n]o state, even the most powerful is wholly autonomous... nor is its autonomy absolute

³⁵⁷ See discussion in Chapter 2.

³⁵⁸ E K Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (2005) 49; This may now be changing in some states such as in the European Union where a more centralised approach is being applied. See also *The Schooner ‘Exchange’ v McFaddon* 11 US 7 116 at 137 (1812) Marshall CJ, married the ‘doctrine [of state immunity] with the absolute jurisdiction of the territorial sovereign; see also Colangelo, above n 2, 6; Philippe Sands, *From Nuremberg to The Hague* (2003) 82.

³⁵⁹ Leonard, above n 5, 49.

³⁶⁰ Jason Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and its vision of world society* (2007), 121.

³⁶¹ D Barnhizer & D Barnhizer, ‘Myth Magic and Mystery: Defending the Hidden Order of the Rule of law’ *Research Paper 07-149* (2007) *Cleveland-Marshall College of Law*, 37 <http://ssrn.com/abstract=1022103>. Accessed 2008.

³⁶² Juliet Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime and Sovereign Power’ (2006) 56 *American University Law Review* 367; Colangelo, above n 2, 5-6.

³⁶³ The death penalty.

³⁶⁴ Leonard, above n 5, 3.

³⁶⁵ Stumpf, above n 9, 38.

³⁶⁶ The very nature of the ‘passport’ is such an arrangement, with the state of the citizen requesting the host state to extend to their citizens ‘safe passage’.

³⁶⁷ C L Sriram, *Globalizing Justice for Mass Atrocities : A Revolution in Accountability* (2005) 50.

³⁶⁸ Leonard, above n 5, 49; Colangelo, above n 2, 2.

in law'.³⁶⁹ As noted this sovereign authority of states is further undermined when one considers the obvious conflict of interest that arises when states (by their agents) breach international criminal law and at the same time they purport to be the 'sole' enforcers of that law. On the other hand the claim by states to the paramount authority of sovereignty has deep historical roots³⁷⁰ which makes the argument in favour of the 'universality' of international criminal law all the more difficult to sustain.

Historically the criminal law was location specific, it was often thought of as a means of maintaining human order within the confines of a specific community.³⁷¹ In 1891 Lord Halsbury decreed that 'all crime is local'.³⁷² Kirby observes that for the period, this pronouncement is 'understandable because society was far less sophisticated and the system to make criminal laws, police and prosecute them was imperfect'.³⁷³ Bronitt and McSherry argue that the rigid application of this principle has never really been the case but that the traditional notion of 'territoriality' of the criminal law reinforces the assertion of sovereignty by the state.³⁷⁴ A more precise formulation might be that national criminal laws operate and apply within the sovereign reach of the state. The courts of the state apply the criminal law according to what they refer to as their 'jurisdiction'.³⁷⁵ However notions of what constitute the boundaries of a community are relative and have changed over time.³⁷⁶

The social arrangement that underpins national criminal law is not entirely appropriate for international criminal law because (as it now stands) it does not contemplate the state (or its officials) as potential transgressors. Under domestic criminal law the sovereign state is the coercer. Accordingly the structural arrangement applicable to national

³⁶⁹ O Schachter, 'The Decline of the Nation-State and its Implications for International Law' (1997) 36 *Columbia Journal of Transnational Law* 7.

³⁷⁰ M Cherif Bassiouni, 'The History of Universal Jurisdiction and Its Place in International Law' in S Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (2004) 41; see also J Kochan, 'Sovereignty and the American Courts at the Cocktail Party of International Law: the Dangers of Domestic Judicial Invocations of Foreign and International Law' (2006) 29 *Fordham International Law Journal* 506.

³⁷¹ Bassiouni, above n 17, 40.

³⁷² *MacLeod v Attorney-General for New South Wales* [1891] AC 455 at 458. Cited by Gleeson CJ in *Lipohar v The Queen* (1999) 74 ALJR 282 para 15; Sands, above n 5, 82.

³⁷³ M D Kirby, 'Criminal Law – The Global Dimension' (Keynote Address to International Society for Reform of the Criminal Law Conference, Canberra, 27 August 2001) 3 'In no field of law was jurisdiction more important than the criminal law. The aphorism, criminal law is local persisted in Australia even until very recent times'. See also *Lipohar*, above n 19, para 160.

³⁷⁴ Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 83.

³⁷⁵ *Lipohar*, above n 19, per Gaudron, Gummow and Hayne JJ, para 79. See also Kirby, above n 20.

³⁷⁶ D Farrier et al (eds), *Criminal Laws* (3rd ed, 2001) 266. See also M Cherif Bassiouni, *Introduction to International Criminal Law* (2003) 35.

criminal law cannot simply be extended to apply to international criminal law because the potential conflict of interest can make the servants of the state ‘judges in their own cause’. It is for this reason that a modified arrangement needs to be developed for the application and enforcement of international criminal law, in order to address this conflict of interest if and when it arises. Of course, in the absence of some other authorised ‘coercer’,³⁷⁷ the state must necessarily continue to play a role but the modified arrangement should ideally include suitable ‘checks and balances’ in order to prevent states from corrupting the international criminal justice process. Achieving these changes may require modification of the sovereignty principle.³⁷⁸ Some states fiercely defend their sovereign rights and resist any attempt to erode those sovereign rights.³⁷⁹ Of course not all claims by states based on the sovereignty principle are either justified or valid.³⁸⁰

3.2 *Sovereign Authority of States*

The sovereign authority of states has a long history of international recognition. As a principle of international law and legal relations it is still very relevant today. Much has been written about state sovereignty;³⁸¹ Shearer observes that many ‘writers have purported to formulate lists of so-called “basic” or “fundamental” rights and duties of states’.³⁸² However ‘sovereignty’ can mean different things to different people and can depend upon when and what state is asserting the sovereign right.³⁸³ Certainly the early ‘naturalist’ writers had considerable influence over the development of the ‘sovereignty principle’ but there is considerable dispute over how far reaching this principle is in the modern context.³⁸⁴ While this is not a thesis on state sovereignty, a brief examination of the historical development of the concept is useful as it helps to provide context to an understanding of why in the face of powerful (almost irrefutable) arguments to the

³⁷⁷ Even with an international adjudicating body such as the ICC, there is no world police force or army to enforce the orders of the Court. The ICC and other international criminal tribunals must rely on states to enforce their orders.

³⁷⁸ Bassiouni, above n 17, 42.

³⁷⁹ Leonard, above n 5, 141 – instance the USA at the Rome Conference and following.

³⁸⁰ Sriram, above n 14, 14.

³⁸¹ See generally: H Lauterpacht, *International Law and Human Rights* (1950); see also C W Jenks, *The Common Law of Mankind* (1958); Julius Stone, *Of Law and Nations: Between Power Politics and Human Hopes* (1974).

³⁸² I A Shearer, *Starke’s International Law* (11th ed, 1996) 89.

³⁸³ *Ibid* 91.

³⁸⁴ *Ibid* 90.

contrary, states still sometimes vigorously assert their dubious claims to these (so called) exclusive sovereign rights.³⁸⁵

3.2.1 Historical 'Roots' of Sovereignty

The term 'sovereignty' first emerged in 1577 when Bodin³⁸⁶ spoke of the 'absolute and perpetual power within a state', as exercised in that instance by the King of France.³⁸⁷ Bodin saw the only limitation on the power of the state being the 'Commandments of God and the Law of Nature'³⁸⁸. What Bodin meant by the 'law of nature' is not precisely defined but it was supposed to 'emanate from God or nature or some other moral authority transcending earthly power'. Natural law operated before the coming into existence of the sovereign state. It was from natural law that the sovereign derived his or her authority. It was not 'positive law' like that created by the (sovereign) government, it was that which applied in an unregulated world before the forming of the 'social contract' although Bodin did not write of it in terms of it being a social contract. Bodin asserted that the sovereign was above the 'positive law',³⁸⁹ which included the criminal law. He reasoned that parliaments were subordinate to the sovereign because they could not assemble or adjourn without express royal command.³⁹⁰ However he argued that if a civil law was 'reasonable and equitable' and incorporated principles of natural justice, then the sovereign was also bound by those civil laws.³⁹¹ Bodin did not seem to recognise any other law such as international law.

Bodin considered that the sovereign authority of the state remained over the citizen, even if that citizen was temporally domiciled in another state.³⁹² Echoes of this concept remain to this day,³⁹³ with the citizen still being bound by national criminal laws even though the citizen may breach those laws beyond the territory of the state.³⁹⁴ Similarly the ease with which states exclusively assert these laws provides an understanding

³⁸⁵ J L Goldsmith & D J Livinson, 'Law for States: International law, Constitutional Law, Public Law' 2009 *Havard Law School Research paper No. 09-16* <<http://ssrn.com/abstract=1340615>> 50.

³⁸⁶ Jean Bodin, *Six Books of the Commonwealth* (M J Tooley, trans) (1576) [trans of: *Les Six Livres de la Republique*]; see also Oppenheim, *International Law: A Treatise* (2nd ed, 1912), excerpted by A D'Amato, *International Law Anthology* (1994) 165.

³⁸⁷ Bodin, above n 33, 28; J Shen, 'National Sovereignty and Human Rights in a Positive Law Context' (2000) 26 *Brooklyn Journal of International Law* 417, 420.

³⁸⁸ Bodin, above n 33, 28; see also Kochan, above n 17, 540.

³⁸⁹ L Oppenheim, 'The State' in A D'Amato (ed), *International Law Anthology* (1994) 165.

³⁹⁰ Bodin, above n 33, 32.

³⁹¹ *Ibid* 33-34.

³⁹² *Ibid* 21.

³⁹³ Kochan, above n 17, 540-541.

³⁹⁴ See Section 16.1 of the *Criminal Code of the Commonwealth of Australia 1995* – extra-territoriality provision.

of why some may assert as unalienable the right to exclusive dominion over international criminal law. Bodin also gave us an early insight into the modern democratic principle, he defined the popular state as one where the ‘majority of people have collective sovereignty over all including the minority’.³⁹⁵ He considered that the popular state was preferable because it aimed at achieving equality under the rule of law without favour or exception.³⁹⁶ He argued that the nearer the state came to realising equality – which he termed as ‘harmonic justice’ – the nearer it came to perfection.³⁹⁷

Another early writer to theorise on the sovereignty principle was Thomas Hobbes. In the 17th century Hobbes developed a ‘materialist account of law’³⁹⁸ and the sovereign state.³⁹⁹ He rejected the natural law theory arguing that in nature there was no moral order. ‘All that is real is material and all that is not material is not real’. He said that people are ruled by the need of self survival, not some supernatural order.⁴⁰⁰ Hobbes proposed that the relationship between the individual and the sovereign was in the nature of a contract.⁴⁰¹ According to the ‘contract theory’ envisaged by Hobbes people allowed themselves to be subject to sovereign rule, they could not claim a right of resistance against the laws of the sovereign because the laws of the state were the rights of the people.⁴⁰² In this way, people give up the ability to enforce their rights against the state, which supposedly guaranteed the protection of all rights of the individual that they had as human beings.⁴⁰³

Under the social contract theory, the individual did not need a separate right against the sovereign because the sovereign had no authority to deprive the individual of any of the rights that the individual possessed in the state of nature.⁴⁰⁴ The state was there to ‘represent the interests of the individual, it was the voice of the people and gained its authority from the fact that the people accepted its authority to act on their behalf’.⁴⁰⁵ The people were subordinate to the sovereign. Although Hobbes did concede that the state could not deprive the people of the right of existence, apart

³⁹⁵ Bodin, above n 33, 72. Interestingly Bodin did not think much of democratically elected monarchs because the interregnum between monarchies would lead to instability, he preferred instead royal succession passing down the male line: 201.

³⁹⁶ Ibid 190.

³⁹⁷ Ibid 204.

³⁹⁸ K R Minogue, ‘Introduction’ to Thomas Hobbes, *Leviathan* (1651, reprinted 1976) xviii.

³⁹⁹ Hobbes, *Leviathan* (1651, reprinted 1976).

⁴⁰⁰ Ibid 81.

⁴⁰¹ Ibid 74.

⁴⁰² Ibid 90.

⁴⁰³ Ibid 92.

⁴⁰⁴ Ibid 93.

⁴⁰⁵ Ibid 96.

from this, the power of the sovereign was absolute. However if the sovereign state did not have the acceptance of the people or it no longer continued as a ‘public institution’⁴⁰⁶ it could not then be said to be the ‘state of those people’.⁴⁰⁷

Although Hobbes could be seen as being less liberal than the ‘natural law theorists’, his social contract theory did obtain acceptance because [1] the laws of nature were ‘ill defined and mostly unworkable against the determined dictator’,⁴⁰⁸ [2] he limited the power of the sovereign by ‘mandating that sovereign power was subordinate to the ‘rule of law’’. Thus the sovereign had to rule through the law; outside of the ‘rule of law’ the sovereign was no more than a private person.⁴⁰⁹ The law had to be written, published and to be seen to proceed from the ‘will of the sovereign’.⁴¹⁰ The ‘rule of law’ carried with it the requirement of an independent judiciary which was required to interpret the sovereign laws and to ensure that no punishment was inflicted upon the individual unless in accordance with the rule of law.⁴¹¹ Thus according to Hobbes the power of the sovereign could be absolute provided such absolute power was exercised according to the rule of law.⁴¹²

John Locke⁴¹³ extended Hobbesian theory by arguing that ‘men (sic) do not have executive power over other men in the state of nature as it would be unreasonable for men to be judges in their own cause’.⁴¹⁴ He argued that men came from the ‘state of nature’ into the commonwealth for their security and protection.⁴¹⁵ The power to make the laws is given to the legislature by civil society.⁴¹⁶ However the legislature ‘does not have absolute or arbitrary power over people’ because men in a state of nature did not have ‘absolute and arbitrary power’ so they could not give the legislature more power than they originally possessed.⁴¹⁷ He said that men gave up the ‘state of nature’ and tied themselves to the state to preserve their lives, liberties and property, men would not do this, he argued, if the state was to then exercise arbitrary and absolute power over

⁴⁰⁶ Barnhizer, above n 8, 10.

⁴⁰⁷ Hobbes, above n 46, 97; Oppenheim, above n 36, 166.

⁴⁰⁸ K. R. Minogue Introduction to Thomas Hobbes, *Leviathan* (1651) Reprinted by Everyman’s Library (1976) xviii.

⁴⁰⁹ Hobbes, above n 46, 116.

⁴¹⁰ Ibid 142.

⁴¹¹ Ibid 142 & 165; Barnhizer, above n 8, 17.

⁴¹² B Fine, *Democracy and the Rule of Law* (1984) 26.

⁴¹³ John Locke, *Two Treatises of Government* (1698) (Mark Goldie, ed, 1995).

⁴¹⁴ Ibid 121.

⁴¹⁵ Ibid 163.

⁴¹⁶ Ibid 182.

⁴¹⁷ Ibid 183.

them.⁴¹⁸ The legislature could not ‘delegate the power to make laws to another as it had been given the power to legislate by civil society and civil society had not given the legislature the power of delegation’.⁴¹⁹

Vattel⁴²⁰ carried the debate into the international arena by giving early voice to the ‘law of nations’. He subscribed to the ‘positivist’ school.⁴²¹ He recognised the need for all states to be equal, notwithstanding the fact that they were different in size and power. He argued that as men are by ‘nature equal and their individual rights and obligations the same’ and as states are made up of men they should all be treated equally regardless of size: ‘[a] dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom’.⁴²² This balance was essential, so as to ensure order in international affairs, and remains as a principle of international law to this day.⁴²³

Vattel defined the state as a ‘political body, a society of men who have united together and combined their forces in order to procure their mutual welfare and security’.⁴²⁴ This society of men (and women) he referred to as ‘civil society’. He said that the aim of civil society was to procure for its citizens the ‘necessities, comforts and pleasures of life, the peaceful enjoyment of their property, a sure means of obtaining justice and finally to defend the whole body against all external violence’. He saw this as being achieved through the formation of the nation or state. Vattel considered that the sovereign state was entitled to absolute legal and political supremacy.⁴²⁵ Once the perfect sovereign state was achieved this then would mark the end of the work of ‘civil society’.⁴²⁶

Vattel said that ‘every nation which governs itself and does not depend on any other nation is a sovereign state’.⁴²⁷ He argued that no foreign power ‘has the right to interfere in the internal affairs of another sovereign state’.⁴²⁸ Threads of this principle survived through to the 21st century but

⁴¹⁸ Ibid 185.

⁴¹⁹ Ibid 187.

⁴²⁰ Emerich de Vattel, *Le Droit des Gens* (1758).

⁴²¹ F F Martin et al, *International Human Rights & Humanitarian Law: Treaties, Cases, & Analysis* (2006) 2.

⁴²² E De Vattel, *The Laws of Nations* (1758) (C G Fenwick trans, 1916 ed) in James Brown Scott (ed), *Classics of International Law*, Vol 3, 7.

⁴²³ Shen, above n 34, 422.

⁴²⁴ De Vattel, above n 69, 11.

⁴²⁵ Martin, above n 68, 2.

⁴²⁶ De Vattel, above n 69, 11.

⁴²⁷ Ibid.

⁴²⁸ De Vattel, above n 69, 19. However Vattel argues that if the sovereign violate fundamental law by insupportable tyranny which brings on a national revolt then any foreign power may come to the aid of

are now being seriously questioned by international civil society, especially when states are implicated in serious breaches of international criminal law. Vattel asserted that civil society entrusted the power to govern to the sovereign government but that power was given only so as to enable the sovereign to provide for the ‘common good, welfare and security of all citizens’.⁴²⁹ To this end Vattel considered that the sovereign should have immunity from prosecution but at the same time did not rule out the possibility of attaching criminal liability to a tyrant who exceeded his sovereign authority.⁴³⁰ While the individual had the right to use force to ‘protect himself from injury’ (including criminal injury), he surrendered this right to use force against the sovereign who had the responsibility to provide justice and to punish criminal offenders.⁴³¹ Vattel was committed to the view that criminal law is ‘local’, he considered that criminal jurisdiction was limited to the territory of the nation state and that no other state had the right to review or bring into question the administration of justice of another state.⁴³²

When it came to international affairs Vattel considered that individuals had no standing – any dispute between a foreign state concerning a citizen of a state was to be resolved between states and not by action of the citizen against the foreign state.⁴³³ Hence the sovereign state had the responsibility of protecting its citizens against the adverse act of a foreign power.

Rousseau argued that when the citizen entered the ‘social contract’ the collective will of all the citizens shared equally in the sovereign power of the state.⁴³⁴ In this context Rousseau declared that the sovereign was ‘inalienable and indivisible’. He saw the ‘prince as the natural or physical expression of the same notion of sovereign power’.⁴³⁵

Jeremy Bentham⁴³⁶ took a more realist view of sovereign power and its abuses, he argued that government was a necessary evil – that every law that passed constituted an ‘infraction of liberty’.⁴³⁷ He said that there can

the oppressed: 131. Of course Vattel said a number of things that would not be recognised as correct under international law as it is now applies, eg the right to colonise: 85.

⁴²⁹ Ibid 20.

⁴³⁰ Ibid 23.

⁴³¹ Ibid 71.

⁴³² Ibid 139.

⁴³³ Ibid 235.

⁴³⁴ Jean Jacques Rousseau, *The Social Contract* (1762) (G D H Cole, trans) 6
<<http://www.constitution.org/jjr/socon.htm>>.

⁴³⁵ Ibid 8.

⁴³⁶ J Bentham, *Theory of Legislation* (R Hildreth, trans, 1911) 14.

⁴³⁷ Ibid 48.

be no ‘equality of rights’⁴³⁸ because there can be ‘no rights to one without imposing obligations upon another’.⁴³⁹ The only equality ‘was an equality of misery’.⁴⁴⁰ For example the laws of property are only good for those who have property but ‘oppressive for those who have none – the poor man is more miserable than he would be if he had no laws’.⁴⁴¹ When security and equality are in conflict ‘equality must yield’.⁴⁴² When security of the state is under threat (internal or external) the security of the individual is subordinated.⁴⁴³

Bentham drew a distinction between law and morals, ‘men he said were concerned with morality’ whereas laws enforced compliance by punishment, which in itself could be immoral.⁴⁴⁴ He rejected Blackstone’s argument that the sovereign ‘could do no wrong’ as being ‘ridiculous’.⁴⁴⁵ He was even more critical of Hobbes’ argument in the *Leviathan* that political society was based on a ‘pretended’ contract between the people and the sovereign – by this so called contract people had given up their ‘natural liberty’ and all it had produced was ‘evil’. He dismissed Hobbes’ contract theory as a ‘defence of despotism’.⁴⁴⁶ He complained ‘how could people be bound by a fictitious contract that they had never heard of?’ The truth, he said ‘is that men live under governments for no reason other than security – security of themselves, of their property, of their industry’.⁴⁴⁷ Without law there is no security – there is not even certainty of subsistence.⁴⁴⁸ Bentham entrusted the improvement of society to an ‘enlightened, progressive and prosperous middle class’, which he considered would reform the law and secure a gradual progress toward equality.⁴⁴⁹ He was also the first to coin the phrase ‘international law’.⁴⁵⁰

3.2.2 “One size does not fit all?”

As noted above, for the purposes of this thesis, it is not necessary to resolve definitional disputes between these early writers or to prove that a ‘social contract’ was actually the foundation of the modern state. It is hoped however that this brief survey of a sample of some of the early

⁴³⁸ Barnhizer, above n 8, 57.

⁴³⁹ Bentham, above n 83, 99.

⁴⁴⁰ Ibid 109.

⁴⁴¹ Ibid 113.

⁴⁴² Ibid 120.

⁴⁴³ Ibid 124.

⁴⁴⁴ Ibid 60.

⁴⁴⁵ Ibid 71.

⁴⁴⁶ Ibid 72.

⁴⁴⁷ Ibid 74.

⁴⁴⁸ Ibid 109.

⁴⁴⁹ Ibid 123 discussed by H L A Hart, *Essays on Bentham* (1982) 25.

⁴⁵⁰ Martin, above n 68, 1.

writers will help identify the threads of the ideas which have influenced the development of the modern state, so as to facilitate an analysis of state sovereignty in the context of the application and enforcement of modern international criminal law. One thing that the early writers did not have to grapple with (at least in an acute sense) was the modern contest between the competing authority of the sovereign state and the universal application of international criminal law, because in their time international criminal law did not exist. The absence of an accepted body of law known as international criminal law created a lacuna which states attempted to fill in an incremental fashion pursuant to their sovereign authority over the individual. To this extent international criminal law has developed in a skewed fashion with uncertain parameters. While international criminal law was originally created by states to deal with the practical issue of controlling criminal conduct during the course of an international armed conflict (war crimes), it has now taken on a broader role (crimes against humanity) which is less constrained by a jurisdictional link to the territory of the warring states. Accordingly international criminal law has moved beyond the confines of the original ‘social contract’ as perceived by the early writers. As a consequence of this shift in the reach of the criminal law it is now appropriate to settle upon some modified arrangement in order to determine how and to what extent international criminal law should apply.

In Chapter 9, a process for bringing about this change will be developed. While generally, a protagonist for change at the international level would look to the sovereign state to advance their cause, in this instance it is argued that the sovereign state is not the only vehicle to promote reform of the area. Therefore, rather than looking to the state as the sole means by which this change can occur, the thesis argues in favour of a ‘civil society mechanism’ to oversee the future development and expansion of international criminal law.⁴⁵¹ In Chapter 9 the ‘civil society mechanism’ will be more fully developed but the mechanism is not the same as the civil society of a state, it is ‘global civil society’. The scheme will be an arrangement between the international community of states, as a single unit and global civil society. This arrangement caters for the fact that at the international level there is no international government, no democratic elections and no independent international mechanism for civil coercion, namely an army or police force.

Consistent with introducing a ‘civil society mechanism’ for change

⁴⁵¹ John Rawls in his seminal work in 1971 acknowledges that civil society plays an important role in securing justice. See John Rawls *A Theory of Justice* (1999) 10.

is an acknowledgement that the sovereign state no longer occupies the same political space (at least in terms of authority) on the international stage as it once did. The authority of the sovereign state is under challenge both domestically and internationally and to some extent the space being vacated by the state is being taken over by global civil society. The changing nature of the state will now be briefly considered.

3.3 *The Decline of the Sovereign State*

The idea that a single state could legally justify the total exclusion of other states and the international community of states in the conduct of its internal affairs has been in a process of decline throughout the 20th century.⁴⁵² This is particularly the case where the state (through its servants), commit crimes against humanity on its own population. The tension between the preservation of the state for the benefit of the majority at the cost of the lives of a ‘troublesome’ minority is often at the heart of the issue.⁴⁵³

Gasset⁴⁵⁴ in the 1930s spoke of the state in terms of the ruling masses which he termed ‘hyperdemocracy’.⁴⁵⁵ The new state is the ‘mass’ which operates outside the law, imposing its ‘aspirations and its desires by means of material pressure’.⁴⁵⁶ The ‘hyperdemocratic state’ demands conformity it ‘crushes beneath it anything that is different’.⁴⁵⁷ Society lives for the state, man for the governmental machine.⁴⁵⁸ Patriotic self sacrifice is demanded by the state even if war and genocide are made possible because of such self sacrifice and patriotism. The killing of human beings is the means by which the state survives. Society is enslaved to the service of the state.⁴⁵⁹ Gasset said the state’s whole ‘existence and maintenance depends on the vital supports around it’.⁴⁶⁰ Once the state has ‘sucked out the marrow of society’ it will be left as ‘bloodless, a skeleton’.⁴⁶¹ While this is a colourful description of the issue, it raises the point of who actually has the authority to send the young men and women off to war and in some cases to their death?

⁴⁵² Leonard, above n 5, 165.

⁴⁵³ Examples of this are numerous: ‘Tamil Tigers’ of Sri Lanka; Palestinians in Israel; Kurds in Iran and Turkey; and indigenous populations of the New World.

⁴⁵⁴ J O Gasset, *The Revolt of the Masses* referred to by L R Beres in ‘Genocide and Power Politics – The Individual and the State’ (1987) 18 *Bulletin of Peace Proposals* 74.

⁴⁵⁵ J O Gasset, *The Revolt of the Masses* (1930) (Translated from the Spanish, 1957) 17.

⁴⁵⁶ *Ibid* 17.

⁴⁵⁷ *Ibid* 18.

⁴⁵⁸ *Ibid* 121.

⁴⁵⁹ *Ibid*.

⁴⁶⁰ *Ibid*.

⁴⁶¹ *Ibid*; Schachter, above n 16, 8.

Gasset foresaw the inevitable demise of the European nation states as the necessary precondition to the establishment of the United States of Europe.⁴⁶² The state is ‘not static it is something that has come from something and is going somewhere’.⁴⁶³ Once it becomes static it is deprived of the very essence of its unity – be that ‘race, language or frontiers’ – it becomes useless and disappears.⁴⁶⁴ The modern nation state is merely the ‘present manifestation of a variable principle, condemned to perpetual supersession’.⁴⁶⁵ Gasset argued that the capacity for the state to transform into something else is not limited by race, language or culture.⁴⁶⁶

Ohmae continued this theme, arguing from the perspective of the global market place and he contends that in an environment of the global economy,⁴⁶⁷ nation states have become ‘bit actors’.⁴⁶⁸ They are no longer efficient distributors of wealth and politicians gain and keep power by handing out subsidies to prop up inefficient and unproductive industries.⁴⁶⁹ Nation states have become the victims of economic decisions made ‘elsewhere by people and institutions over which they have no practical control’.⁴⁷⁰ Nation states have become ‘unnatural – even dysfunctional – organizational units for thinking about economic activity’.⁴⁷¹ Economic activity in ‘today’s borderless world follows neither the traditional boundary lines of nation states or cultural boundary lines’.⁴⁷²

Ohmae saw the old principle of state sovereignty as imposing impossible restraints on state structures as they struggled to maintain national economies in the face of declining industries and the need to pour endless sums into propping up inefficient and unnecessary services predicated on old state boundaries.⁴⁷³ Sovereignty, he argued, saps nations states of their ability to ‘bootstrap themselves back onto a healthy trajectory of growth’.⁴⁷⁴

⁴⁶² Gasset, above n 102, 139.

⁴⁶³ Leonard, above n 5, 165.

⁴⁶⁴ Gasset, above n 102, 163.

⁴⁶⁵ Ibid 165.

⁴⁶⁶ Ibid 171.

⁴⁶⁷ Leonard, above n 5, 166.

⁴⁶⁸ K Ohmae, *The End of the Nation State* (1995) 12.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid 16.

⁴⁷² Ibid 21.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid 81.

As Bentham and others pointed out, the emergence of the sovereign state was based (at least in part) on the need to provide economic security for men which was not otherwise available to them in their natural state.⁴⁷⁵ Presumably if the sovereign state can no longer provide this security then it ceases to be a relevant or useful as a social unit?⁴⁷⁶ Ohmae contends that the ‘glue that held traditional states together no longer works’, the pieces cannot simply be put back together again and for the most part state leaders are trying to achieve the impossible by employing outdated techniques.⁴⁷⁷

The decline of the sovereign state⁴⁷⁸ will not occur without some state leaders, assemblies and those with a vested interest in sovereignty fighting to maintain their power. It is to be expected that some of these entities will pretend that nothing has changed.⁴⁷⁹ International state organisations like the United Nations,⁴⁸⁰ must reform their structures in order to embrace global civil society otherwise they are at risk of becoming less relevant.⁴⁸¹

While economic decline is the single most potent threat to the continued existence of outmoded sovereign law,⁴⁸² the inability to protect state borders from refugee migration, global environmental damage and the inability to ensure security of the citizen from international terrorism will also demonstrate the ineffectiveness of some sovereign principles.⁴⁸³ However it is unlikely that states will actually disappear and in the absence of some better alternative, their disappearance would not be a good thing in any event.⁴⁸⁴ The argument advanced in this thesis is not that states should disappear or that they should necessarily surrender all their sovereign interests. What is argued is that states should make room for the preservation of humanity in the way that is envisaged by the proper enforcement of international criminal law.⁴⁸⁵

When it comes to making provision for states participating in the proper enforcement of international criminal law, not all aspects of state judicial

⁴⁷⁵ Bentham, above n 83, 74.

⁴⁷⁶ Ohmae, above n 115, viii.

⁴⁷⁷ Ibid 59.

⁴⁷⁸ Martin, above n 68, 938.

⁴⁷⁹ Ohmae, above n 115, vii.

⁴⁸⁰ H.J. Steiner & P Alston *International Human Rights in Context: Law, Politics, ,Morals* (2000) Oxford U.P. p 942

⁴⁸¹ Ohmae, above n 115, 2; see also UN Charter Chapter 1, art 2.

⁴⁸² Schachter, above n 16, 22.

⁴⁸³ H J Steiner, P Alston, *International Human Rights in Context: Law, Politics, Morals* (2000) 942.

⁴⁸⁴ D B Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (2007) 37.

⁴⁸⁵ Leonard, above n 5, 169.

administration should be overlooked. There are many features of the judicial systems of states that need to be emulated by the international community when enforcing international criminal law. The system of justice as regulated by the 'rule of law' is a case in point. While the rule of law was originally focussed on how states were expected to behave within their national jurisdictions there is no particular reason why the rule of law should be so confined.

3.4 *Importance of the Rule of Law.*

The rule of law has various applications and interpretations. However in relation to the administration of criminal justice there are considerable similarities between the national system and the international system. In a well ordered national society judges must act fairly, they must apply the law in a consistent manner without prejudice or bias. Citizens should be able to obey clearly articulated laws and the *nullum crimen sine lege* principle should operate.⁴⁸⁶ No punitive sanction should be imposed upon an individual without there having been a finding of guilt after a fair and regular trial and any sentence imposed should be appropriate for the offending proved. These principles are integral to the rule of law and are at the heart of a well ordered national criminal justice system. In like manner an international judge must act the same way. The statutes of the modern international tribunals, ICTY, ICTR and ICC incorporate many of these notions of justice. Accordingly the rule of law is also essential to a well ordered international society.⁴⁸⁷

However there are some aspects of the international criminal justice system where rule of law is not applied in the same way as happens in a well ordered national criminal justice system. One such area is law enforcement. Under well ordered national systems the citizen has an expectation that if someone offends against the criminal law they will be dealt with according to law. This expectation is part of the compact associated with the obligation of the state to provide the citizen with a secure environment in which to live. However there is no equivalent accepted responsibility by states at the international level.

⁴⁸⁶ The rule of law requires government officials and citizens alike to act in accordance with the law: Brian Tamanaha, 'A Concise Guide to the Rule of Law' *Legal Studies Research Paper Series Paper #07-0082 St Johns University School of Law* <http://ssrn.com/abstract+1012051>. Accessed 2008.

⁴⁸⁷ J Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' 2009 *New York University School of Law Research Paper No.09-01* <<http://ssrn.com/abstract=1323383>> Accessed at July 2009, 3 & 13; see also Dunoff above n 3 in Chapter 3 contributed by A.L. Paulus 'The International Legal System as a Constitution' 98.

Another point of difference concerns the institutions of government. At the state level the rule of law often encompasses constitutions and doctrines of ‘separations of power’⁴⁸⁸ which assist in ensuring the provision of justice. Again these provisions are integral to the national system of justice but these state constitutions and doctrines generally do not operate at the international level. To some extent treaties such as the Rome Statute, the *International Covenant on Civil and Political Rights* and even the United Nations Charter incorporate some of these principles, but as things now stand the mechanism to enforce compliance by states is weak. States are able to elevate their national interests above their international obligations without fear of international intervention.

Conversely, states may resort to illegal armed conflict and other breaches of international humanitarian law in order to fulfil what they deem as their security interests. This inward looking view is especially prevalent when survival of the state is under threat although it may equally relate to the survival of the particular government. Sometimes it is just a case of not wanting the sovereign power of states to be eroded by international law. Whatever the real basis might be, states often articulate the justification for this conduct as protecting their sovereign interests. They may also subordinate international organisations to the interest of the particular state, if to do so is in their sovereign interest. This is so even with those international organisations that have been deliberately created at the behest of civil society with the express intention that they will have superior authority to individual sovereign states. It is often the case that the recognition and acceptance of the superior authority of an international organisation only applies for so long as powerful sovereign states allow this to occur.

Enforcement of international criminal law is often sporadic and inconsistent. In part this inconsistency is due to the absence of a mature well recognised system of international criminal law. While jurisdiction is said to be ‘universal’,⁴⁸⁹ universal recognition of this jurisdiction and even the body of law referred to as ‘international criminal law’ is still contested.⁴⁹⁰ Kittichaisaree argues that a clear view on ‘what is the international criminal law system’ is yet to emerge.⁴⁹¹ McGoldrick accepts the existence of a ‘system’ of international criminal law but notes that for much of its history it has been ‘rudimentary, indeterminate and

⁴⁸⁸ Ibid 5.

⁴⁸⁹ Kirby, above n 20, 3.

⁴⁹⁰ G Schwarzenburger, ‘Chapter 1’ in J Dugard, C Wyngart (eds), *International Criminal Law and Procedure* (1966) 4.

⁴⁹¹ Kittichaisaree, above n 1, 4.

ineffectual'.⁴⁹² However Bantekas and Nash argue that Schwarzenberger's rejection altogether of the existence of a body of law known as 'international criminal law',⁴⁹³ should be dismissed.⁴⁹⁴ Determining what international criminal law 'is' depends on 'who is applying it' and whether or not it is being approached from a 'monistic or dualistic' perspective.⁴⁹⁵ If international criminal law is seen merely as an extension or part of national law, then it is not a separate law at all.⁴⁹⁶ However those who subscribe to the 'monistic view' offer no satisfactory explanation as to why the sovereign (head of state) is not culpable under national criminal law, yet under international criminal law the sovereign has no immunity. They would argue that international customary law cannot conflict with state law, as state law is supreme.⁴⁹⁷ They believe that in so far as the citizens of the state are concerned, they can validly make laws which are inconsistent with international law and the courts will enforce those inconsistent laws.⁴⁹⁸ With respect to 'treaty law', such laws would not be regarded by state courts as having any application, unless such international laws are made part of state law by state legislation.⁴⁹⁹ This view of the law is not settled and some would argue that in the end it makes little difference.⁵⁰⁰ However proponents of this view would say that as the International Military Tribunal for Nuremberg evolved as a consequence of a treaty⁵⁰¹ then the laws to be enforced by that Tribunal would have had no direct application, as part of the ordinary criminal law of the participating states, unless those states incorporated the laws by specific legislation.⁵⁰²

While this debate about the existence of international criminal law is still ongoing, the reality of the Rome Statute of the ICC suggests that resolution of the debate may have to be resolved a little faster than might

⁴⁹² Dominic McGoldrick, 'Criminal Trials Before International Tribunals: Legality and Legitimacy' in McGoldrick, Rowe and Donnelly, *The Permanent International Criminal Court* (2004) 9.

⁴⁹³ G Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 *CLP* 263, 274 cited in Ilias Bantekas & Susan Nash, *International Criminal Law* (2nd ed, 2003) 8.

⁴⁹⁴ Bantekas, above n 140, 8.

⁴⁹⁵ Shearer, above n 29, 64-66.

⁴⁹⁶ Confusing international criminal law as merely an extension of national law is perhaps understandable because as Bassiouni points out, international criminal law contains the same 'functional goals of national criminal law', namely the prevention and suppression of criminality. See Bassiouni, above n 23, 11.

⁴⁹⁷ *Polites v Commonwealth* (1945) 70 CLR 60. Ivan Shearer, 'Australia, The United States and The Rule of Law in International Affairs: Comparisons and Contrasts' (2005) 26 *Adelaide Law Review* 191, 194.

⁴⁹⁸ J N Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) 53.

⁴⁹⁹ *Chow Hung Ching v R* (1949) 77 CLR 449, 477.

⁵⁰⁰ Shearer, above n 29, 66; see also Martin, above n 68, 175 regarding the situation with respect to 'incorporation' under the law of the United States of America.

⁵⁰¹ *Agreement for the Prosecution and Punishment of Major War criminals of the European Axis* ('The London Agreement') 8 August 1945; 8 UNTS 279.

⁵⁰² Shearer, above n 144, 194.

have had to occur prior to the conclusion of this treaty.⁵⁰³ On balance it seems likely that over time a separate and distinct body of criminal law known as international criminal law will exist. This is likely to coincide with the universal acceptance of its jurisdiction. However if uniform enforcement of international criminal law is desirable, then this should happen at the same time.

Meanwhile there are some important issues that need to be resolved. Foremost among them are claims by some states that they alone must decide whether the enforcement of international criminal law against their citizens is to be dealt with according to their own criminal justice system or whether an offender may be dealt with under the international criminal justice system. Much of this debate is predicated upon concerns that the state needs to preserve its sovereign interests as only the individual state can determine the fate of its citizen. No other state or the international community of states have any business interfering in this compact between the state and its citizen.

3.5 IHL Limitations

The tension between individual sovereign state interests and the interests of the international community is often brought into sharp focus when the international community calls for the enforcement of international criminal law by international tribunals for serious breaches of international humanitarian law.⁵⁰⁴ Traditionally states have resisted other states interfering in their internal affairs even in the case of armed conflicts, especially internal armed conflicts.⁵⁰⁵ The only limited exception to this is perhaps in the case of an ‘international armed conflict’,⁵⁰⁶ but historically such exceptional interference was more a case of ‘might rather than right’. In other words the victorious power asserted its authority over the weaker defeated state. Sometimes this was a matter of necessity because the judicial apparatus of the defeated state was destroyed during the conflict leaving the victorious occupying state with the only functioning system available. However the need to classify the conflict as ‘international’ remained. Determining as a matter of law, what

⁵⁰³ Leonard, above n 5, 163.

⁵⁰⁴ For example Sudan’s resistance to ICL enforcement by the ICC in 2008 to the present.

⁵⁰⁵ ‘Rules on the Limits of Warfare’ in Hans-Peter Gasser, *International Humanitarian Law: An Introduction* (1993) 21; Maogoto, above n 145, 7; B R Roth ‘Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and The Limits of International Criminal Justice’ 2009 *Wayne State University Law School Legal Research paper N0.09-17* <<http://ssrn.com/abstract=1441962>> 56 at November 2009.

⁵⁰⁶ *Prosecutor v Tadic*, Jurisdictional Appeal Decision, ICTY AC, Case No IT-94-I-AR72, (2 Oct 1995) para 80; see also Gasser, above n 152, 21.

constitutes an international armed conflict was not always easy. The necessity to determine the character of the conflict is an essential feature of international humanitarian law. Both Hague and Geneva Law (discussed in Chapter 2), require the classification of the conflict to be determined in advance of deciding whether and to what extent IHL applies. It makes sense that this question should be resolved if one state is to interfere in the internal affairs of another state having regard to the principle of comity, but should this be the case when the Security Council has overridden the 'sovereignty principle' by exercising its powers under Chapter VII of the UN Charter?

A case in point was the 1990s conflict in the former Yugoslavia. This conflict involved the disintegration of a federal state.⁵⁰⁷ As with most federations, if there is a dispute involving armed conflict between the federated states then this is viewed, at least *prima facie*, as an internal conflict or civil war, not as an international armed conflict.⁵⁰⁸

In the case of the former Yugoslavia: Serbia, Montenegro, Croatia, Slovenia and Bosnia-Herzegovina were the federated states of Yugoslavia. While (especially at that time) states outside of the Federation were reluctant to act unilaterally in the absence of a determination that the conflict was 'international'. The live question was whether the absence of such a determination limited the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY). The first case the ICTY had to decide was whether the war between the former federated states of Serbia, Croatia and Bosnia-Herzegovina was an international armed conflict.⁵⁰⁹ The question for determination was whether by the time of the conflict any of the states had achieved the status of an independent nation state.⁵¹⁰

The situation became even more complex with respect to the conflict between the Bosnian Serbs, the Bosnian Croats and the Bosniacs (initially mostly Muslims) all within Bosnia-Herzegovina. Serbia and Croatia had been assisting the Bosnian Serbs and Bosnian Croats respectively by

⁵⁰⁷ *Tadic*, above n 153, para 65.

⁵⁰⁸ *Ibid* para 72.

⁵⁰⁹ *Ibid* para 65.

⁵¹⁰ *Prosecutor v Delalic and others*, ICTY Trial Chamber, Case No IT-96-21-T (1998) paras 96 to 108. Whether a state is an independent state depends on whether [1] it has a population, [2] it governs a particular territory, [3] it has declared itself independent [4] whether other countries recognise it as an independent state [5] whether the UN recognises it as an independent state. Things that mitigate against it being an independent state include the reverse of the above principles, such as, does the entity control its own borders, does it have its own independent army, does it control its own customs, is it dependant upon any other state for governance.

supplying arms and other military support.⁵¹¹ Serbia assisted the Bosnian Serbs by leaving behind parts of the Yugoslav Peoples Army (the ‘JNA’).⁵¹² However, in order to confuse the issue, President Milosevic of Serbia withdrew most of the Serbian component of the JNA. He did this so that he could argue (to the international community) that the conflict in Bosnia was only an internal armed conflict and that Serbia was not involved. This Serbian withdrawal took place on 4 May 1992.⁵¹³ The Federal Republic of Yugoslavia (the ‘FRY’) publicly ordered its troops out of Bosnia. The Bosnian Republic of Srpska under General Mladic and President Karadzic then allegedly carried on the battle alone.⁵¹⁴

In order for prosecutors to persuade the Tribunal that there continued to exist an international armed conflict in Bosnia, despite the withdrawal of FRY troops, it had to mount a complex argument that as the FRY was leaving behind a fully equipped army, this ‘unfriendly act’ was sufficient to assert that the FRY continued to be a party to the conflict, thus making the conflict international.⁵¹⁵ In other words the FRY was in Bosnia before May 1992, it then (ostensibly) left. There still remained a fully equipped army, albeit that command had passed to some of the Bosnian Serbs (but not all). The prosecution pointed to evidence that showed that Mladic and Karadzic were still in effect subordinate to the FRY and that not all Serbian and Montenegrin troops had left Bosnia.⁵¹⁶ Ultimately the Tribunal saw through the ruse created by Milosevic and declared the conflict international.⁵¹⁷

Similarly, Croatia supplied weapons and advisors to the Bosnian Croats. The Croats were a little more open than the Serbs, hence there was more evidence of their direct involvement including having actual command of Bosnian Croat troops in Bosnia.⁵¹⁸

The determination of the status of the conflict was considered necessary by the ICTY in order to decide whether or not the ‘grave breach’ provisions of the 1949 Geneva Conventions applied.⁵¹⁹ But why was it necessary to classify the conflict as ‘international’ at all? After all, had not the Security Council determined that the Tribunal should exercise

⁵¹¹ Ibid, para 109.

⁵¹² Ibid para 110.

⁵¹³ Ibid para 116.

⁵¹⁴ Ibid para 96.

⁵¹⁵ Ibid para 117.

⁵¹⁶ Ibid.

⁵¹⁷ *Prosecutor v Tadic*, Appeal Judgement, ICTY Appeal Chamber, Case No IT-94-1-A (15 July 1999) paras 68–162.

⁵¹⁸ *Delalic*, above n 157, para 96.

⁵¹⁹ Gasser, above n 152, 21.

jurisdiction over these offences?⁵²⁰ While the preservation of international peace and security might best be achieved by ensuring that one state is restrained from interfering in the internal affairs of another state, the same cannot be said for the international community of states when committed to the preservation of humanity. In these circumstances, the limitation of the application of the grave breach provisions to only international armed conflict makes little sense.

Another jurisdictional constraint that is apt for affairs between states, but less so when international tribunals are exercising jurisdiction, concerns 'state nexus'. In the traditional context, war crimes could only be committed by persons linked to one side of the armed conflict against neutral citizens or combatants of a belligerent party on the other side of the conflict.⁵²¹ Again this is a sensible constraint if one state is attempting to interfere in the internal affairs of another state. However it makes less sense when international criminal law is being enforced by international tribunals. Why should members of armed gangs accused of committing war crimes be able to plead before an international tribunal the technical defence that their group has no provable nexus to a state? It is now well accepted that war crimes can be committed irrespective of whether or not the armed conflict was international or internal in nature⁵²² and it does not matter if the offender carries out the act on his own initiative or as a result of state policy, but the requirement that there must be some linkage to the belligerent state still remains.⁵²³

Even as far back as 1946 the strict requirement of proving a 'state nexus' was partially relaxed. In the *Essen Lynching* case⁵²⁴ a British military tribunal had to apply some 'creative logic' in order to find a gang of German civilians guilty of war crimes for acting as a lynch mob in the murder of British airmen. There was no evidence of any 'military' or 'command' link between the citizens and the Nazi German state but they were on the side of Germany and their actions 'benefited' the German state in dealing with the airmen in this way so this was considered sufficient to satisfy the 'state nexus' requirement. The victims were linked to the other side of the conflict (Britain) and were entitled to be

⁵²⁰ *Prosecutor v Aleksovski*, Judgement, Case No IT -95-14/I-T (25 June 1999) per dissenting opinion of Judge Rodrigues para 29.

⁵²¹ *Tadic* (Appeal Judgement) above n 164, para 94.

⁵²² *Tadic*, above n 153, para 89.

⁵²³ *Tadic* (Appeal Judgement) above n 164, para 88.

⁵²⁴ *In re Heyer & Others (Essen Lynching Case)* British Military Court, Essen Germany, 22 December 1995 Ann. Dig (1946) 287 also reported at 1 Law Reports of the Trials of War Criminals, (LRTWC) The United Nations War Crimes Commission, Case no 8.

treated as prisoners of war, which is why war crimes charges were preferred in the first place.

The proof of links becomes even more confusing when the offenders are from the same side of the conflict as the victims. For example in the *Belsen Trial*⁵²⁵ a number of concentration camp inmates were employed by the Nazi Germans as minor camp functionaries. However the court justified their conviction on the (not very convincing) basis that the inmates were working for the Germans which, in the circumstances, was sufficient to establish a linkage.

In a more recent case of the Shatilla massacre the question for determination was whether a group of Lebanese militia were linked to the State of Israel. The militia massacred Palestinians in the Sabra and Shatilla refugee camps in 1982. These militia were trained, equipped and under some level of control by the Israeli army. This ‘equipping and command’ link with Israel was sufficient for the authors of the Kahan Report to find that the Israeli officers were, at least in part, responsible for the massacre.⁵²⁶

The issue becomes even more problematic when one or other of the parties are non-states. Many conflicts are now carried out by ‘armed groups’. What is the situation when they have no provable links to a state? What if enforcement is left to the international community of states? In these cases the armed groups tend to be insurgents or terrorists and they are fighting a group of states, so the need to establish a state nexus in order to prove a war crime has little or no relevance.

The requirement of proving ‘state nexus’ relates to an international armed conflict between states and legitimately acts as a limitation on one state interfering in the internal affairs of another state, but this limitation should not constrain the jurisdiction of international tribunals. The examples cited above are merely illustrative of how IHL, as applied between states, does not fit quite so well when the law is being applied by international tribunals. This does not mean that a rewrite of IHL is required, it is more a case of how IHL should be applied when jurisdiction is exercised by international tribunals. The valid interests of state sovereignty as contained within Hague and Geneva Law and as

⁵²⁵ *The Belsen Trial* 1 LRTWC 88.

⁵²⁶ *The Report of the Commission of Inquiry into the events at the refugee camps in Beirut, (The Kahan Report)* International Legal Materials 658, 7 February 1983. However despite this finding no enforcement action was taken by Israel and Israel successfully prevented the international community or a single state from taking enforcement action.

written into the UN Charter, should not act as a break on upholding the interests of global humanity. When the choice is between the interests of state sovereignty and humanity, the argument of the thesis is that humanity should prevail.

The question is ‘how can these anomalies be resolved?’ The answer advanced in the thesis is that in the absence of a global government or a supra-national sovereign it falls to international civil society to require sovereign states to give priority to humanity.⁵²⁷ This raises the question of whether sovereign interests ought to be subordinated to the interests of the international community⁵²⁸ and whether states are (at the moment) performing satisfactorily in the interests of all humanity. Accordingly it is when and under what circumstances states do not effectively enforce international criminal law that needs to be identified so that international civil society may encourage appropriate change.

The argument advanced in this thesis is that (a) international criminal law (at least in part) emanates from civil society because it is directed to the ultimate preservation of humanity rather than the interests of individual sovereign states (or the governments of those states), therefore (b) where state sovereignty is in conflict with international criminal law, international criminal law should prevail.⁵²⁹ In these circumstances the particular sovereign interest should no longer be preferred over the superior humanitarian interests. Having said this, not all laws that preserve sovereignty are bad laws or are *prima facie* in conflict with international criminal law. For example the international law that prohibits one state from interfering in the legitimate internal affairs of another state is not a bad law because it may protect the sovereignty of that state and preserve international peace and security.⁵³⁰ However what is challenged in the thesis, is the legitimacy of a claim that a state (its officials or agents), may invoke the sovereignty principle as a basis upon which it can, with impunity, commit international crimes against its own people and at the same time restrain other states from enforcing international criminal law on the territory of that state.⁵³¹

The realignment of sovereign interests so as to ensure that it complies with international criminal law is (as noted above) still in the process of

⁵²⁷ Shen, above n 34, 434.

⁵²⁸ Ibid 435.

⁵²⁹ Louis Henkin, ‘Human Rights and State “Sovereignty”’ (1995) 25 *Georgia Journal of International and Comparative Law* 31, 39.

⁵³⁰ Shen, above n 34, 427.

⁵³¹ Henkin, above n 176, 39.

transition.⁵³² How long the process will take is quite uncertain but it is not occurring in isolation as other influences are also impacting upon the traditional structures of sovereign states. Bassiouni optimistically predicts that the ‘progress of international criminal justice is likely to move faster than it did’ prior to the creation of the modern international tribunals.⁵³³

Ultimately the claim by some states that they should have the exclusive right to determine when, how and to whom they apply the criminal law (including international criminal law), may have greater validity if they were capable of demonstrating their capacity to effectively fulfil this function, however history belies this assertion.

3.6 *Humanity vs Sovereignty Based Approach*

The most important and fundamental area of conflict between sovereign rights and international criminal law relates to people. Citizens of a state are often required to sacrifice their own lives in order to satisfy the needs of the sovereign state. According to sovereignty principles, the right of survival of the individual is always subordinate to the right of survival of the sovereign state.⁵³⁴ This is asserted by states notwithstanding that arguably, it has never been accepted as part of international law.⁵³⁵ International law scholars point out that states have never had the right to ‘unlimited sovereignty’.⁵³⁶ They contend that international law applies to individuals and not just states.⁵³⁷ However the reality is that the individual human beings have very few enforceable rights from the point of view of international law.

A person is related to one state through nationality or citizenship, but on the international stage that person has no voice.⁵³⁸ With respect to other states the foreign citizen has no rights.⁵³⁹ In the absence of domestic law

⁵³² Kochan, above n 17, 510.

⁵³³ Bassiouni, above n 23, 684.

⁵³⁴ As Beres so eloquently states it: ‘In giving ourselves over completely to national self determination, we commit a grievous form of idolatry. Allegedly offering ourselves to a “higher cause” we actually turn national frontiers into prison walls that lock up capacity for thought and authentic feeling. We nurture incessant preparations for killing by embracing the cold metallic surfaces of the state. Without such preparations national leaders would jeopardize their positions and the State itself would be in “danger” of relinquishing its hold on citizens as an object of liberation’. L R Beres, ‘Genocide and Power Politics – The Individual and the State’ (1997) 18 *Bulletin of Peace Proposals*.

⁵³⁵ Henkin, above n 176.

⁵³⁶ P C Jessup, *A Modern Law of Nations* (1948) 1; Shen, above n 34, 428.

⁵³⁷ Jessup, above n 183, 2.

⁵³⁸ Note the decision in *Israel v Eichmann* (1962) 36 ILR 277, relating to Eichmann’s ability to protest the jurisdiction of the Israeli Court on the basis of his abduction from Argentina. The dispute was between Argentina and Israel; Eichmann had no standing, irrespective of the fact that the abduction affected him far more than it affected either Argentina or Israel.

⁵³⁹ Jessup, above n 183, 9.

to the contrary, if an individual of one state is injured in another state by a wrongful act of that state, it is the injuring state that owes compensation to the other state, the individual having no personal claim.⁵⁴⁰ The state may protect its citizens but there is no duty on a state to do so, in other words the state has the option whether or not to protect its citizens from the acts of another state.⁵⁴¹ In these circumstances the interests of the state are paramount and the interests of the citizen are always subordinate to what is best for the state.⁵⁴²

Even where a state does take steps to protect the interests of its citizens according to the sovereignty principle, the primary focus is on the preservation of sovereign interests, rather than on the interests of the individual.⁵⁴³ In the *Barcelona Traction Case*,⁵⁴⁴ a Canadian light and power company operated in Spain. In 1948 the Spanish Government seized the assets of the company. No legal action was taken by Canada, but many of the company shareholders were nationals of Belgium. Belgium instituted proceedings against Spain in the ICJ. The Court held that Belgium lacked standing because the company was incorporated in Canada and it was the company that should have been represented not the shareholders. Only Canada had the standing to represent company, the shareholders had no rights at all.

If a citizen of a state has little or no rights under international law, the stateless person originally had no rights at all.⁵⁴⁵ Following World War II, the position of the 'stateless person' was so critical that states bowed to pressure from civil society and amended the principle to provide some protection for the 'stateless person'.⁵⁴⁶ However if a person is unfortunate enough to become stateless, in the sense that their state ceases to exist, then according to international law they have no rights at all, because they

⁵⁴⁰ Martin, above n 68, 71 referring to *Mavrommatis Palestine Concession Case* [1924] PCIJ ser A, No 2, 6, 12.

⁵⁴¹ M S McDougal et al, 'Nationality and Human Rights The protection of the Individual in External Areas' in M S McDougal, W M Reisman (eds), *International Law Essays: A Supplement to International Law in Contemporary Perspective* (1981) 559.

⁵⁴² Ibid 560.

⁵⁴³ See, eg *Nottebohm (Liechtenstein v Guatemala)* [1970] ICJ Rep 4, the citizen operated a business in Guatemala. Prior to World War II he changed his citizenship from German to Liechtenstein. Nevertheless the USA imprisoned him as a German National during the war. After the war he was refused entry into Guatemala where his assets had been frozen. So he went to Liechtenstein. Guatemala then confiscated his assets as a German enemy alien. On his behalf Liechtenstein took action in the International Court of Justice. Guatemala argued that the Liechtenstein's claim could not succeed because Nottebohm had not established a sufficient bond of attachment with Liechtenstein. The ICJ agreed with this argument and dismissed Liechtenstein's claim.

⁵⁴⁴ Ibid.

⁵⁴⁵ Stumpf, above n 9, 27.

⁵⁴⁶ Jessup, above n 183, 9. See also the *Refugee Convention* of 1951.

have no state to protect their rights.⁵⁴⁷ Stateless persons are without documentation and if compelled to move they have to do so illegally without a passport or visa.⁵⁴⁸ With ‘global warming’ and the potential for island states to be submerged under the sea, this could be a serious issue during the 21st century.

At times states may simply refuse to assist their citizens when they are ensnared in the legal system of another country. When this occurs the citizen is powerless (unless civil society puts pressure on the offending states to act). A case in point concerned the Australian citizen David Hicks. In 2002 David Hicks was incarcerated and held incommunicado in a US military prison camp at Guantanamo Bay, Cuba. For a considerable period of time he was not charged with any criminal offence; he was not given access to a lawyer nor was he permitted to make a phone call. He was extensively interrogated and subjected to inhumane conditions. This occurred even though the right to freedom from arbitrary arrest and detention was considered one of the most ‘elementary and important’ rights that had existed since Magna Carta.⁵⁴⁹

Not only did the Australian federal government fail to protect the rights of its citizen, it actively supported the United States government in this breach of criminal procedure. At the time, the Australian Federal Attorney General, Daryl Williams, stated that it was ‘appropriate for Hicks to remain in US military custody’.⁵⁵⁰ He acknowledged that Hicks would be held in custody until either the US government or the Australian Government could ‘think of something’ to charge him with.⁵⁵¹

The then US Secretary of Defence, Donald Rumsfeld, stated that ‘al Qaida’ prisoners would be ‘held indefinitely’ at Guantanamo Bay; the detention would be ‘open ended’ until the US could ‘build a case against them’.⁵⁵² At the time the United States law (and international criminal law) provided that a person could only be arrested and kept in custody if a ‘probable cause’ existed that the person had committed an offence. The person could only be held in custody as a prelude to prosecution.⁵⁵³ As

⁵⁴⁷ McDougal, above n 188, 559.

⁵⁴⁸ Ibid 606.

⁵⁴⁹ *Trowbrige v Hardy* (1955) 94 CLR 147 at 152.

⁵⁵⁰ Federal Attorney General Daryl Williams press release of 18 January 2002.

⁵⁵¹ Ibid.

⁵⁵² *Hicks et al v George W Bush et al* (Unreported) US District Court for the District of Columbia, 2002 Civil Action No. 02-828 (CKK) ‘Petition for Writ of Habeas Corpus’ para 39.

⁵⁵³ *State v Murphy* 465 P 2d 900, 902 Oral App 1970. The person is also protected by the Fourth Amendment to the US Constitution.

both the Australian and US governments could not say what offence Hicks had committed, then clearly there existed no probable cause.

These cases illustrate a much wider problem of the failure or inability of sovereign states to protect their citizens in the international arena or on the territory of another state.⁵⁵⁴ Where states fail to provide this protection, the international community should be permitted to ‘step into the breach’,⁵⁵⁵ but this solution does not always work because in many instances it has been thwarted by states wishing to pursue a particular political agenda. In the Hicks case international criminal law could have provided the solution had the Geneva Conventions of 1949 been permitted to apply, but the US asserted that their paramount sovereign rights excluded the operation of these international conventions.⁵⁵⁶ In these circumstances, had international criminal law been permitted to operate, the interests of the states and individuals concerned could have been better protected. The protection of the interests of the individual afforded by international criminal law in these circumstances would be ‘ensuring the person is given a fair and regular trial’ which is itself a human right.⁵⁵⁷ Fortunately the US Supreme Court in *Hamden v Rumsfeld*⁵⁵⁸ ultimately ruled that the Geneva Conventions of 1949 Common Article 3 did prevail and the executive government was forced to amend the law so as to ensure that these Conventions took effect.⁵⁵⁹

Not all assertions of sovereign rights by states are contrary to human interests. However to the extent that human interests are detrimentally subordinated to sovereign interests, then it is in this context that

⁵⁵⁴ Stumpf, above n 9, 27.

⁵⁵⁵ Bassiouni, above n 23, 90; see also V P Bantz, R Baird & A E Cassimatic, ‘After 60 Years - The United Nations and International Legal Order’ (2005) 24 *The Queensland Journal of Law Reform* 259, 264 where the authors contend that ‘the primary *raison d’être* of States and their duty is said to be the protection of their citizens. If States fail in this high mission, “then the responsibility shifts to the international community”...’.

⁵⁵⁶ The issue is complex because the United States of America was presumably asserting these sovereign rights in the interests of the majority of Americans who required their government (the state) to protect them from the criminal acts of ‘terrorists’ (fulfilment of the ‘social contract’) and it is only reasonable for the majority to seek this protection. The problem however is that in so doing, the United States arguably intruded upon the sovereign rights of other states to protect their citizens pursuant to their ‘social contract’ with their citizens. It is only ‘arguably’ the case because with respect to Australia’s sovereign rights, it would be unfair to make this claim against the USA because the Australian government actively supported the action taken by the US against Hicks; see also David A Harris, ‘How the Commander in Chief Swallowed the Rest of the Constitution’ *Legal Studies Research paper series Working Paper No. 2008-15, University of Pittsburgh School of Law* <<http://ssrn.com/abstract=1129237>> at February 2009, 44, 47.

⁵⁵⁷ See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 14.

⁵⁵⁸ *Hamdan v Rumsfeld*, 548 US 557 (2006); Common Article 3 is an article ‘common’ to all four Geneva Conventions of 1949 and relates to conflicts ‘not of an international nature’.

⁵⁵⁹ *Ibid.*

international civil society should promote the ascendancy of international criminal law over the subordinate interests of sovereign states.⁵⁶⁰ Where, however, both sovereign interests and human interests converge (and they often do) then civil society should advocate their concerns in the international arena. In these circumstances international organisations such as the United Nations may also join in by applying pressure upon the offending state.⁵⁶¹

3.7 Conflict of Interests when States are the Sole Enforcers of ICL

The question of whether or not sovereign rights pertaining to the exclusion of other states and the international community of states from interfering in the internal affairs of a state (even to the extent of preventing a humanitarian disaster), is complex. States assert that it is their sovereign right to deal with subversive elements within the state. They claim that doing this is an ordinary police action consistent with their responsibility to maintain law and order. They argue that no other state has the right to interfere. Sometimes taking this stance has the popular support of the majority of the citizens of that state.

International criminal law would however seek to protect minority groups in particular from criminal acts of genocide and crimes against humanity. It is anomalous for a state to take repressive action against a minority group in circumstances where such crimes are committed and yet at the same time be entrusted with the sole responsibility for prosecuting the perpetrators of these crimes, especially if the crimes were committed at the urging of that state. This right of non-interference is precisely what is argued by states when other states seek to repress the commission of these crimes.

The international community of states intervened in the internal conflict in Kosovo in 1999 to prevent Serbia from committing crimes against humanity against the Muslim community in that province. At the time, Serbia complained that this intervention constituted a breach of its sovereign rights. However if the international community had not involved itself in the conflict then inevitably the cost in human lives would have been excessive. If the principle of excluding interference in the internal affairs of a state had prevailed in these circumstances it would have been inconceivable that Serbia would have subsequently arrested

⁵⁶⁰ Schachter, above n 16, 14.

⁵⁶¹ Shen, above n 34, 427.

and punished the soldiers that perpetrated these atrocities against the Muslim population.

This conflict between the sovereign right of ‘non interference in the internal affairs of a state’ and the humanitarian right of humans not to be subjected to genocide and crimes against humanity will be further developed in subsequent chapters of the thesis but it is clear that both principles cannot operate successfully side by side, one has to give way to the other, and the argument of the thesis is that there is an overriding right of humanity to survive. This right of human survival must transcend the individual sovereign rights of states, even if survival of the state is at risk.

3.8 Conclusion

This chapter looks at the close relationship between the state and the citizen. It has attempted to locate the origins of this relationship. It can be seen how there exists an understanding between the citizen and the state, that the government of the state will rule the citizen as a means of preserving ‘law and order’ within the state. This provision of law and order may be expressed alternatively as providing ‘security for the citizen’. The relationship is identified in terms of a ‘social contract’, the government of the state assumes the responsibility of providing law and order and in large measure, achieves this through the enforcement of national criminal law. The right to provide security for the citizen is claimed by the government of that state to be a ‘sovereign right’ which no other state or entity may interfere with.

Also discussed is how international criminal law has a ‘humanity focus’ and at times this humanity focus conflicts with the national interests of a particular state. The issue in such circumstances is ‘what law prevails?’ Some states assert an exclusive right to control the conduct of their citizens under the criminal law but ‘what happens when states abuse their role and commit international crimes against their citizens?’ The next chapter will expand on this theme in a more significant way. We will go further and argue that the delinquent behaviour of some states towards their citizens is so egregious that their conduct has deprived them of credibility when they assert exclusive authority over the enforcement of international criminal law.

CHAPTER 4

States as Enforcers of ICL - Examples of where States have Failed to Properly Enforce ICL – Women and Children

4.1 Introduction

As discussed in Chapter 3 the sovereign state assumes the responsibility of protecting of its citizens. This responsibility should extend to all citizens irrespective of age, gender, race, religion, politics or other difference. Certainly this equality of protection is a fundamental tenet of international human rights law.⁵⁶² However during periods of civil unrest or armed conflict states often demonstrate a reluctance to uphold these fundamental principles. Expressed differently, all citizens of a state should be entitled to equal protection under the law. The degree of protection may be affected by the relative wealth of the state, the tranquillity of its society or whether the state is at peace or engaged in an armed conflict. An examination of state performance in upholding these principles during armed conflict reveals a poor record, especially where the military imperative takes precedence over the humanitarian objective.⁵⁶³

International criminal law is in part directed at protecting victims of crime when offences are committed in the course of armed conflict. Vulnerable groups within the community are often exploited during war. Notwithstanding some progress having been made in more recent times, vulnerable groups are still often exploited during the course of armed conflict - their welfare being sacrificed in favour of state interests.

States have frequently demonstrated an illegitimate preference for sovereign power/hegemony over human protection. The fact that states at times, put their politico/military pursuits ahead of their duty to provide security and protection for all their citizens is the reason why they have lost credibility when asserting exclusive authority over the enforcement of international criminal law. It is argued in Chapters 1 and 9 of this

⁵⁶² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 26; *Judicial Status and Human Rights of the Child* (Advisory Opinion) OC 17/02 InterAmerican Court of Human Rights (28 August 2002).

⁵⁶³ Discussion Paper 1, 'Sexual Violence in Armed Conflict' *OCHA Policy Development Studies Branch*, (20 June 2008) 1.

thesis that the neglect of the ‘human interest’ by states in these circumstances is so widespread that states should forfeit any such claim to ‘exclusivity’.

While it is understandable during armed conflict, when the war effort may demand a higher priority than protecting the human population, especially if survival of the state is at stake, military activity must be proportionate. Proportionality is a fundamental principle of international humanitarian law⁵⁶⁴ and operates whether proportionality is being exercised against one’s enemy, or whether it involves the utilization of the human resources of the state. What is argued in the thesis is that if states have exclusive dominion over the enforcement of international criminal law, a dispassionate review of whether or not a state has legitimately exploited their human resource becomes impossible. It is not argued that states should be prevented from employing their human resources during armed conflict or at any other time, the complaint is directed at disproportionate exploitation. The determination of whether or not disproportionate exploitation has occurred should not be left entirely to states because of the obvious ‘conflict of interest’.

In the face of this ‘conflict of interest’ international criminal tribunals are often better placed to dispense justice. However the problem may not be resolved entirely by leaving it to international criminal tribunals without more, because as discussed in Chapter 7, powerful states often try to exert influence over international tribunals. Accordingly international tribunals need to be reinforced so as to protect them from state interference.

Disproportionate exploitation can manifest itself in a number of ways. It might be the failure to punish soldiers who have committed offences contrary to the Laws and Customs of War. It may be a failure to prosecute offenders who have exploited a vulnerable segment of the community or it may be the excessive and unjust treatment of enemy’s of the state that fall into their hands during the course of an armed conflict.⁵⁶⁵ All of these issues can arise when states are left as the sole enforcers of international criminal law.

564 Donald R. Rothwell, ‘Anticipatory Self Defence in the Age of International Terrorism’ Vol. 24, No. 2 (2005) *The University of Queensland Law Journal* 337. 339; see also Regulations made under *The Hague Convention IV of 1907 pertaining to the Laws and Customs of War*, art 22; *Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977 1125 UNTS 3 (entered into force 7 December 1978) (‘Additional Protocol I’) art 51(4).

⁵⁶⁵ Richard J Wilson, ‘Children in Armed Conflict: The Detention of Children at Guantanamo Bay and The Trial for War Crimes by Military Commission of Omar Khadr a Child’ *American University Washington College of Law research Paper N0: 2009-13* <<http://ssrn.com/abstract:1368323>>.

In this thesis instances of when states have inappropriately exercised their coercive power to take advantage of vulnerable people, be they civilians or prisoners of war are examined. This chapter is concerned with two such examples, the impact of armed conflict on women and children and how states have historically treated these vulnerable people.

4.2 *Women - Victims of State Exploitation During Armed Conflict*

The Laws and Customs of War when originally conceived, had the participants of battle as their central focus.⁵⁶⁶ Soldiers and to a lesser extent police, are often injured or killed during the course of military operations or civil unrest but the real victims are those who have not caused the conflict or have not necessarily had any interest in the conflict but who through no fault on their part have simply ‘got in the way’.

Askin argues that the exploitation of women has always been one of the consequences of armed conflict.⁵⁶⁷ In most cases women in civilian life are unarmed, they are not trained in military tactics and, after the men have been forcibly removed by the aggressor, they are left vulnerable with little means to mount any form of effective self-defence, assuming self-defence is a viable option.⁵⁶⁸ Armed conflict imposes a strain on the resources of a country and it is common for non combatants, such as women, to suffer disproportionately during these periods.⁵⁶⁹ Invariably priority is given to the prosecution of the war, even though in many instances the victims do not support the conflict.

Women now play a much more significant role in national and international affairs but nevertheless they are still very much concerned with being at the centre of the family unit, and this is especially so in times of extreme crisis.⁵⁷⁰ Accordingly they are regularly left with the burden of protecting the very young, the very old and the infirmed, both on a domestic and community level, all of which adds to their level of

⁵⁶⁶ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field (22 August 1864)*, cited by Kelly Dawn Askin, *War Crimes Against Women* (1998) in fn 117 p 37, it consisted of only 7 Articles directed at caring for wounded combatants.

⁵⁶⁷ Askin, above n 5, 49. See also Women, Law & Development, *International Report on Gender Violence: The Hidden War Crime* (1998) 11: ‘Rape has been a feature of warfare throughout the centuries’.

⁵⁶⁸ Askin, above n 5, 58-59.

⁵⁶⁹ Amnesty International, *Sudan: Darfur – Rape as a weapon of war: sexual violence and its consequences* (19 July 2004) 17 <<http://web.amnesty.org/library/Index/ENGAFR540762004> par 4.5.3>

⁵⁷⁰ *International Report on Gender Violence*, above n 6, 13.

vulnerability.⁵⁷¹ One of the most egregious aspects of the exploitation of women during armed conflict has been the wholesale failure of states to punish war criminals for sexual crimes committed against women. This is so notwithstanding the widespread and systematic nature of these crimes.⁵⁷²

In conflicts such as that which occurred in the Balkan's during the 1990s, women were the targets of exploitation including sexual exploitation, so little has changed since the beginning of the recorded history of war but gradually some steps have been taken to punish the perpetrators.⁵⁷³ Unfortunately these measures are often far too little, too late.⁵⁷⁴ Women have been (and in some instances, still are)⁵⁷⁵ at a considerable disadvantage to men in securing recognition for their plight during the course of armed conflict.⁵⁷⁶ Until as late as the 20th century, women were by law disadvantaged in comparison to their male counterparts. They did not enjoy the same rights and privileges as men, they often had no voting rights, they could not own property, they had no separate identity from their husbands, but most significantly they lacked the means of effecting change.⁵⁷⁷ Government, the sovereign state and war were primarily men's business.⁵⁷⁸

Askin notes that if women could not vote they could not attend parliament and urge changes in the law! They were generally not present when peace treaties were signed so that punishment and recognition of the atrocities committed against them during war did not feature as a part of the settlement process. Further, as women were in the past considered

⁵⁷¹ Ibid 13 referring to the United Nations Executive Committee of the High Commissioner's Programme, *Note on Certain Aspects of Sexual Violence against Women Refugees* UN Doc A/AC.96/822 (12 October 1993).

⁵⁷² Amnesty International, above n 8, 2.

⁵⁷³ Jenny Kuper, *Military Training and Children in Armed Conflict: Law Policy and Practice* (2005) 216. With respect to sexually exploited victims during the 1992 war in the former Yugoslavia see Special Rapporteur Tadeus Mazowiecki, *Report on the Situation of human rights in the territory of the former Yugoslavia*, Commission on Human Rights, UN Doc E/CN.4/1993/50. The ICTY has now had a number of successful prosecutions arising out of this conflict directly related to the sexual exploitation. See *Prosecutor v Furundajija* IT-95-17/1-A.

⁵⁷⁴ Kuper, above n 12, 66. No child victim specific cases have been prosecuted before the ICTY or the ICTR.

⁵⁷⁵ Askin, above n 5, 227: 'In the past 100 years, women have made great strides in such areas as voting and political rights, property ownership, employment rights, educational achievement, reproduction choices and divorce rights. However without question, women have not attained equality in any nation of the world'.

⁵⁷⁶ Ibid, note 2 at 206: 'Physically, politically and legally women have seldom been able to prevent or redress violence committed against them'.

⁵⁷⁷ David Barnhizer and Daniel Barnhizer, 'Myth Magic and Mystery: Defending the Hidden Order of the Rule of Law' *Research Paper 07 – 149 Working Paper Cleveland State University* 7; Askin, above n 5, 209.

⁵⁷⁸ Askin, above n 5, 47.

to be the property of their husbands, their pain and suffering during war was irrelevant, it was the pain that the husband suffered as a consequence of them being ‘damaged property’ that became the most important issue.⁵⁷⁹

Unfortunately reform of this area has been slow. For example only marginal progress has been made in bringing to justice the perpetrators of sexual crimes against women committed during the armed conflicts in Cambodia, Rwanda, the former Yugoslavia, East Timor, Sudan, and Uganda.⁵⁸⁰ In part the reason for this is the fact that the interests of the state are preferred over the interest of the individual.⁵⁸¹ Applying this logic, if the sexual appetite of the men in the army of the state is at stake, then the crime of rape is ignored.

Nevertheless the international criminal law applicable to the regulation and control of sexual offences committed against women during the course of armed conflict and civil disturbance has gone through a process of significant development during the last 15 years. Prior to the 1990s the enforcement record of these crimes at an international level was unsatisfactory. Feminist thinking and the ability of women to influence the development of customary international humanitarian law applicable to these crimes has played an important part in this process.⁵⁸² Further the creation of the international criminal tribunals has provided the mechanism by which these changes can occur.

The Fourth Geneva Convention of 1949 ‘Relative to the Protection of Civilian Persons in Time of War’ expressly provides that women shall be protected against any attack ‘on their honour’ in particular against rape, enforced prostitution, or any form of indecent assault.⁵⁸³ It is also a ‘grave breach’ of the *Convention* to torture; (or) inflict inhumane treatment by causing great suffering or serious injury to the body or health of a person. Sexual assault or rape falls within this definition.

⁵⁷⁹ Ibid 254-255; *The Prosecutors and the Peoples of the Asia-Pacific Region v Emperor Hirohito et al. and the Government of Japan* (Unreported, People’s Court, McDonald PJ, Argibay, Chinkin, Mutunga JJ) Interim Decision of The Women’s International War Crimes Tribunal for the Trial of Japanese Military Sexual Slavery, Tokyo Japan, (12 December 2000) (*Hirohito et al.*) ‘My husband said it is better to have a left over dog than a left over person’. Mang-Mei Cu, Taiwan ‘comfort women’ to Japanese Army WWII para 1 of Findings.

⁵⁸⁰ *International Report on Gender Violence*, above n 6, 100-101.

⁵⁸¹ Amnesty International, above n 8, 3.

⁵⁸² Hillary Charlesworth and Christine Chinkin, *The boundaries of international law, A feminist analysis*, Manchester University Press 2000.

⁵⁸³ *Convention Relative to Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949 75 UNTS 287 (entered into force 21 October 1950) (‘Fourth Geneva Convention’) art 27 and 147.

While the ‘grave breach’ provisions only apply during an international armed conflict, limited protections against rape and sexual assault are given to the citizens of a country during an internal attack. Common Article 3 of the *1949 Geneva Conventions* prohibits violence to life including cruel treatment and torture, together with outrages upon personal dignity, in particular, humiliating or degrading treatment during an internal armed conflict.⁵⁸⁴ This definition would include rape and sexual assault.

4.2.1 Historical perspective

In those cases where sexual assault has not been expressly mentioned in the law as a crime, the offence provision is generally wide enough to include it within general language of the provision such as ‘inhumane or degrading treatment’.⁵⁸⁵ In most cases where no prosecution action was taken the reason for this failure was more a lack of ‘prosecutorial will’ than the absence of any law. Rape was considered to be a war crime at least as far back as 1474.⁵⁸⁶ During World War I rape and sexual assault of women was considered a war crime and yet despite extensive investigations of the war crimes no prosecutions followed.⁵⁸⁷ Similarly, the Japanese invasion and the rapes that occurred in Nanking in 1937 was a notorious international event, but no prosecutions followed.⁵⁸⁸

A substantial number of crimes were committed against women during the course of World War II, rapes of eastern European women by Germans and of Germans by the Eastern Europeans,⁵⁸⁹ was widespread yet at the Nuremberg trials rape was barely mentioned, let alone prosecuted.⁵⁹⁰ A possible explanation for this was that unlike the modern international tribunals created in the 1990s, the Nuremberg tribunal was still very much a court in the hands of the victorious allies.

⁵⁸⁴ Ibid arts 3(1)(a) and (c).

⁵⁸⁵ For example, the Nuremberg crimes against humanity provisions did not expressly mention rape or sexual offences against women, but clearly rape and sexual assaults against women could have been charged under these crimes. Similarly genocide does not expressly mention rape, but rape is surely contained within these provisions by inference.

⁵⁸⁶ *Trial of Peter van Hagenbarch 1474*. See Askin, above n 5, 47.

⁵⁸⁷ During World War I the rape by German soldiers upon Belgian women was a notorious event, broadly criticised and condemned, but other than form the basis of some propaganda campaign against the evil ‘Hun’ little else happened. See Askin, above n 5, 42.

⁵⁸⁸ *Hirohito et al*, above n 18, para 155.

⁵⁸⁹ Askin, above n 5, 52. 100 000 rapes were reported to have been committed in Berlin in the last two weeks of the war. Japan enslaved 200 000 women as ex slaves ‘comfort women’ during WWII, see also *Hirohito et al*, above n 18.

⁵⁹⁰ Askin, above n 5, 97-98. Of the 42 volumes of the IMT Reports (Nuremberg) sexual assaults were only referred to on a few random pages.

The failure to prosecute the sexual assaults against women even extended to those cases brought under Control Council Law No.10. There was ample opportunity to prosecute under Control Council Law No 10, because the prosecutions brought under this law were conducted according to themes, such as ‘The Justice Case’⁵⁹¹ ‘The Hostages Case’⁵⁹² and so on. It would have been very easy and appropriate to bring a prosecution under a specific ‘sexual assault against women’ head but again despite all the evidence available to prosecutors no such prosecution was ever brought.⁵⁹³ It was not as though the perpetrators of these crimes were not warned by the Allies that prosecutions would occur following the war. In the Moscow declaration of 1943, the Germans were unmistakably informed that individuals responsible for committing war crimes would be punished.⁵⁹⁴

There were no specific prosecutions for the sexual slavery of the so called ‘comfort women’ by the International Military Tribunal for the Far East either. This Tribunal was arguably even more under the influence of the victorious states than the Nuremberg tribunal. No official explanation was given for omitting to prosecute these rape cases at either the Tokyo or Nuremberg.

While the International Military Tribunal for the Far East did include some prosecutions for rape the failure to include any prosecutions for the extensive sexual enslavement of ‘comfort women’ was unjustified.⁵⁹⁵ The trial of General Tomoyuki Yamashita, prosecuted before an American military commission in Manila included counts for the extensive rapes committed against Filipino women during the invasion of their country, based on the command responsibility principle,⁵⁹⁶ so it cannot be suggested that the widespread nature of this offending was unknown to the Nuremberg and Tokyo prosecutors. Indeed after World War II it was not uncommon for soldiers to admit to raping and otherwise torturing women during the war without any appropriate action being taken against them. In many cases Japanese soldiers were spurred on by their superior officers.⁵⁹⁷

⁵⁹¹ *Alstotter & ors* 1947 TWC (iii) 954.

⁵⁹² *Re List and Others (Hostages)*, 1948 TWC (xi) 1230 – 39.

⁵⁹³ Askin, above n 5, 122 fn 426 citing J A Appleman, *Military Tribunals and International Crimes* (1954) 409.

⁵⁹⁴ *Declaration of the Four Nations on General Security (‘Moscow Declaration’)* (1 Nov. 1943) 3.

⁵⁹⁵ *Hirohito et al*, above n 18, para 615.

⁵⁹⁶ Askin, above n 5, 194.

⁵⁹⁷ *Hirohito et al*, above n 18, para 559.

Thus if it were possible to prosecute for rapes and sexual assaults committed against civilian women in the Yamashita case, based on command responsibility, then equally it would have been possible to include charges in the prosecutions that were brought before the International Military Tribunal for the Far East (IMTFE) with respect to the notorious sexual enslavement of the ‘comfort women’. The evidence was available and the offence provisions would have permitted these prosecutions, what was missing was an advocate for the victims. The women did not have a ‘voice at the table’ and so the prosecutors did not hear. The relevant states involved simply did not consider that it was of sufficient importance to take up the time of the Tribunals with these ‘non-military’ issues.⁵⁹⁸

4.2.2 Policy Reasons Behind the Exploitation of Women During Armed Conflict

The reasons why women are exploited during war has been made the subject of a special study by the United Nations Special Rapporteur on ‘Violence Against Women’.⁵⁹⁹ The Special Rapporteur concluded that much of the answer seems to lie in the traditions of ‘honour’. Women are the ‘prize of the victor’. The object of war, particularly a war of aggression, is for the victor to take ‘political economic and social control of the vanquished and then to purport to impose their authority over the territory, property and population of the defeated country’. Specific studies have identified four main reasons for why rape is committed during war:- (1) gender inequality; (2) psycho – social and economic; (3) strategic rape; (4) biosocial.⁶⁰⁰ It is very difficult for states to resolve these issues themselves without the intervention of some independent third party.

Even in conflicts as recent as the 1990 former Yugoslav war, males were often cast in the role as those who possessed the physical capacity to fight so they were traditionally seen as a threat to the invader and had to be neutralised. Women were suppressed or subjugated by the invading force – rape of the women lowered the morale of the defeated men because it demonstrated that they were too weak to protect the women. Rape was a reward for the victor.⁶⁰¹ It is very unlikely that this war would have

⁵⁹⁸ Askin, above n 5, 95.

⁵⁹⁹ Preliminary Report by the Special Rapporteur on *Violence Against Women*, UN Doc E/CN.4/1995/42 para 60.

⁶⁰⁰ ‘Sexual Violence in Armed Conflict’ above n 2, 1.

⁶⁰¹ *International Report on Gender Violence*, above n 6; ‘Sexual Violence in Armed Conflict’ above n 2, 1.

resolved itself, had it not been for the intervention of the international community.

Having regard to the powerful destructive nature of rape during armed conflict it is not surprising that eliminating rape as a weapon of war has proved to be impossible. True it is that rape in civilian life has not been eliminated either but rarely is it condoned either overtly or covertly by the state. Unfortunately with respect to rape committed during the course of armed conflict, rape is often regarded as a legitimate plank of government policy. It is the 'things that soldiers do'. While in the past, mass rape by an invading enemy's soldiers may have caused immediate international condemnation, once the event passed, and the parties settled their differences, the rapes were ignored, or merely mopped up with general 'property reparations'. Rarely was specific consideration given to the damage that had occurred to the women themselves.⁶⁰²

In terms of military action rape is also used as an instrument of retribution, a way of 'getting back' at ones enemy, the 'quid pro quo' - 'if the enemy raped our women during their advance, we will rape their women during the retreat'.⁶⁰³ The difficulty with this attitude is that again the women are merely treated as chattels or pawns in the process. No doubt the women raped by the initial aggressor, were as innocent and undeserving of this abuse, as the women of the retreating army.

During periods of military conflict women also become ensnared in often bizarre ideological doctrines, which result in them being sexually abused and/or killed as part of the implementation of that state policy. In the 1990s Balkan conflict, the Bosnian Serbs claimed that they were ordered by their superiors (ultimately the government) to rape non-Serbian (Muslim) women, thereby planting Serb seeds in these women, so that any offspring would be ethnically Serb, thus Serbian genes would prevail over the genes of the other ethnic group.⁶⁰⁴ By contrast the Nazi State prohibited so called Aryans from having sexual intercourse with Jews, on the basis that the purity of the Aryan race would be 'defiled'.

⁶⁰² During World War I (August 1914) German soldiers mass raped Belgian women. Worldwide condemnation followed, but after the war nothing was done about the matter. See Askin, above n 5, 41 quoting Brownmiller. Similarly the 'Rape of Nanking' December 1937 also attracted international condemnation of the Japanese, but again no prosecutions were commenced. See *Hirohito et al*, above n 18, 155.

⁶⁰³ Askin, above n 5, 60 quoting from C Ryan, 'The Last Battle' (1966). During the German retreat from Russia, the raping of German women and children was widespread and systematic and partly justified on the basis that what the Russians were doing was no worse than what the Germans had done to their women.

⁶⁰⁴ *Final Report of the Commission of Experts (ICTY) UN SCOR*, UN Doc S/1994/674, paras 248 - 250.

Nevertheless the raping of Jewish women by Nazi Germans was extremely prevalent. However on the few rare occasions when the perpetrators were punished it was for ‘defiling of the purity of German blood’ not for the rape of the woman.⁶⁰⁵

While Japanese soldiers during the course of the World War II, made no distinction, between enslaving and raping women based on race or political or religious beliefs, the creation of ‘comfort stations’ in which women and children were enslaved as sex objects, was seen as an efficient means of addressing a number of policy issues. Comfort stations had the advantage of being out of the glare of international observation, thus avoiding the embarrassing criticism that followed incidences such as the ‘Rape of Nanking’.⁶⁰⁶ Imported sex slaves had little or no contact with the local population, thus their treatment was not a factor which led to discontent among the conquered populace. Imported sex slaves were less likely to be an intelligence risk, thus divulging state military secrets, inadvertently passed onto them by their rapist. Sex slaves could be more effectively screened for venereal disease, thus protecting the health of the troops.⁶⁰⁷

Rape can be used as a means of propaganda. Community hatred is often aroused by showing graphic pictures of past sexual brutality. This can be done in order to incite the public to war or attract international aid or assistance. Prior to the Serbian invasion of Croatia and Bosnia–Herzegovina, Serbian television was filled with propaganda messages reminding the Serbs how Serbian women had been raped by the Croats during the course of the Second World War.⁶⁰⁸ This propaganda was not broadcast on behalf of the Milosevic government because they had a sudden deep felt sympathy for the Serbian women victims of World War II, but because it was a means of stirring up the Serbian population to engage in a genocidal war against the innocent citizens of the other states of the Yugoslav Federation.

Similarly the widespread rape of the Belgium women during World War I was used as an effective propaganda exercise to persuade the allied populations of the brutality of ‘bestly Germans’ which had to be stopped

⁶⁰⁵ Askin, above n 5, 57 quoting Muller.

⁶⁰⁶ Ibid 79.

⁶⁰⁷ Hirohito et al, above n 18, paras 142-158; See also Yoshimi Yoshiaki, *Comfort Women: Sexual Slavery in the Japanese Military During World War II* (1995).

⁶⁰⁸ *Final Report of the Commission of Experts*, above n 43, Annex IV, 24 par 127. See also F J Hampson, *Papers on the Theory and Practice of Human Rights – Incitement and the Media* Human Rights Centre – University of Essex (1993) 3.

at all cost. However as Askin notes, once these reports had served their propaganda purposes they were ignored, no prosecutions followed.⁶⁰⁹ The modern international tribunals are more independent of states than the post World War II tribunals and have been more active than national courts in dealing with international crimes of sexual violence during the course of armed conflict. However the incidence of sexual assault during armed conflict is still prevalent. Arguably women are more vulnerable now than before because they are better educated and occupy positions of authority in the community. There are a much greater percentage of politicians, doctors, lawyers and other community leaders coming from the ranks of women.⁶¹⁰ This can be a disadvantage when there is in place a government sponsored policy of ‘ethnic cleansing’ like that which occurred in the Balkan’s conflict, because in order to destroy the ethnic community, it is necessary to destroy the *intelligencia*, the political and community leaders, the professionals, and all those who may be a source from which the particular community can draw strength.⁶¹¹

Women in the former Yugoslavia, had a particularly onerous task, for not only, in this time of extreme crisis, where they were left alone to fulfil their domestic or family responsibilities but many of them had to maintain their role as community leaders and/or people carers.⁶¹² A particular feature of the Balkan wars of the 1990s was that for the most part the able bodied men were imprisoned and segregated from the women, children and the elderly. This separation often meant that the women were left to fend for themselves.⁶¹³ In due course, those women who assumed community responsibility or had the education which was perceived to be necessary to fulfil this role, were inevitably then made the targets of the ‘ethnic cleansers’.⁶¹⁴ Many women in positions of authority lost their lives, sometimes only after being subjected to the most appalling torture, often of a sexual nature.⁶¹⁵ While women of all ages

⁶⁰⁹ Askin, above n 5, 42.

⁶¹⁰ *Prosecutor v Kvočka et al* Case No IT-98-30/I-T (2 November 2001), para 21; see also *Report of Medical Centre for Human Rights at Zagreb* (1994) part 5.

⁶¹¹ There has been no precise definition of ‘ethnic cleansing’ settled upon in international law, but the Commissions of Experts in the Final Report described ethnic cleansing as a ‘policy rendering an area ethnically homogeneous by using force or intimidation to remove targeted persons or a given group from the area. The practice of ethnic cleansing reveals that as a crime it is essentially a form of unlawful population transfer by force, using terror-inspiring violence to inhibit any potential return by those expelled’. See *Final Report of the Commission of Experts*, above n 43, paras 129-130. See also *Review of Indictment Karadzic & Mladic*, Case No IT-95-5-R61 per Riad J, noting ethnic cleansing is a form of genocide.

⁶¹² *Kvočka*, above n 49, para 14. See also *International Report on Gender Violence*, above n 6; ‘Sexual Violence in Armed Conflict’ above n 2, 13.

⁶¹³ *Prosecutor v Tadic* (Opinion & Judgement) Case No IT-94-1-T (7 May 1997) para 151.

⁶¹⁴ Beverly Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (1996); *Kvočka*, above n 49, para 21.

⁶¹⁵ *Kvočka*, above n 49.

were systematically raped, many very young women were often used by the ethnic cleansers as 'comfort women'.⁶¹⁶

4.2.3 *The Degree of Offending*

The extent of the problem of rape during the course of armed conflict is enduring. During World War II rape was committed on all sides on a massive scale. In Korea alone it is estimated that Japanese soldiers abducted between 100,000 and 200,000 Korean women forcing them into sexual slavery.⁶¹⁷

In 1971 the Pakistani army committed widespread rape of the Bengali women in an attempt to silence demands for a separate and independent Bangladesh.⁶¹⁸ It was estimated that somewhere between some 50,000 and 200,000 women were sexually assaulted, resulting in some 25,000 pregnancies.⁶¹⁹

The estimates of the number of rapes committed by Bosnian Serb forces in the early stages of the 1991 Balkan conflict in Bosnia -Herzegovina range from 20,000 to 35,000 rapes of Muslim women.⁶²⁰

In 1994 during the Rwandan genocide between 250,000 and 500,000 women were subjected to sexual violence.⁶²¹ The sexual crimes perpetrated against women included rape, mutilation and sexual slavery.⁶²²

In January 2001 The UN Special Rapporteur on Violence Against Women reported that in the period 1997 to 2000 the Taliban committed widespread abuses against women in Afghanistan including rape, sexual assault, prostitution and forced marriage. She also reported that during the

⁶¹⁶ Amnesty International, *Rape and sexual abuse by armed forces* (1993) 9 cited by Askin, above n 5, 291.

⁶¹⁷ S Swiss, J E Giller, 'Rape as a War crime: A Medical Perspective' (1993) 270 *Journal of the American Medical Association* 612.

⁶¹⁸ S Brownmiller, *Against Our Will: Men Women and Rape* (1975) 78- 86, cited by R W Smith, 'Genocide and the Politics of Rape: Historical and Psychological Perspectives' (Paper presented at the Remembering for the Future Conference on the Holocaust and Genocide, Berlin, March 1994.

⁶¹⁹ Smith, above n 57, 5.

⁶²⁰ I Felice et al, 'Women Refugees from Bosnia-Herzegovina: Developing a Culturally Sensitive Counselling Framework' (1994) 6 *International Journal of Refugee Law* 210.

⁶²¹ UN Office for the Coordination of Humanitarian Affairs IRIN, *Gender Based Violence in Conflict Zones* <http://www.irinnews.org/webspecials/GBV/fearap.asp>. Accessed 2007.

⁶²² UN Division for the Advancement of Women, Department of Economic & Social Affairs, *Sexual Violence and Armed Conflict: United Nations Response* (1998) 13. <http://www.un.org/womenwatch/daw/public/w2apr98.htm>.

same period there were reports of widespread rapes and sexual abuse of women committed during the course of armed conflict in Burundi, Colombia, The Democratic Republic of the Congo, East and West Timor, Myanmar, Chechnya, Sierra Leone, Sri Lanka and Kosovo in the Federal Republic of Yugoslavia.⁶²³

In March 2004 Amnesty International reported that in Darfur, western Sudan at least 1.2 Million people had been displaced by the Government sponsored 'Janjawid'. Human rights violations against women involving sexual violence were committed on a massive scale.⁶²⁴

As these figures indicate the close link between armed conflict and the systematic sexual exploitation of women is an enduring phenomenon. Armed conflict and civil unrest are traditionally under the influence of the state whose territory is affected. The necessity of the relevant state to restore order and control is understandable but the means by which this is achieved can at times be questionable. The long term impact upon sexual assault victims undermines the future stability of these states especially where the victims are deprived of any form of justice. Prosecutorial action can help cure the damage inflicted upon the victim. If states fail to act or make light of the magnitude of the crime then some other mechanism needs to be in place to address this justice issue. In these circumstances an international justice system could perform the role, either by prosecuting the offenders directly or overseeing the prosecutions by the states themselves. At the moment no such system exists notwithstanding the advent of the International Criminal Court (ICC), although a modification of the role of this court would seem to be the best way forward.

4.3 *Children and ICL*

If women are vulnerable during armed conflict and civil unrest due to entrenched gender discrimination then children who are less developed physically and mentally than adults are even more exposed to the possibility of exploitation. As repugnant as it might seem, the use of children by states as the instruments of war is not new. Children have been involved in military campaigns for centuries. Cabin boys on warships, gun powder runners, and drummer boys on the battlefields were a familiar feature of 18th and 19th century military campaigns. The

⁶²³ *Report of the Special Rapporteur on Violence against Women*, UN Commission on Human Rights, 57th sess, UN Doc E/CN.4/2001/73 (23 January 2001) 21.

⁶²⁴ Amnesty International, above n 8.

word ‘infantry’ (infant) is derived from the use of young foot soldiers.⁶²⁵ However, in the past children were not particularly effective as soldiers, because they were not strong enough to carry or pull the very heavy and cumbersome hardware of war.⁶²⁶

In this regard things have changed for the worst, UNICEF reports that the AK-47 or the M-16 automatic rifle can be stripped and reassembled by a child of 10 years of age.⁶²⁷ Since 1947, 55 million AK-47s have been sold.⁶²⁸ In parts of Africa they can be purchased for as little as US\$6 dollars each.⁶²⁹ In some of the troubled regions of the Philippines, armed conflict has become a way of life, children traditionally become soldiers as soon as they enter their teens.⁶³⁰ During the Cambodian genocide of the 1980s, many children joined armed groups in order to secure their protection.⁶³¹ In Liberia in the 1990s children as young as 7 years of age became soldiers because children with guns had a much greater chance of survival.⁶³² Children are often inundated with military propaganda. In Sri Lanka the ‘Tamil Tigers’ recruited children into their armed forces.⁶³³ Government forces in El Salvador, Ethiopia and Guatemala have in recent times, all recruited children into the government military forces.⁶³⁴ Human Rights Watch in a 2005 Report noted that in the West African countries of Liberia, Sierra Leone, Guinea and Cote d’Ivoire soldiers who were originally recruited when they were children, ‘now regard war as a way of life’. It is their ‘economic means of survival’.⁶³⁵ They travel from one country to another whenever there is a war on in order to earn a living.⁶³⁶

Some governments and armed groups actually prefer to use children as soldiers because they are easier to condition into committing atrocities.⁶³⁷

⁶²⁵ *Wordsworth Concise English Dictionary* ‘Infantry’; see also <<http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=infantry>>

⁶²⁶ Human Rights Watch, *Stop the Use of Child Soldiers: Facts About Child Soldiers* (2003) <<http://www.hrw.org/campaigns/crp/facts.htm>> 1.

⁶²⁷ UNICEF, *Global March Against Child Soldiers* <<http://www.globalmarch.org/childsoldiers/unicef2.php3>>

⁶²⁸ *Ibid.*

⁶²⁹ *Ibid.*

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

⁶³² *Ibid.*

⁶³³ *Ibid.*

⁶³⁴ *Ibid.*

⁶³⁵ Susan W Tiefenbrun, ‘Child Soldiers, Slavery and the Trafficking of Children’ *TJSL Legal Studies Research Paper No 1020341* (October 2007) 18 <<http://ssrn.com/abstract=1020341>>

⁶³⁶ Human Rights Watch, ‘Youth, Poverty and Blood: The Lethal Legacy of West Africa’s Regional Warriors’ 17 *Human Rights Watch* 1.

⁶³⁷ Guy Goodwin-Gill, Irene Cohn, *Child Soldier: the role of children in armed conflicts: A Study on behalf of the Henry Dunant Institute* (1994).

Children generally do not fully appreciate the risks of injury or death to themselves,⁶³⁸ they do not demand salaries and they can be more readily brainwashed into rendering unquestioning obedience.⁶³⁹ In these circumstances children are often supplied with drugs and alcohol so as to further weaken their resistance.⁶⁴⁰

The use of child soldiers means that they can be treated as combatants by opposing forces, thus depriving them of the protections afforded to children under international humanitarian law.⁶⁴¹ In other words they are the enemy. In practical terms this may have a flow-on effect to all children, even those who are not child soldiers.⁶⁴² Accordingly, in these circumstances, any child encountered during the course of an armed conflict may be treated as combatants and not afforded the protections provided for civilian children under the Laws and Customs of War.⁶⁴³

Child soldiers are increasingly being required to participate in war as combatants, and are being deliberately recruited by government and rebel forces alike. Machel⁶⁴⁴ reported that children as young as 8 years of age, were forcibly recruited into military forces.⁶⁴⁵ Machel noted that these children were manipulated by adults, because they were too young to resist.⁶⁴⁶ In most cases the children came from a background of poverty and were often separated from their families.⁶⁴⁷ The methods of recruitment varied, some children were simply kidnapped or otherwise forced to join armed groups. Others joined up due to force of circumstances, such as poverty or as a means of survival.⁶⁴⁸ Machel observed that child soldiers were forced to perform a variety of roles including combatants, messengers, cooks and porters.⁶⁴⁹ She noted that there was a direct relationship between child labour and child soldiers. Often a child would start out being forced to do labour and this would

⁶³⁸ Tiefenbrun, above n 74, 16.

⁶³⁹ *Child Soldiers: An Overview of the Coalition to Stop the Use of Child Soldiers* <[http://www.child-soldiers.org/CS/child soldiers](http://www.child-soldiers.org/CS/child%20soldiers)> 2.

⁶⁴⁰ Ibid 2.

⁶⁴¹ Ibid 4; Tiefenbrun, above n 74, 33.

⁶⁴² *Child Soldiers*, above n 78, 4.

⁶⁴³ Ibid. On 15 August 2000 in Colombia an army unit mistook a party of schoolchildren for a guerrilla unit and open fired killing six children aged between six and 10 years of age. Six others were wounded.

⁶⁴⁴ In 1993 the United Nations Committee on the Rights of the Child recommended to the General Assembly that the Secretary General appoint an expert to study the impact of armed conflict on children. After two years of research, Graca Machel submitted a report, titled *Impact of Armed Conflict on Children*, UN Doc A/51/306 and Add.1 (1996).

⁶⁴⁵ Graca Machel, *Impact of Armed Conflict on Children – Special Concerns UNICEF*, UN Doc A/51/306 and Add 1 (1996) 1.

⁶⁴⁶ Ibid.

⁶⁴⁷ Ibid.

⁶⁴⁸ Ibid.

⁶⁴⁹ Ibid,

then be converted into requiring them to provide military service.⁶⁵⁰ Many children were mistreated physically and mentally and some were forced to provide sexual services. Children were often attracted to military service, particularly when they were in their early adolescence, due to the attraction of the 'ideology and mythology of war'.⁶⁵¹ These children often accepted without question the use of violence as the 'only effective means of resolving conflict'.⁶⁵²

4.3.1 *The Extent of the Problem*

At the beginning of the 21st century, Human Rights Watch⁶⁵³ estimated that there were as many as 300,000 children under the age of 18 years of age serving in various military groups around the world.⁶⁵⁴ Invariably the effects of war, causing as it does the vast displacement of the civilian population, means that families were often separated, leaving children in vulnerable circumstances.⁶⁵⁵ At least one third of child soldiers were girls who were often forced to provide sexual services for military commanders.⁶⁵⁶ Sometimes children were forced to commit atrocities against their own family thus ostracising them from their families.⁶⁵⁷

In 2000, UNICEF estimated that 120,000 children were serving in government armed forces and other armed groups in Africa.⁶⁵⁸ In Sierra Leone, they estimated that 30 percent of the fighting forces on both sides of the conflict were children. In Colombia 6000 children served as soldiers in recent conflicts.⁶⁵⁹ The 'Coalition to Stop the Use of Child Soldiers' in their 2002 overview report⁶⁶⁰ noted that during the 1980 Iran-Iraq war, thousands of Iranian school children were sent to the front-line, after being given a 'symbolic key to paradise' and the promise of martyrdom status.⁶⁶¹ In the war between Ethiopia and Eritrea (1999-2000), the Ethiopian Government Forces compelled thousands of

⁶⁵⁰ *Free the Children Campaigns* <<http://www.freethechildren.org>>

⁶⁵¹ Machel, above n 84, 7.

⁶⁵² Ibid.

⁶⁵³ In 1998/99 Human Rights Watch and other NGOs formed a 'Coalition to Stop the Use of Child Soldiers'. Human Rights Watch and the Coalition embarked upon an education campaign to try and educate governments about the extensive use of child soldiers in various armed conflicts around the world. Another object of the campaign was to increase the age of recruitment of child soldiers to 18 years. See Human Rights Watch, *World Report 1999* <<http://www.hrw.org/wprldreport99/special/child.html>>

⁶⁵⁴ Human Rights Watch, above n 65, 1.

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid.

⁶⁵⁷ Ibid.

⁶⁵⁸ UNICEF, *Child Soldiers* <http://www.unicef.org/emerg/index_childsoldiers.html>

⁶⁵⁹ Ibid.

⁶⁶⁰ *Child Soldiers*, above n 78.

⁶⁶¹ Ibid 2.

secondary school students to join the military forces. Some of these children were used as a 'human wave' to clear minefields.⁶⁶² At the same time in Afghanistan, young children from religious schools in Pakistan, were forced to perform military service with the Taliban. These children were involved in the policing of urban centres and checkpoints.⁶⁶³ Children were used during the Balkan conflict in the 1990s.⁶⁶⁴ Children were forced to fight with the Serbian militia and some were directly involved in the genocide. In Sri Lanka young Tamil girls were systematically recruited by the 'Tigers' to perform the role of suicide bombers.⁶⁶⁵ Girls abducted for the 'Lords Resistance Army' in Uganda, were distributed as sex slaves to soldiers who had lost their wives during the course of the conflict.⁶⁶⁶

The international community is divided on the question of 'what age does a child cease to be a child and becomes an adult particularly for the purposes of military recruitment?' Generally a child achieves the right to vote and participate in civilian affairs at the age of 18 years. These 'adult rights' do not necessarily accord with the age that states expect a child to participate in the military forces of a country. Both Burundi and Rwanda had the lowest legal recruitment ages on the African continent.⁶⁶⁷ Children as young as 15 years of age were recruited into the armed forces as 'volunteers', but given the absence of an accurate birth registration system many children were younger than this when they entered the armed forces. In Rwanda and Burundi military schools often served as a 'backdoor means' by which children younger than 15 years of age could be accepted for recruitment into the armed forces.⁶⁶⁸

The conflict in Sudan has long been recognised as one of the worst examples of child soldier recruitment anywhere in the world. Thousands of children as young as 12 years of age have been forcibly recruited into government aligned and separatist groups in the south of the country.⁶⁶⁹ The Sudanese government has also provided support and immunity to the resistance army responsible for the 'abduction and brutal treatment and sexual slavery of approximately 10,000 children from northern Uganda since 1987'. Of the 1.4 million men and women in the United States armed forces in 1999, 49,000 were 17 years of age when they 'signed

⁶⁶² Ibid.

⁶⁶³ Ibid 3.

⁶⁶⁴ Ibid 2.

⁶⁶⁵ Ibid.

⁶⁶⁶ Ibid.

⁶⁶⁷ Ibid 5.

⁶⁶⁸ Ibid 6.

⁶⁶⁹ Ibid 7.

on'.⁶⁷⁰ Even when children are 'legally' forced to join the army, they are sometimes deprived of the benefits of military service. In Angola the child soldiers received no benefits following the war in circumstances where many of the adult soldiers, aged 18 years and above were rewarded.⁶⁷¹ Those children who were forced into the army received no benefits notwithstanding the fact that the World Bank granted US\$33 million to assist with the rehabilitation of former combatants.⁶⁷²

In a briefing prepared by the 'Coalition to Stop the Use of Child Soldiers' in January 2004 for the 4th United Nations Security Council 'Open Debate on Children and Armed Conflict', the Coalition reported that for the year 2003 'thousands of children were (still) deployed as combatants, to commit abuses against civilians, as sex slaves, forced labourers, messengers, informants and servants in continuing and newly erupting conflicts'.⁶⁷³ The Coalition reported that in Cote d'Ivoire, the Democratic Republic of Congo and Liberia there had been a 'massive' increase in the recruitment of children into the armed forces during 2003.⁶⁷⁴ They further reported that in Uganda 'thousands of children were abducted and forced to serve in the opposition 'Lords Resistance Army''.⁶⁷⁵ In the same year it was estimated that there were as many as 70,000 children in the Myanmar (Burma) armed forces.⁶⁷⁶

4.3.2 *The International Criminal law Applicable to the Exploitation of Children*

The first attempt to provide some protection for civilians under international humanitarian law during an international armed conflict was Article 46 made under the *Regulations Annexed to the (Hague) Convention (IV) Respecting the Laws and Customs of War on Land* of 1899 and 1907. This brief Article required 'respect for family life in armed conflict'.⁶⁷⁷ While it is vaguely worded and makes no specific mention of children, like the application it had to women, it had application to civilian children to the extent that they could be considered

⁶⁷⁰ Of the 1.4 million men and women in the United States armed forces in 1999, 49 000 were 17 years of age when they 'signed on'. *New York Times* (22 January 2000).

⁶⁷¹ *Child Soldiers*, above n 78, 6.

⁶⁷² *Child soldiers forgotten in Angola* <<http://operationsick.com/articles/2003>>

⁶⁷³ Coalition to Stop the Use of Child Soldiers, *Child Soldier Use 2003: A briefing for the 4th UN Security Council Open Debate on Children and Armed Conflict* (January 2004) 1.

⁶⁷⁴ *Ibid* 2.

⁶⁷⁵ *Ibid* 45.

⁶⁷⁶ *Ibid* 27.

⁶⁷⁷ Article 46: 'Family honour and rights, the lives of persons, and private property as well as religious convictions and practice, must be respected. Private property can not be confiscated'. This somewhat obscure regulation has been interpreted to mean a great deal more than the simple wording would otherwise suggest: see Askin, above n 5, 40.

as a part of ‘family life’. Similarly Article 23 (h) prohibited forcing the ‘nationals of a hostile party to take part in the war operations directed against their own country’ which provided limited protection to both adult and child recruits. However these provisions could not be enforced against individual perpetrators because individual criminal responsibility was not provided for in the *1907 Convention*.⁶⁷⁸ The only sanction available was against the home state of the perpetrator which could be liable to pay compensation for breaches of the Regulations by that perpetrator provided the perpetrator was ‘part of the armed forces of that state’. Unfortunately the children would not directly receive the benefit of this compensation, as the compensation was only payable to the victim’s state, not the victims themselves.

The *Declaration on Rights of the Child of Geneva* (1924)⁶⁷⁹ did direct itself specifically to children but was platitudinous in content and non-binding in effect. As it was not part of international criminal law it provided no mechanism for enforcement against individual perpetrators nor require the nation state of the perpetrator to pay compensation. Accordingly it did little to protect children from exploitation by the state. However as an early document it did recognise that children should be protected so as to ensure their development. It did contain provisions designed to shelter them from the adverse effects of war by declaring that ‘the child must be the first to receive relief in times of distress’ and ‘the child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.’⁶⁸⁰

It was not until after World War II that the deficiencies in protecting non-combatants became so obvious that the glaring inadequacies in the law were corrected.⁶⁸¹ In 1948 the United Nations General Assembly adopted the *Universal Declaration of Human Rights* which specifically recognised that ‘children have the right to special care and assistance.’⁶⁸² Although this is a non-binding instrument some of it has been followed in international treaties and state practice thus forming part of customary

⁶⁷⁸ Article 3 of the *Hague Convention (IV) Respecting the Laws and Customs of War 1907* provides that ‘[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces’.

⁶⁷⁹ Adopted at the fifth assembly by League of Nations in 1924.

⁶⁸⁰ G Van Bueren, *The International Law on the Rights of the Child* (1998), 6.

⁶⁸¹ The central thrust of the Fourth Geneva Convention was designed to overcome this deficiency in the law.

⁶⁸² *Universal Declaration of Human Rights*, GA Res 217, UN GAOR, UN Doc A/Res/3/217A (10 December 1948) art 25(2).

international law.⁶⁸³ To the extent that children form part of the civilian population they are protected by all of the Articles containing general civilian protections in the *Fourth Geneva Convention of 1949 'Relative to the Protection of Civilian Persons in Time of War'*.

As noted above with respect to women, the 1949 *Geneva Convention IV Relative to Civilians*, contains a number of specific provisions designed to protect children in armed conflict. Children under the age of 15 years have to be sheltered from the affects of war.⁶⁸⁴ Orphaned or separated children under 15 years are not to be left to their own resources.⁶⁸⁵ Children can not be compelled to work.⁶⁸⁶ However a breach of these provisions does not amount to a 'grave breach' of the Geneva Conventions. As a consequence the failure to provide these protections does not of itself entitle the international community to take action in exercise of 'universal jurisdiction'.⁶⁸⁷

The 1974 *Declaration on the Protection of Women and Children in Emergency and Armed Conflict* and the 1977 *Additional Protocols to the 1949 Geneva Conventions* contain further provisions designed to protect children during the course of armed conflict. *Additional Protocol I to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflict* provides that children 'shall be the object of special respect' and protected from neglect and indecent assault.⁶⁸⁸ The Protocol also requires states, in the course of international armed conflict, to take all feasible measures to prevent children from taking part in hostilities and to refrain from recruiting children under the age of 15 years into their armed forces.⁶⁸⁹

Additional Protocol II of the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflict also requires that children under 15 years be given special protection so as to prevent them from harm during hostilities. This Protocol also prohibits the recruitment of children under the age of 15 years into the armed forces in an internal conflict.⁶⁹⁰

⁶⁸³ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* Vol. 1 Rules ICRC Cambridge University Press 2005 p 307.

⁶⁸⁴ See above at page 100; Fourth Geneva Convention, art 14.

⁶⁸⁵ Fourth Geneva Convention, art 24.

⁶⁸⁶ Fourth Geneva Convention, art 51.

⁶⁸⁷ Wilson, above n 4.

⁶⁸⁸ Additional Protocol I, above n 3, art 77(1).

⁶⁸⁹ Ibid, art 77(2).

⁶⁹⁰ *Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977 1125 UNTS 609 (entered into force 7 December 1978) ('Additional Protocol II'), arts 4(3)(c) and (d).

The *Convention on the Rights of the Child* adopted by the United Nations General Assembly on 20 November 1989 and which entered into force on 2 September 1990 created obligations upon states to specifically protect the interests of children. Article 38 of the Convention provides that states to respect the applicable international humanitarian law pertaining to children during the course of armed conflict. It requires that children under the age of 15 years not be employed in military activities, including recruitment of children under the age of 15 years into the military armed forces. So far 192 states have ratified the *Convention* leaving only Somalia and the United States of America as non parties.⁶⁹¹

In 1993 the UN Committee on the Rights of the Child took steps to strengthen the prohibition on the use of children as soldiers. In 1995, UNICEF together with many states, NGOs and other UN Organisations called for the lifting of the age limit to 18 years on the prohibition of all forms of military recruitment and participation of children in armed conflict.⁶⁹² On 25 May 2000 the United Nations General Assembly adopted the *Optional Protocol to the Convention on the Rights of the Child* relative to the involvement of children in armed conflict. The Optional Protocol raises the minimum age limit for recruitment to 18 years and limits the actual participation in hostility to persons over the age of 18 years.⁶⁹³

The *International Labour Organisation Convention number 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, which entered into force in November 2000, defines a ‘child’ as a person under of the age of 18 years of age (article 2) and prohibits ‘forced or compulsory recruitment of children for use in armed conflict’.⁶⁹⁴ The *African Charter on the Rights and Welfare of the Child* (which entered into force in November 1999), prohibits the recruitment or direct participation in hostilities or internal strife of anyone under the age of 18 years (article 22).⁶⁹⁵

Since 2000 there has been mounting pressure by the international community to address the practice of recruiting children into the armed

⁶⁹¹ *Free the Children Campaigns* <<http://www.freethechildren.org>>

⁶⁹² *Child Soldiers*, above n 78. An important study on this issue by Graca Machel in 1995 gave greater momentum to the introduction of additional measures for the protection of children.

⁶⁹³ The Optional Protocol came into force in February 2002. As of June 2004, 74 countries had ratified the Optional Protocol: OHCHR – *Status of Ratification on the Principle Human Rights Treaties Register* (June 2004) <<http://www.un.org/documents>>

⁶⁹⁴ *Child Soldiers*, above n 78, 11.

⁶⁹⁵ *Ibid* 11.

forces of a state. The United Nations Security Council in resolutions 1261 and 1314; the General Assembly; the former United Nations Commission on Human Rights; the Organisation for African Unity; the Organisation of American States; the Organisation for Security and Cooperation in Europe; the European Parliament and the Organisation of the Islamic Conference, have all called for an end to the practice of using children as soldiers.⁶⁹⁶

Unfortunately, as noted above, the use of child soldiers is not considered a grave breach of the Geneva Conventions of 1949, it is not a crime, either as a war crime or a crime against humanity, under the statutes of the ICTY or ICTR. Only the ICC Statute specifically prohibits the conscription or enlisting of children under the age of 15 years into national forces or using them to participate actively in hostilities. To do so is declared to be a war crime.⁶⁹⁷ Many treaty and convention provisions providing for the protection of children during armed conflict are now part of customary international law. For example, it is a customary international law requirement to afford special respect and protection for children during armed conflict.⁶⁹⁸ More to the point, under customary international law children must not be recruited or allowed to take part in hostilities.⁶⁹⁹ However it is not always necessary for crimes against children to be specifically spelt out in conventions or under customary international law, because the conduct against children by the perpetrator can often fall within other less specific international crimes such as torture, slavery, crimes against humanity or even genocide.

In February 2002 after the *Optional Protocol to the Convention on the Rights of the Child* came into force, the age limit for military recruitment of children was raised from 15 to 18 years. Subsequently, child recruitment by government forces had ceased or decreased in Afghanistan, Angola, Columbia, Nepal, Philippines and Sierra Leone. In some cases the governments had introduced legislation prohibiting the recruitment of children under the age of 18 years following ratification of the Optional Protocol. Another factor that may have influenced this change was the coming into force of the ICC Statute which (as noted above) made the recruitment of children under the age of 15 years a war crime.⁷⁰⁰

⁶⁹⁶ Ibid.

⁶⁹⁷ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 91 (entered into force 1 July 2002) ('Rome Statute') art 8(2)(c)(xxvi).

⁶⁹⁸ Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law*, vol 1 'Rules' (2005) rule 135, p 479.

⁶⁹⁹ Ibid, rules 136, 137.

⁷⁰⁰ Rome Statute, art 8(2)(c)(xxvi).

In December 2003 the President of Uganda, President Yoweri Museveni decided to refer for investigation the crimes committed in the conflict with the Lord's Army to the prosecutor of the ICC.⁷⁰¹ The ICC has now commenced his investigation which will hopefully include the crimes committed in relation to the forced recruitment of child soldiers by the Lords Army.⁷⁰² This is one of the first investigations to be conducted by the ICC and will be an important investigations into the illegal recruitment of children into military forces.

In the February 2005 Report of the Secretary- General to both the General Assembly and Security Council of the United Nations⁷⁰³ the Secretary General reported a general improvement in the situation in Afghanistan; Burundi; Cote d'Ivoire; Liberia; Somalia and the Sudan. However the situation had either not improved or had worsened, particularly with non-government forces, in Iraq; Colombia; Myanmar; Nepal; Sri Lanka and Uganda.⁷⁰⁴ The Secretary General recommended that 'concrete steps should be taken to ensure the earliest possible prosecution of persons responsible for war crimes against children'.⁷⁰⁵ He went on to emphasise that the '...deterrence role of the International Criminal Court needs to be actively promoted through proactive advocacy and public information activities by United Nations and NGO actors at all levels.'⁷⁰⁶

On 3 April 2006 the ex Liberian President, Charles Taylor was charged with 11 counts of war crimes and crimes against humanity before the Special Court for Sierra Leone. The offences included the use of child soldiers in the war that occurred in Sierra Leone in 1991-1992. It is alleged that he was responsible for giving child soldiers drugs in order to get them to commit particularly atrocious crimes. His trial is continuing to take place in The Hague.⁷⁰⁷

On 29 January 2007 Pre-trial Chamber 1 of the ICC confirmed the indictment in *Prosecutor v Thomas Lubanga Dyilo*⁷⁰⁸ where it held that there were substantial grounds to believe that Lubanga, the former

⁷⁰¹ International Criminal Court, 'Background Information on the Situation in Uganda' (2005) <http://www.icc-cpi.int/library/cases/icc_20051410-056-1_English.pdf> at March 2008.

⁷⁰² International Criminal Court Press Release, <http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html>

⁷⁰³ UN Secretary General, *Children in Armed Conflict: Promotion and Protection of the Rights of Children*, UN Doc A/59/695 & S/2005/72.

⁷⁰⁴ Ibid.

⁷⁰⁵ Ibid, 25.

⁷⁰⁶ Ibid.

⁷⁰⁷ IRINnews.org, <<http://www.irinnews.org/>>

⁷⁰⁸ *Prosecutor v Thomas Lubanga Dyilo*, Case No ICC-01/04-01/06 (29 January 2007).

Commander-in-Chief of the military wing of the *Forces Patriotiques pour la Liberation du Congo* (FPLC), had committed war crimes in the Congo, including charges relating to the recruitment of child soldiers.

In February 2007 at a major international conference held in Paris relating to child soldiers, a model set of principles were adopted relating to the protection of children and their recruitment during armed conflict, these principles have now been adopted by 84 countries.⁷⁰⁹

While movement at the international level to ban the practice of recruiting child soldiers is to be welcomed and while there may have been a slight drop off recently in this practice by states, the reforms have been at the international rather than the national level, and the increased awareness of the illegality of this conduct will be short lived if the ‘rhetoric is not followed up by action’. The deterrent effect of creating a new war crime pertaining to the recruitment of child soldiers will only work if the ICC is successful in bringing some prosecutions for this offence. In terms of reform at the state level this will only happen if pressure is applied by the international community to compel states to observe this law. Creating international laws to prohibit illegal conduct only works effectively if offenders believe that enforcement action is likely to happen. History is replete with examples of where states have ignored international laws in order to advance some domestic purpose. The mere creation of the laws, without effective enforcement action is simply not enough.

4.4 Conclusion

Like many problems the reasons for the problems are multi-faceted. It would not be correct to place the whole blame for the failure to prosecute war crime rape cases and child soldier cases entirely at the feet of the sovereign state. However there is no escaping the fact that during armed conflict states give preference to the war effort at the expense of protecting women and children which are deemed expendable in circumstances where the survival of the state is perceived to be under threat.⁷¹⁰ While this preference may be understandable, what cannot be justified is allowing states to have the final say when it comes to prosecuting state officials that have sanctioned the recruitment of child soldiers or the sexual exploitation of women during armed conflict. In

⁷⁰⁹ Adopted by 84 countries as of September 2009, see Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report* (2008), <http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_20078_Global_Report.pdf> at September 2009.

⁷¹⁰ Wilson, above n 4.

particular the sovereign right of the state not to be interfered within the conduct of its internal affairs has meant that the development of laws prohibiting recruitment of child soldiers or the rigorous enforcement of laws that prohibit rape during the course of armed conflict, particularly internal armed conflict, has been neglected. The special protection afforded to ‘sovereign interests’ of the state is recognised by the United Nations Charter,⁷¹¹ well ahead of any recognition of the evil of war time sexual exploitation of women and/or the recruitment of child soldiers. The pre-eminent position of the state continues to dominate the world order today and will continue to do so for the foreseeable future. The complaint made here is not a complaint about this domination in all instances. The complaint arises when states insist on having exclusive control when it is unjustified for them to do so. The argument advanced is that when confronted with this obvious conflict of interest the solution is to be found in authorising international tribunals to have the final say in relation to prosecutorial decisions.⁷¹²

International humanitarian law emphasises the need to protect children but when it comes to having to make a choice between the survival of the political regime of the state and the survival of the children, in many cases, survival of the government is given priority.⁷¹³

The best chance to deal with this problem arose during the negotiations for the drafting of the Rome Statue of the ICC. The opportunity presented itself here to create an international criminal court which could over-ride sovereign rights in circumstances where a state preferred its ‘military objectives’ ahead of the protection of their citizens, especially women and children. Unfortunately the negotiations failed to secure jurisdictional ‘primacy’. So for the moment the sovereign interest of the state still prevails over international humanitarian law in its attempt to protect women and children in armed conflict. However some progress has already been made and it is just possible that international civil society will in the future force states to ensure that justice is provided to the victims of sexual assaults committed during the course of armed conflict and that the recruiters of child soldiers will be vigorously prosecuted.

⁷¹¹ UN Charter, art 2(7) ‘Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.. .’

⁷¹² The fact that Slobodan Milosevic was able to ‘snub his nose’ at the ICTY in The Hague is all born out of the ultimate right of the sovereign state. However the fact that Slobodan Milosevic actually faced trial in The Hague would have been inconceivable 20 years ago. In any event states have no difficulty in controlling sexual exploitation of children when it suits their interest to do so - note offences created by states to deal with ‘child sex tourism’ – these crimes relate to offences committed outside their territorial jurisdiction.

⁷¹³ Wilson, above n 4.

International civil society is gaining momentum, it is possible that civil society will eventually limit the reach of sovereign authority in this area and curtail its excesses.

CHAPTER 5

Military Commissions as Enforcers of ICL

5.1 Introduction

In the previous chapter it was argued that at times states attempt to assert exclusive sovereign authority over their citizens to the exclusion of the international community.⁷¹⁴ It was argued that this authority is often misused especially with respect to women and children. In the context of this thesis the extent of this misuse was examined during the course of civil unrest or armed conflict. It was further argued that this improper exploitation of women and children could amount to a breach of international criminal law if it involved sexual exploitation of woman or the recruitment of child soldiers. Not only is such conduct a breach of international criminal law but it is also a breach of the citizen–state compact involving the unjustified exploitation of the most vulnerable members of the community, persons that the state has a positive duty to protect. It was argued that if states were left with the task of prosecuting these offenders (acts carried out on their behalf by state servants implementing state policy) then the conflict of interest is so great, that there is every chance that states would abuse the prosecutorial function in order to achieve a politically acceptable outcome.

In this chapter we look at the ‘other side of the coin’. What happens to individuals of a defeated state who fall into the hands of a victorious state during or following the conclusion of an armed conflict? One might think that having regard to the well entrenched and extensive laws relating to ‘prisoners of war’⁷¹⁵ that the answer is straightforward. However in this chapter it is argued that this is not always the case and that from time to time, states ignore international humanitarian law relating to ‘protected

⁷¹⁴ This is a claim made by states; it is not justified as a matter of law. Examples of where the claim has been made include: the USA under the G W Bush Administration in opposition to the International Criminal Court; the government of Indonesia in opposition to an International War Crimes Tribunal for East Timor; Cambodia in opposition to an International War crimes Tribunal for Cambodia concerning the Khmer Rouge genocide; and Germany in opposition to an International War Crimes Tribunal following World War I. All of these examples will be expanded on during the course of the thesis.

⁷¹⁵ *Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949 75 UNTS 135 (entered into force 21 October 1950) (‘Third Geneva Convention’), arts 135-285.

persons' in order to exact revenge on their enemies or to pursue some other political objective.⁷¹⁶

The relevant international humanitarian law relating to 'prisoners of war' is located in both Hague and Geneva Law. The four *Geneva Conventions* of 1949 have now been ratified by every country on Earth. Many of the provisions of the Conventions now form part of customary international humanitarian law. Some of the provisions of the conventions have achieved *jus cogens* status. With such widespread acceptance one might think that all states, from rogue states to the most powerful, would at least observe the *Geneva Conventions*. Unfortunately the enforcement mechanisms of the *Geneva Conventions* are for the most part dependant on state action and when a state (particularly a powerful state),⁷¹⁷ chooses to pursue an alternative political objective, the *Geneva Conventions* are ignored. As a consequence, the current system of relying on states to exclusively enforce the law, especially in circumstances when the state concerned is hopelessly conflicted, imports a weakness into the enforcement mechanism.

This illegal behaviour by states strikes at the heart of international humanitarian law relating to 'prisoners of war'. The manipulation of the prosecution process by states is often directed at exacting revenge from someone who has acted contrary to state interest. A recent example of this concerns those persons originally detained by the USA at Guantanamo Bay.⁷¹⁸ When the Guantanamo prison was originally established the government of the USA consistently maintained that international humanitarian law, in particular the *Geneva Conventions of 1949* did not apply to the prisoners held there.⁷¹⁹ Article 2 common to the four *Geneva Conventions of 1949* triggers the application of the Conventions in circumstances where two or more states are engaged in an armed conflict whether or not either or both states recognise that a state of war exists. There is no requirement for a formal declaration of war in order for the *Conventions* to apply. The wording of Article 2 was carefully selected to apply to all international armed conflicts, irrespective of formal declarations of war because prior to 1949 some states had refused to recognise the existence of a state of war on the

⁷¹⁶ Richard J Wilson, 'Children in Armed Conflict: The Detention of Children at Guantanamo Bay and The Trial for War Crimes by Military Commission of Omar Khadr a Child' *American University Washington College of Law research Paper N0: 2009-13* <<http://ssrn.com/abstract:1368323>>.

⁷¹⁷ Ibid.

⁷¹⁸ Ibid.

⁷¹⁹ *New York Times Digest* (12 January 2002): 'Defense Secretary Donald Rumsfeld called the prisoners "unlawful combatants", distinguishing them from prisoners of war. "Unlawful combatants do not have any rights under the Geneva Convention" Rumsfeld said'.

grounds that they contested the legitimacy of the enemy government.⁷²⁰ Similarly the disappearance of the government of a state does not entitle an invading state to ignore the application of the *Geneva Conventions*.⁷²¹

The USA and its allies had engaged in armed conflict on the sovereign soil of Afghanistan.⁷²² The USA had engaged in armed conflict with the military forces of the former government of Afghanistan, the Taliban. The military action in Afghanistan by the USA was directed towards arresting terrorists but the USA could not legally argue that they were excused from applying the *Geneva Conventions* on the grounds that they were merely engaged in a ‘police action’ because the words ‘armed conflict’ were expressly chosen to prevent a state taking this course.⁷²³

The government of the USA maintained that the prisoners held at Guantanamo Bay were ‘illegal combatants’ and are therefore not entitled to the protection of the *Geneva Conventions*.⁷²⁴ The legal position taken by the USA was pre 1949 *Geneva Conventions* and arguably pre 1907 Hague Conventions on the Laws and Customs of War.⁷²⁵ Following the World War II, the drafters of the 1949 *Geneva Conventions*, had two additional groups that they sought to protect under the *Third Geneva Conventions Relative to the Protection of Prisoner of War (Third Geneva Conventions)*, ‘partisans’, and ‘inhabitants of non occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading force’.⁷²⁶

It matters not whether the USA recognised the Taliban as the ‘official government’ of Afghanistan, it still had to respect the *Third Geneva Convention* with respect to members of its armed forces.⁷²⁷ The US government’s argument rested on sub-paragraph (b) of Article 4 of the *Third Geneva Convention* which requires such groups to wear a ‘fixed distinctive sign recognisable at a distance’. However, it is to be remembered that many of the ‘partisans’ who participated in the Second World War did not wear distinctive signs either. Further it must be

⁷²⁰ J S Pictet, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War*, International Committee of the Red Cross (1960) 19.

⁷²¹ *Ibid* 20.

⁷²² J Cerone, ‘Status of Detainees, International Armed Conflict and Their Protection in the Course of Criminal Proceedings’ (2002) <www.asil.org.insights/insight81.htm> 1.

⁷²³ Pictet, above n 7, 23. The USA had deployed its army, not its police force.

⁷²⁴ *New York Times Digest*, above n 6.

⁷²⁵ UN Secretary General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* UN Doc S/25705 & add I, para 51.

⁷²⁶ *Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949 75 UNTS 135 (entered into force 21 October 1950) (‘Third Geneva Convention’) arts 4(2) and (6).

⁷²⁷ *Ibid* art 4(3).

accepted that distinctive signs and uniforms are often a matter for the group concerned.⁷²⁸ Persons of another culture may view differently what others consider to be suitable military attire for a Western army. What is important is not the distinctive uniform, but whether one side of the conflict is able to recognise their enemy on the other side of the conflict.⁷²⁹ Clearly the fact that the USA (and her allies) successfully captured a large number of the enemy and sent them off the Guantanamo Bay is testimony to the fact that they had few identification problems of this kind.⁷³⁰ In any event the *Third Geneva Convention* expressly contemplates a situation where an enemy force may not wear a distinctive sign, yet the protection of this *Convention* is still afforded to the members of that force.⁷³¹

At the time this argument was being ventilated by the US government it was taking action in order to enforce its sovereign rights following the terrorist attacks of September, 11, 2001. There was no question that the perpetrators of these crimes should have been brought to justice.

Thousands of innocent human beings lost their lives as a result of these crimes. The question was whether international criminal law principles, such as the ‘presumption of innocence’,⁷³² the right not to be ‘arbitrarily detained without charge’⁷³³ and the right to a ‘fair and speedy trial’⁷³⁴ were to be subordinated to political need for retribution. The answer to this question was clear at the time because as Judge Antonio Cassese observed in the Tadic Jurisdictional Appeal:

A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman Law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.⁷³⁵

⁷²⁸ Pictet, above n 7, 52.

⁷²⁹ Ibid.

⁷³⁰ The emphasis on requiring soldiers to wear distinctive uniforms dates back to the American Civil War because it was the practice of the Confederate Army to disguise combatants as civilians that prompted General Halleck to write to Francis Lieber to seek legal advice on the issue. See discussion in Michael A Newton, ‘Modern Military Necessity: The Role and Relevance of Military Lawyers’ (2007) 12 *Rodger Williams University Law Review* 869, 874.

⁷³¹ Third Geneva Convention, art 4(6). Mass levies are given full protection yet they are not required to wear a distinctive sign.

⁷³² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), (‘ICCPR’) art 14; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 91 (entered into force 1 July 2002) (‘Rome Statute’) art 66.

⁷³³ ICCPR, art 9; Rome Statute, art 58.

⁷³⁴ ICCPR, art 14; Rome Statute, art 64.

⁷³⁵ *Prosecutor v Tadic*, Jurisdictional Appeal Decision, ICTY AC, Case No IT-94-I-AR72, (2 Oct 1995) para 97; see Louis Henkin, ‘Human Rights and State Sovereignty’ (1995) 25 *Georgia Journal of International and Comparative Law* 31, 32, 35.

As the detainees had been taken to Guantanamo Bay, they could no longer be a threat to the US, so they should have been afforded full *Geneva Convention* rights and privileges.⁷³⁶ The resolution of whether or not the detainees were entitled to these protections is not for the ‘executive’ of government to decree, but for the judiciary to decide. Until these issues are resolved detainees are entitled to be presumed a prisoner of war and entitled to *Convention* protection.⁷³⁷

No matter how narrowly or broadly one might read these international conventions, the right to be tried by a fair independent and impartial tribunal and to be afforded the procedural fairness rights associated therewith no longer depend on whether a country was party to the convention or whether ‘quaint’ exclusory provisions still apply. Such rights had been recognised by countries such as the USA for over 200 years. These rights are undoubtedly part of customary international law, and a fair and independent tribunal would not find otherwise.⁷³⁸ In this case the sovereign interest were illegally preferred over the human interest and as such constituted a fundamental breach of the state’s obligation to international civil society.

In this case global civil society as represented by international NGO’s such as Human Rights Watch and Amnesty International expressed such strident opposition to the way the government of the USA was handling these cases and particularly following the US Supreme Court’s decision in *Hamdan v Rumsfeld*⁷³⁹ the US government was eventually forced to accept the binding nature of the *Geneva Conventions*. However this did not occur until after the detainees had been illegally incarcerated for a

⁷³⁶ *Convention Relative to Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949 75 UNTS 287 (entered into force 21 October 1950) (‘Fourth Geneva Convention’) art 5(3).

⁷³⁷ Third Geneva Convention, art 5 expressly provides that persons who fall into the hands of the enemy are entitled to the protection of the Convention until their release and more importantly: ‘Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal’; *Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977 1125 UNTS 3 (entered into force 7 December 1978) (‘Additional Protocol I’) art 45(1) is even more explicit on the point, it provides that: ‘A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war... Should any doubt arise as to whether any such person is entitled to the status of prisoner of war... Should any doubt arise as to whether any such person is entitled to the status of prisoner of war... until such time as his status has been determined by a competent tribunal’.

⁷³⁸ The right to a fair trial and express procedural fairness provisions are not only deeply entrenched in the Laws of War, but are recognised throughout the world including the United States. Further, article 14 of the ICCPR guarantees the right to a fair trial and other procedural fairness provisions.

⁷³⁹ *Hamdan v Rumsfeld* 584 US 1 (2006).

very long period of time. Again this is not an isolated incident. There are many example of where states have deliberately ignored binding international instruments such as the *Geneva Conventions*.

While international supervision of state enforcement of international criminal law is necessary, the idea of international tribunals assuming full prosecutorial responsibility is impractical. This inability of international tribunals to accept the full prosecution responsibility is recognised in most international instruments dealing with international criminal law including the *Genocide Convention* and the *Rome Statute of the International Criminal Court*.⁷⁴⁰ The important elements contained in these (and other) Conventions are the fair trial guarantees. When enemy combatants and even non-combatants aligned to the other side of a conflict fall into the hands of a victorious power, these Conventions prescribe how those individuals should be dealt with in order to provide them with at least minimum fair trial guarantees. What states often try to do with prisoners of war or enemy non-combatants is to deny them these rights and subject them to ‘executive style’ trials where procedural rights are denied and where convictions are assured. These ‘executive style’ trials are often by way of military commissions.

5.2 *Military Commissions*

The use by states of military commissions to adjudicate upon breaches of international criminal law is not new, nor is their use in decline.⁷⁴¹ The problem with a military commission is that they are generally not part of the regular judicial system of a country and can be directly influenced by the executive of government. By removing them from the independence assured by the ‘separation of powers doctrine’, military commissions are susceptible to political manipulation. The history of military commissions in terms of their ability to provide defendants with a ‘fair and regular’ trial is not good.

Ideally the enforcement of international criminal law by individual states should be encouraged because international criminal tribunals cannot take on the whole prosecutorial burden when international crimes of great magnitude are committed. However there must be a genuine co-operative arrangement with the international community because if not then delinquent states are often inclined to improperly manipulate the process

⁷⁴⁰ Principle of Complementarity – Preamble to the Rome Statute; Fourth Geneva Convention art 146.

⁷⁴¹ A Hegarty, ‘Truth, Law and Official Denial’ in W A Schabas and S Darcy (eds), *Truth Commissions and Courts* (2004) 210.

to suit their own political ends.⁷⁴² Even if the international community tries to prevent this from happening, these delinquent states often claim that they are entitled to exercise exclusive jurisdiction because of the sovereignty principle. In these cases states abuse the criminal justice process to avenge their enemies and at the same time seek to shield the perpetrators of international crimes committed on their behalf from being dealt with according to the criminal law.⁷⁴³

So what is argued in the thesis is that states (at times) manipulate the prosecution of alleged breaches of the Laws of War, they deprive accused persons of their ‘fundamental due process’ rights,⁷⁴⁴ and they achieve this by the use of politically ‘rigged’ military commissions which ensure convictions at the expense of providing the accused with a ‘fair trial’.⁷⁴⁵ As noted this is not a new phenomenon, it is not specific to any particular country or form of government. While there are many instances of this abuse of due process, an in-depth analysis of the specific examples mentioned below is offered to illustrate why states cannot be trusted to impartially enforce international criminal law in every case. The first example analysed is the immediate post-World War II Australian – Japanese war crimes trials; this is followed by the USA trials during and immediately following World War II; and the most modern example is that already mentioned, namely, the US military commission process at Guantanamo Bay, Cuba.

The motivational basis for the creation of these military commissions is often expediency or revenge and generally follows an armed attack or prolonged conflict.⁷⁴⁶ The legal foundation for these military commissions is loosely based on the sovereignty principle that enables a belligerent state to punish enemy war criminals that fall into their hands following an armed conflict.⁷⁴⁷ This principle can be abused when states employ military commissions to adjudicate on these crimes. Typically states attempt to restrict access to their civilian courts because the executive of government fear that the judicially assured fair trial provisions might impede securing a ‘conviction’. In these circumstances

⁷⁴² Ibid.

⁷⁴³ *Contra* Hegarty, above n 28, 220.

⁷⁴⁴ It is not limited to international criminal law, as states deprive their citizens of ‘due process rights’ in other areas of law enforcement such as terrorism law. See, eg the use of ‘control orders’ discussed in Greg Carne, ‘Prevent, Detain, Control and Orders?: Legislative Process and Executive Outcomes in Enacting the Anti-Terrorism Act (No 2) 2005 (Cth)’ (2007) 10 *Flinders Journal of Law Reform* 1, 17.

⁷⁴⁵ Wilson, above n 3, 6.

⁷⁴⁶ Hegarty, above n 28, 220.

⁷⁴⁷ See *Ex parte Quirin* 317 US 1 (1942) and the *Application of Yamashita* 327 US 1 (1946). See also *Draft opening speech by Chief prosecutor for France – Nuremberg - Jurisdiction*, National Archives of Australia (NAA) M1417.

the process amounts to trial by the executive where procedural rights to the accused are either non-existent or significantly curtailed.

Of course states are quite capable of providing a fair and just trial process for the domestic prosecution of war criminals if they have the political will to do so. There are a few instances where states have not abused the process, they have voluntarily sought to discharge their international responsibilities to bring offenders to justice and have made a genuine attempt to dispense justice correctly by applying international fair trial principles in exercise of universal jurisdiction.⁷⁴⁸ These cases demonstrate that international criminal law can be effectively enforced by states if they choose to do so. Generally these ‘fair’ trials take place before the regular civilian courts of the state rather than military commissions. Accordingly it is not argued (nor is it practical) for states to be excluded from the process altogether. States can effectively enforce international criminal law if they want to, international criminal tribunals cannot prosecute all of the cases and having a properly balanced approach to enforcing international criminal law is most desirable.

5.2.1 The Australian Trials – Post World War II – Australian Military Commissions

Following World War II Australia embarked upon a major program of prosecuting Japanese war criminals that had been captured as ‘prisoners of war’ during or immediately after the Pacific War.⁷⁴⁹ In a number of cases the investigation had commenced during the course of the war.⁷⁵⁰ A post war Australian War Crimes Military Commission was established to investigate war crimes committed by Japanese soldiers.⁷⁵¹ The head of the

⁷⁴⁸ *Polyukhovic v Cth* (1991) 172 CLR 501; *R v Finta* (1994) 104 ILR 284.

⁷⁴⁹ Detailed academic study of these trials has only occurred recently. The first PhD dissertation written on the topic was by Caroline Pappas, titled ‘Law and Politics: Australia’s War Crimes Trials in the Pacific, 1943 – 1961’, PhD Thesis (University of New South Wales, 1998). At the same time as this thesis was being researched, Michael Carrel was writing his PhD Thesis titled ‘Australia’s Prosecution of Japanese War Criminals: Stimuli and Constraints’ PhD Thesis (University of Melbourne 2006).

⁷⁵⁰ In 1944 the Australian Defence Forces (‘ADF’) issued instructions on what to do with war refugees who had escaped from Japanese held territory and landed in Australian held territory. The interrogation of these people was to include (not only) ‘an attempt to obtain intelligence information about the location of the enemy but also details of any war crimes or atrocities that had been committed by the Japanese’. National Archives of Australia (NAA - A1066).

⁷⁵¹ Allies agreed on a protocol which determined who would be prosecuted and by which state. Those suspected of committing war crimes against Australia were category ‘a’; war crimes against both Australian and Allied nationals were category ‘b’; war crimes wholly against Allied nationals were category ‘c’. Generally category ‘c’ offences were not tried by Australian military commissions. These prisoners were handed over to the country concerned. (Australian War Memorial record referred to as ‘AWM’) AWM54-1010/1/2.

Commission was Justice W F Webb (prior to him being appointed to the International Military tribunal for the Far East (IMTFE)).⁷⁵²

One of the first major reports of the Commission to be made public concerned the slave employment of Allied prisoners of war by the Japanese on the Siam - Burma Railway. The Commission's Report stated that some 20,000 prisoners of war – British, American, New Zealand, Australian and others captured at Singapore were sent to work on the railway. Conditions for the Allied prisoners of war were 'barbarous and contrary to the laws and customs of war'.⁷⁵³ The Australian media widely reported these atrocities which stirred up public outrage towards the Japanese.⁷⁵⁴

Other investigations undertaken by the Commission uncovered hideous war crimes including allegations of 'beheading of captured Australian and Allied airmen',⁷⁵⁵ other instances of mistreatment and killing of prisoners of war;⁷⁵⁶ cannibalism;⁷⁵⁷ murder and mistreatment of Australian nurses;⁷⁵⁸ forced labour;⁷⁵⁹ and barbaric mistreatment of civilians.⁷⁶⁰

⁷⁵² M Carrel, 'Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints' PhD thesis (University of Melbourne 2006) 45-52; Webb wrote three reports dated 15 March 1944; 31 October 1944 and 31 January 1946 (AWM 54-1010/1/2).

⁷⁵³ AWM 54-1010/3/10 Pt 1.

⁷⁵⁴ Carrel, above n 39, 124-125.

⁷⁵⁵ AWM 54-1010/9/8 Report concerning crash of Australian military aircraft. Japanese captured four allied airmen and then beheaded them; AWM 54-1010/9/6 Report of war crimes. Five RAAF airmen were tied to a tree, Japanese local commander then ordered a young 23 year old Japanese soldier, inexperienced in killing, to kill the airmen by stabbing them with his bayonet; AWM 54-1010/9/16 Report relating to the execution of two American airmen who were beheaded with a sword at Bougainville and then eaten by the Japanese soldiers; AWM 54-1010/1/37 Report of an Australian Flying Boat Crew captured by the Japanese during the Battle of the Coral Sea - Nine crew were reported missing.

⁷⁵⁶ AWM 54-1010/9/67 Report concerning execution of Australian prisoners of war at East Timor including forced labour; AWM 54-1010/6/10 Report concerning murder of Australian POWs; AWM 54-1010/9/113 Report of murder and ill treatment of Australian and Dutch POWs at Ambon. Beatings were common place.

⁷⁵⁷ AWM 54-1010/9/94 Report relating to cannibalism committed by the Japanese military.

⁷⁵⁸ AWM 54-1010/6/128 Report concerning atrocities committed by Japanese Infantry – murder and maltreatment of Australian nurses on Banka Island.

⁷⁵⁹ AWM 54-1010/9/77 Report 10 January 1946 – Malays used for forced labour.

⁷⁶⁰ AWM 54-1010/6/102 Report of Japanese beating their victims with cane. Some were jabbed in the face with lighted mosquito coils and burning cigarettes; AWM 54-1010/3/91 Report 13 May 1946 relates to the murder of 15 Indians; AWM 54-1010/6/78 Report where victim tied to a tree for three days without food or water in extreme heat - the victim died; AWM 54 - 1010/6/92 Report for causing grievous bodily harm contrary to the laws and usages of war; AWM 54-1010/9/14 Report of Catholic Marist missionaries at Bougainville - never heard from again; AWM 54-1010/9/27 Report concerning treatment of indigenous persons accused of spying on the Japanese at New Ireland. Captured spies were executed without trial; AWM 54-1010/9/65 Report on Bali Island where 300 Europeans were taken by the Japanese. Atrocities reported included crimes where the victims were strung up by their thumbs; where they poured boiling water over the prisoners. In one case they forced a prisoner to drink large quantities of water, they then forced the prisoner to lie down on his back, they placed a board across his stomach and played 'see-saw' on his bloated stomach.

Influenced by the public demand for Japanese war criminals to be punished, the Australian government threw itself into these prosecutions without giving adequate consideration to the resource implications of such a massive and complex undertaking.⁷⁶¹ When the Japanese surrendered the Australian Military Forces (AMF) found itself responsible for vast areas of South East Asia and the South Pacific. Fragments of the Japanese army were captured throughout the region. Carrel notes that it is estimated that Australia found itself responsible for some 344,000 Japanese, of which 1,326 were suspected war criminals.⁷⁶² Initially, investigations and trials were to be carried out ‘*in situ*’. However in time the number of suspected Japanese war criminals increased to the point that the facilities available to conduct these trials became stretched. In one case the Australian command in Timor (1946), telegraphed Melbourne and reported that they lacked adequate staff to deal with trials in Timor. They were acutely short of Japanese to English interpreters.⁷⁶³ Similarly there were complaints by military defence counsel that there were not enough Australian defence lawyers to conduct the trials.⁷⁶⁴

One of the major faults of these trials was the speed with which they were conducted.⁷⁶⁵ Having regard to the seriousness of the charges and the penalties imposed it is hard to imagine how the accused could have a fair trial under these conditions.⁷⁶⁶ Mass trials were carried out in circumstances where the defence were not given an adequate opportunity to prepare.

The pressure to process such a large number of trials under difficult circumstances made the provision of fair and just proceedings almost impossible, irrespective of the best intentions of the court officials. This

⁷⁶¹ M Cherif Bassiouni, *Introduction to International Criminal Law* (2003) 419, fn 125. Although a comparatively small country out of the eight countries that conducted these prosecutions (Australia, China, France, Netherlands, Philippines, UK, USA and Canada), Australia recorded the third highest number of convictions after USA and Netherlands.

⁷⁶² Carrel, above n 39, 132.

⁷⁶³ AWM 45-1010/1/37.

⁷⁶⁴ AWM 54-1010/1/38.

⁷⁶⁵ Mangan, Sagejima ‘Proceedings of an Australian Military Court War Crimes Trial’ 1992 Silverdale NSW James McClelland Research.P6-12 Whole of prosecution case dependant on Affidavits produced. No other evidence called, this evidence includes ID evidence. Prosecution then close and defence call their evidence.

⁷⁶⁶ Another example of mass trials carried on with undue haste before military commissions was the Dakota Trials of 1862 in the USA where some 392 charges were brought against the Sioux Indians. As many as 42 Sioux were tried on the same day, some trials lasting for only five minutes. Many of the accused were sentenced to death. See Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (2005) 52.

difficulty was compounded by the fact that the *War Crimes Act 1945* was bereft of any fair trial guarantees for an accused. Even allowing for the state of the law at the time as it pertained to the rights of an accused, this was a draconian piece of legislation. The Act did not provide such basic rights as the ‘presumption of innocence’ or that guilt of an accused must be proved beyond reasonable doubt or that all participants before the tribunal were entitled to be treated equally; there was no prohibition of ‘double jeopardy’; there was no right to a fair and public hearing; there was no requirement that presiding officers had to be legally qualified; accused were not guaranteed the right to be represented by counsel; there was no provision for discovery to the defence before trial of prosecution evidence; there was no provision to allow the defence adequate time to prepare for trial; there was no right for an accused to have an interpreter; there was no right of an accused to demand that witnesses against him be called or to cross examine such witnesses; there was no right of an accused to have witnesses called to give evidence on behalf of the defence; there was no right to a speedy trial; there was no prohibition on an accused being compelled to testify against himself or to confess his guilt; there was no right for an accused to be informed promptly and in a language which he understands of the nature and the cause of the charge against him; there was no provision for *habeas corpus* or entitlement to bail or provisional release before trial nor any limitation on how long and under what conditions a person could be held before being formerly charged or before trial and there was no right of appeal.⁷⁶⁷ All of this pertained in circumstances where the death penalty could be (and was) imposed.

A particularly pernicious provision of the *War Crimes Act 1945* was the Section concerning the admission of evidence. Section 9 allowed the military court to admit any ‘oral statement or document which appears to the court to be of assistance in proving or disproving the charge...’. While the reception of hearsay evidence before tribunals of this kind may not be unique, it becomes particularly problematic, if the presiding officers are not legally qualified or if there is no right for an accused to face his accusers and to cross examine witnesses against him. In these circumstances highly prejudicial evidence of slight probative value can be used as the basis for a conviction which carries the death penalty. For

⁷⁶⁷ *Regulations for the Trial of War Criminals – Statutory Rules 1945*, No 164, made under the *War Crimes Act 1945* on 25 October 1945, published in the Commonwealth Government Gazette of 26 October 1945 (‘Regulations for the Trial of War Criminals’). Regulation 17 did however provide that an accused could petition the confirming officer against any finding or sentence. Carrel notes that the confirming officer Lt Gen Sturdee acted in a fair and considered way (Carrel, above n 39, 98) but the Act or Regulations provided no guidance on how he should discharge his responsibilities and his review of the cases could not be compared to the ordinary civilian appellate process.

example an investigating officer could testify that a person, possibly an accomplice, told him that the accused committed the crime. The first hand witness is not called or cross examined. The investigator may be quite veridical but the informant may well have good reason to falsely implicate the accused in a crime that the accused did not commit. This vital information about the first hand witness's motives for implicating the accused never comes before the court.

The Act also contained a provision,⁷⁶⁸ to the effect that 'where there was evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, evidence given upon any charge relating to that crime against any member of the ... group may be received as evidence of the responsibility of each member of the group for that crime'. This provision made no distinction for the different levels of responsibility for different members within the group. Hence the same degree of responsibility for the crime could be sheeted home to the lowest ranking foot soldier within the group notwithstanding an order being given to him at the time by his commanding officer who may not be facing charges before the court.

This provision was gratuitously extended by the Regulations to preclude an application by an accused for a separate trial, irrespective of the merits of any such application.⁷⁶⁹ In one case the group in question contained 91 accused. While joining this many accused together in the one trial may have suited the military prosecutor and court it is difficult to see how the accused persons could have possibly received a 'fair trial' under these conditions.⁷⁷⁰

Many of the trials were conducted by Australian Military Forces (AMF) prosecutors where the accused were defended by AMF defence counsel before AMF judges. All of this took place very shortly after one of the most desperate and bloody conflict that the AMF had ever been involved with. The shocking war crimes allegedly committed by the Japanese where against members of the AMF and amounted to the worst crimes ever encountered by the AMF. No matter how much the AMF may have tried to be impartial in dealing with these cases, there was no way that it could ever demonstrate the appearance of impartiality. The need to avoid this conflict of interest was as obvious then as it is now,⁷⁷¹ but the AMF

⁷⁶⁸ *War Crimes Act 1945*, s 9(2).

⁷⁶⁹ Regulation for the Trial of War Criminals, above n 54, reg 12.

⁷⁷⁰ Carrel refers to a trial conducted on the island of Ambon involving 91 accused. See Carrel, above n 39, 167.

⁷⁷¹ Carrel notes that Webb pressed unsuccessfully for civilian oversight of the war crimes programme. See Carrel, above n 39, 147.

insisted in running the prosecutions and the government was content to allow this to happen.

The use of these military tribunals by the Australian governments was a means to an end and whether intended or not was an abuse of the criminal justice system, as Carrel observes:

Military tribunals simply do not provide the checks and balances that are fundamental to the provision of justice in any truly democratic system of Government. Military tribunals are contrived as an arm of the Executive designed to define the crimes, prosecute people, adjudicate guilt and dispense punishment.⁷⁷²

5.2.2 USA Use of Military Commissions in the 20th and 21st Centuries

(a) Nazi Saboteurs Military Commission

The use of military commissions in the USA has a long history which they inherited from the British.⁷⁷³ Military Commissioners were used during the 19th century in the USA but this was at a time when international humanitarian law was in its infancy and their use may not have offended international law in the same way as it does today. However by 1907 it was contrary to the Laws and Customs of War to confine prisoners of war unnecessarily and there was a positive duty to treat them ‘humanely’.⁷⁷⁴ Even spies could not be punished without first being tried.⁷⁷⁵ Accordingly, by the time of World War II, states had a positive obligation to treat prisoners of war and spies humanely, which included the right to a fair trial.

In June 1942 (after the USA entered the war) eight German Marines secretly entered the US in order to blow up various US Military installations. One of the saboteurs defected and informed the Federal Bureau of Investigation of the whereabouts of the other seven Nazi Marines. All were subsequently arrested. The US President in his capacity as Commander in Chief of the Army and Navy, by Order of 2 July 1942 appointed a Military Commission to try the saboteurs for war crimes. Although they were in fact spies and should have been treated as such, the US argued that they did not fall under the definition of ‘spy’ in the Laws and Customs of War because they were found on mainland USA which was not the ‘zone of operations’ of the war.⁷⁷⁶

⁷⁷² Carrel, above n 39, 256.

⁷⁷³ Fisher, above n 53, 2.

⁷⁷⁴ 1907 Hague Convention IV – Laws and Customs of War, arts 4, 5.

⁷⁷⁵ 1907 Hague Convention IV – Laws and Customs of War, art 30.

⁷⁷⁶ Art 29 of the Regulations of the Laws and Customs of War annexed to the Hague Convention of 1907 applies to spies acting clandestinely in the zone of operation. This point was pressed by the

The Presidential Order prescribed regulations which determined that ‘access to civilian trial by jury with its attendant procedural guarantees and appeal rights would have no application to these unlawful belligerents.’⁷⁷⁷ Fisher argues that the choice of a military commission over a civilian trial was ‘political’ – because the FBI Director J. Edgar Hoover wanted a secret trial so it would not be known that the speed with which the saboteurs were arrested was not because of superior FBI investigative techniques but because one of the saboteurs had turned ‘states evidence’.⁷⁷⁸ Fisher notes that another factor influencing the selection of a military commission was that US Attorney-General (Biddle) did not think he could get a conviction before a civilian court.⁷⁷⁹ In any event a civilian court could only impose a 2 year sentence on the conspiracy charge whereas the government wanted the death penalty.⁷⁸⁰ Military court-martial was not an option either because being designed for US military personnel, it afforded too many procedural rights similar to that available before a civilian criminal court in the United States.⁷⁸¹

The military commission established by the President had the power to determine its own rules of procedure and evidence and did not require an Act of Congress in order to be created.⁷⁸² President Roosevelt directed that the judgement and sentence of the military commission be ‘directed to him’, thus avoiding any appellate review.⁷⁸³

The saboteurs sought writs of *habeas corpus* and the matter came before the US Supreme Court for final determination in *Ex parte Quirin*.⁷⁸⁴ Chief Justice Stone delivered the opinion of the Court.⁷⁸⁵ The Court held that they were ‘unlawful combatants and as such were denied the usual rights applicable to lawful combatants taken as prisoners of war’.⁷⁸⁶ Considerable emphasis was placed on the fact that the defendants had removed their military uniforms and had entered the US disguised as ordinary citizens in order to perform their illegal acts. The Court

defence in the Nazi saboteurs case but the US Attorney-General (contradicting an earlier opinion) said that this was not how the regulation was to be interpreted. See Fisher, above n 53, 89.

⁷⁷⁷ Fisher, above n 53, 98.

⁷⁷⁸ Ibid 95.

⁷⁷⁹ Ibid.

⁷⁸⁰ Ibid 96, 97.

⁷⁸¹ Ibid 97.

⁷⁸² Ibid 100.

⁷⁸³ Ibid.

⁷⁸⁴ *Ex parte Quirin* 317 US 1 (1942).

⁷⁸⁵ The Court delivered a ‘quick per curiam decision’ in order to let the military commission get on with its work. The problem with this is that the court subsequently had a hard time justifying its reasoned decision; see Fisher, above n 53, 113 and following.

⁷⁸⁶ Fisher, above n 53, 117.

concluded that the acts were in breach of the Laws and Customs of War. Importantly the Court ruled that the President had the Constitutional authority to create this Military Commission because of his position as Commander-in-Chief of the Armed Forces. It was perhaps because the USA was in the middle of the war that little attention was paid to the fact that these accused were hastily tried before a military commission which was secretly housed in the Department of Justice Building in Washington.⁷⁸⁷ The usual rules of evidence were suspended and as noted, no provision was made for appellate review.⁷⁸⁸ Six of the eight accused were sentenced to death and electrocuted in a Washington D.C. jail on 8 August 1942. The other two were sentenced to life imprisonment but released after the war.⁷⁸⁹ The whole process from arrest to execution took a total of 46 days. In Fisher's view, the reluctance of the Supreme Court to invalidate the process reflected an unwillingness to interfere with the government's efforts in prosecuting the war.⁷⁹⁰ Fisher explains, '.....it was a matter of policy, if a message had to be sent to America's enemies that 'would be' saboteurs would receive harsh summary punishment, then the US Supreme Court was not about to interfere with this objective'.⁷⁹¹

Fisher describes the saboteurs case as an 'unwise and ill-conceived concentration of power in the executive branch (of government)...'.⁷⁹² He noted that the Military Commission judges, the prosecution and the defence counsel were all subordinates of the President and subject to his orders. Neither the legislature (Congress) or the judiciary (civilian courts) had any role in determining the guilt or innocence of the accused.⁷⁹³

(b) Yamashita Military Commission

After World War II, General Tomoyuki Yamashita was prosecuted for war crimes before a US Military Commission.⁷⁹⁴ It has been suggested that the use of a military commission in this instance was 'revenge' because General Douglas MacArthur had embarrassingly suffered defeat at the hands of Japanese in the Philippines during the early part of the

⁷⁸⁷ Ibid 101.

⁷⁸⁸ Ibid 119.

⁷⁸⁹ Ibid 114.

⁷⁹⁰ There were some serious problems with the impartiality of the justices of the Supreme Court in the *Quirin* Case. Chief Justice Stone's son was on the defence team and Justice Frankfurter had numerous conversations with government officials, including the President, about the case prior to the hearing. See Fisher, above n 53, 108, 116.

⁷⁹¹ Justice Murphy recused himself because he was an officer in the military reserve, see Fisher, above n 53, 107; see also *Ex parte Quirin* 317 US 1 (1942) 1.

⁷⁹² Fisher, above n 53, 124.

⁷⁹³ Ibid 125.

⁷⁹⁴ Ibid 144.

war, so that when Yamashita surrendered to the victorious MacArthur his conviction and execution was not going to be risked on the uncertain outcome of a trial before the International Military Tribunal for the Far East in Tokyo.⁷⁹⁵ Once again the preferred option was the military commission, where the outcome of the trial could be assured.

The centrepiece of MacArthur's directive establishing Yamashita's Military Commission was the removal of any fair trial guarantees associated with the reception of evidence. Any relevant material could go before the Military Commission provided they considered it to be of 'assistance'.⁷⁹⁶ This directive ensured that the Military Commission was a 'law unto itself'.⁷⁹⁷

Yamashita was imprisoned in Philippines and came under the authority of USA pursuant to the Allied agreement. The trial of Yamashita took place in the ballroom of the US High Commission in Manila.⁷⁹⁸ The trial commenced on 8 October 1945. MacArthur had the final say on what charges Yamashita was to face.⁷⁹⁹ He was charged with 'unlawfully disregarding his duty as a commander by failing to control the operations of his command, thus permitting them to commit atrocities'.⁸⁰⁰ Six US army officers were assigned as his defence counsel.⁸⁰¹ They were only given three weeks to prepare the defence case which meant they had to locate and interview all their witnesses as well as prepare to meet some 123 charges brought against Yamashita.⁸⁰²

Over the course of the trial the Military Commission heard 286 witnesses, read 423 exhibits and created over 4055 pages of transcript. The war crimes alleged were widespread acts of murder and rape. A feature of the defence case was that Yamashita could not have properly supervised his troops because the constant bombardment by the Americans had made his

⁷⁹⁵ In the *Order of General Douglas MacArthur Confirming Death Sentence of General Tomoyuki Yamashita* (6 February 1946) MacArthur notes 'It is appropriate here to recall that the accused was fully forewarned as to the personal consequences of such atrocities. On October 24 – four days following the landing of our forces in Layte - it was publicly proclaimed that I would "hold the Japanese military authorities in the Philippines immediately liable for any harm which may result from the failure to accord prisoners of war, civilian internees or civilian non-combatants the proper treatment and protection to which they of right are entitled"'. *The Laws of War War Crimes Trials* page 1599; Bassiouni, above n 48, 420.

⁷⁹⁶ In his dissenting judgment in *Application of Yamashita* 327 US 1 (1946) at 50, Justice Rutledge said 'Every conceivable kind of statement, rumor, report, at first, second, third or further handwritten, printed or oral, and one "propaganda" film were allowed to come in...'.
⁷⁹⁷ *Application of Yamishita* 327 US 1 (1946) as per Justice Rutledge.

⁷⁹⁸ Richard Lael, *The Yamashita Precedent – War Crimes and Command Responsibility* (1982) 79.

⁷⁹⁹ Fisher, above n 53, 144.

⁸⁰⁰ Lael, above n 85, 80.

⁸⁰¹ Ibid 81.

⁸⁰² Fisher, above n 53, 145.

job so difficult that he spent all his time and energy trying to defend his military position.⁸⁰³ The defence emphasised the fact that Yamashita had not been charged with having ‘done something or omitted to do something but with having *been* something’.⁸⁰⁴ The prosecution countered that it did not have to prove whether or not Yamashita gave the order because their case rested on the principle that he should have known what his troops were doing and done something about it.⁸⁰⁵ On this principle, Yamashita was held liable for the crimes of his troops notwithstanding that it was clearly proved that he had no knowledge of the fact that they were committing such crimes.⁸⁰⁶

On an Application to the US Supreme Court for a writ of *habeas corpus* the majority held that the exercise of jurisdiction by the military tribunal was a valid exercise of power by the Executive. In these circumstances the majority were not prepared to go beyond the jurisdictional point and examine the merits of the case.⁸⁰⁷ The majority felt bound by what they had determined in *Ex parte Quirin*.⁸⁰⁸ Nevertheless the majority were not prepared to endorse the findings of the military commission based on the evidence that it had relied upon in order to reach its decision, the majority noted ‘[n]othing we have said is to be taken as indicating any opinion on the question of the wisdom of considering such evidence...’.⁸⁰⁹

What is more important about this case is not what is said by the majority but what was said by the dissenting Judges, Murphy and Rutledge. Justice Murphy held that:

[T]he military commission had disregarded ‘due process’ as guaranteed by the Fifth Amendment, which did not only belong to the ‘victors’ alone but to the ‘vanquished’ as well.⁸¹⁰ Because the war was over, no military necessity or other emergency demanded suspension of the safeguards of due process. Yet the petitioner was rushed

⁸⁰³ Part of the prosecution case against Yamashita included reference to an alleged order by Yamashita to a General Ricarte (a Filipino ‘quisling’ General), to wipe out the Philippine population. However this evidence was hearsay evidence given by Ricarte’s private secretary Narciso Lapus. Lapus proved to be an unreliable witness who admitted under cross examination that he did not actually hear Yamashita give Ricarte the order, but relied upon a conversation he had with Ricarte later. Another witness, Galang, claimed to have heard the so called Yamashita – Ricarte conversation but his credibility was so thoroughly undermined by the defence that it was not even accepted by the military commission as reliable. Lael, above n 85, 84. However this evidence when coupled with the sheer magnitude of the war crimes that had been perpetrated by the Japanese against the Philippine population probably influenced their decision.

⁸⁰⁴ Lael, above n 85, 82.

⁸⁰⁵ Fisher, above n 53, 145.

⁸⁰⁶ Lael, above n 85, 86.

⁸⁰⁷ AWM 54-1010/7/4.

⁸⁰⁸ *Ex parte Quirin* 317 US 1 63 (1942) referred to with approval by the majority in *Application of Yamashita* 327 US 1 1946 at 7 by Chief Justice Stone who delivered the majority decision on behalf of the Court.

⁸⁰⁹ *Yamashita*, above n 95, 23 per Chief Justice Stone.

⁸¹⁰ *Ibid* 27 per Justice Murphy.

to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged.... He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes were attributed to him.... The recorded annals of warfare and the established principles of international law, afford not the slightest precedent for such a charge.⁸¹¹

Justice Rutledge said that ‘[t]he proceedings in this case veer so far from some of our time tested road signs that I cannot take the large strides validating them would demand’.⁸¹²

An interesting point considered by the Supreme Court in *Yamashita* was how they dealt with Article 63 of the Geneva Convention 1929 pertaining to Prisoners of War. Article 63 provided that a prisoner of war must be tried by the same courts and procedures as applies to the armed forces of the detaining power. The majority found that this only applied to offences committed by prisoners of war after they had been detained.⁸¹³ Justice Rutledge argued that majority view could not be correct because this would allow the enemy to treat US forces held as POWs in anyway that they sought fit, thus depriving the Convention of most of its useful purpose so far as this matter was concerned.⁸¹⁴ This ambiguity was removed when the 1949 Geneva Conventions were drafted.⁸¹⁵

The problem with using military commissions in this way is that they are usually short sighted ‘quick fixes’ which often create problems in the long term. The *Yamashita* case has now been long criticised as a dark moment in US military jurisprudence.⁸¹⁶ The principles established by the case were resoundingly dismissed as inappropriate and not followed by subsequent international tribunals.⁸¹⁷ Interestingly this outcome was foreseen at the time, as Justice Murphy remarked in *Yamashita*, in relation to the inadequate due process provisions of the military commission:

[S]uch a procedure is unworthy of the traditions of our people.... The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the

⁸¹¹ Ibid 28 per Justice Murphy.

⁸¹² Ibid 43 per Justice Rutledge.

⁸¹³ Ibid 21 per Chief Justice Stone.

⁸¹⁴ Ibid 75.

⁸¹⁵ Article 85 of the *Third Geneva Convention Relative to the Treatment of Prisoners of War* See discussed in Pictet’s *Commentary on the Third Convention* at page 413; Pictet *Commentary III Geneva Convention –Relative to the treatment of Prisoners of War* Geneva ICRC 1960

⁸¹⁵ Louis Fisher *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* 2005 (University Press – Kansas) p 150; Bassiouni, above n 48, 298.

⁸¹⁶ Fisher, above n 53, 150; Bassiouni, above n 48, 298.

⁸¹⁷ *USA v Wilhelm von Leeb et al* “High Command Case” Vol XI, TWC, 462; *Prosecutor v Delalic* “Celibici” Judgement of Trial Chamber 16 Nov 1998 IT-96-21-T p 143.

realization of the boundless and dangerous implications of the procedure sanctioned today... To subject an enemy belligerent to an unfair trial, to charge him with an unrecognised crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.⁸¹⁸

Justice Murphy acknowledged the enormous brutality and atrocities inflicted upon innocent civilians by the Japanese but said of such horrific crimes that they ‘do not justify the abandonment of our devotion to justice in dealing with a fallen enemy commander. To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals’.⁸¹⁹

Sadly, as history so often demonstrates, the prophetic warnings of wise men such as Justice Murphy fall on deaf ears, because some 56 years later when the tragic events of September 11, 2001 unfolded, the USA government was to respond in exactly the same way.

(c) Guantanamo Bay Military Commission

As was the case in the immediate aftermath of World War II, the terrorist bombings in New York and Washington D.C. on September 11, 2001 triggered a reaction to hunt down the culprits and ‘deal’ with them as expeditiously. If this required abandoning procedural fairness guarantees in order to quickly rid the world of terrorism, then this was deemed a ‘small price to pay’. Scant regard was paid to the fact that the right to procedural fairness, incorporated into law at both the national and international level, had been greatly improved during the intervening period. Few paid any attention to the fact that it had taken centuries to develop these essential guarantees. Even fewer failed to articulate that this draconian response would not rid the world of terrorism but it would certainly damage the international criminal justice system.

A common feature of states attempting to rely on sovereignty in order to avoid the fair trial requirements of humanitarian law is for them to (try to) put the process outside of the reach of their domestic civilian courts. This can be done by ‘creating jurisdiction ousting’ provisions to prevent civilian courts from reviewing the matter or simply locating the trials at a venue which is inaccessible. In all the cases discussed above, the relevant players have in various ways employed this *modus operandi*. The response to September 11 2001, was no different. The government of the

⁸¹⁸ *Yamishita*, above n 95, 28.

⁸¹⁹ *Ibid* 29.

United States, relying on the precedents of *Ex parte Quirin*⁸²⁰ and *Yamashita*⁸²¹ quickly set up a ‘terrorist’ detention centre on land that the US had leased for a naval base from the Cuban government at Guantanamo Bay, Cuba. Persons captured and placed in this detention centre would be dealt with by military commission.

Another largely unresolved issue for the USA government in responding to September 11, 2001, was that the *Ex parte Quirin*⁸²² precedent, that supposedly gave the President authority to establish military commissions pursuant to his position as Commander-in-Chief of the armed forces. However *Ex parte Quirin*⁸²³ dealt with the use of that power during the course of an armed conflict. While the USA was at war in Afghanistan many of the terrorists targeted following September 11, 2001 were non-state actors and their conduct did not arise during the course of an armed conflict. In an effort to address this issue the USA President George W. Bush used the guise of declaring that the US was waging a ‘war on terrorism’.⁸²⁴ However this does not make it a war so far as the Laws and Customs of War are concerned.

The USA then set about arresting and detaining a large number of alleged ‘terrorists’.⁸²⁵ It has been alleged that many of these detainees had been tortured by the US or by others on behalf of the US at various locations. Most of the suspects were not charged with any criminal offence.

The illegality of the process when progressively ruled on by the USA civil courts has meant that the whole Guantanamo process had to be continually modified in an attempt to cover over the breaches of international humanitarian law that they offend. Originally the Guantanamo Bay military commission process comprised of three limbs: the Military Commission, the Combatant Status Review Tribunal and the Administrative Review Board. The Military Commission was created by Military Order of November 13, 2001. Its purpose was to hear the trials of non-US Citizens who are believed to have been involved in acts of terrorism against the United States.⁸²⁶ No case ever went before this Commission. The Administrative Review Tribunal was established by

⁸²⁰ *Quirin*, above n 95.

⁸²¹ *Yamashita*, above n 95, 28.

⁸²² *Quirin*, above n 95.

⁸²³ *Ibid.*

⁸²⁴ President G W Bush ‘Address to a Joint Session of Congress and the American People’ (20 September 2001’ www.whitehouse.gov/news/releases/2001/09/20010920-8.html. Accessed 2005.

⁸²⁵ Fact Sheet: Bringing Terrorists to Justice www.whitehouse.gov/news/releases/2006/09/20060906-2.html. Accessed 2008.

⁸²⁶ Devika Hovell and Grant Niemann, ‘In the Matter of David Hicks: A case for Australian Courts’ (2005) 16 *Public Law Review* 116, 117.

order of the US Department of Defense on 11 May 2004 to conduct an annual review of the Guantanamo Bay detainees to ascertain whether they continued to pose a threat to the security of the USA and its allies. This Tribunal did function and a number of detainees were released as a consequence of its work. The Combatant Status Review Tribunal was established by order of the US Deputy Secretary of Defence on 7 July 2004 following the decision of the US Supreme Court in *Rasul v Bush*,⁸²⁷ where the Court ruled that the US government was obliged to comply the Geneva Convention requirement. Its purpose was to permit Guantanamo Bay detainees to contest their status as ‘enemy combatants’.

The Military Commission received world wide condemnation where it was declared incapable of rendering justice.⁸²⁸ Hovell noted that it ‘has been written off by the British government as not...the type of process which we would afford British nationals’⁸²⁹ and censured by human rights organisations.⁸³⁰ Even USA courts have criticised the Guantanamo Bay and military commission process. The USA Supreme Court held in its June 2004 decision in *Rasul v Bush* that the allegations by petitioners that they had been held in Executive detention for more than two years without access to counsel and without being charged with any wrongdoing ‘unquestionably violate the Constitution or laws or treaties of the United States’.⁸³¹ The Federal Court held in November 2004 that ‘the rules of the Military Commission are fatally contrary to or inconsistent with the statutory requirements for courts-martial convened under the Uniform Code of Military Justice, and thus unlawful’.⁸³² On 8 November 2004, in response to the judgment of Judge Robertson, the Presiding

⁸²⁷ *Rasul v Bush* 542 US 466 (2004).

⁸²⁸ Lex Lasry QC, *First Report of the Independent Legal Observer for the Law Council of Australia*, September 2004, 4.

⁸²⁹ ‘Five Britons to be freed from Guantanamo Bay’, *Times* (19 February 2004); Paul Reynolds, ‘Guantanamo: Britain says no’, *BBC News* (25 June 2004) <http://news.bbc.co.uk/2/hi/uk_news/3839657.stm.. Accessed 2006.

⁸³⁰ See, eg, Human Rights Watch, *Making Sense of Guantanamo Bay Tribunals* (16 August 2004) <<http://hrw.org/english/docs/2004/08/16/usdom9235.htm>..>; Hovell, above n 113, 117.

⁸³¹ *Rasul v Bush* 542 US (2004) 2698, (Opinion of the Court). Note that the Court’s Opinion was subsequently the subject of a narrow interpretation by Judge Leon of the US District Court of Columbia where he held, ‘The Supreme Court majority in *Rasul* expressly limited its inquiry to whether non-resident aliens detained at Guantanamo have a right to a judicial review of the legality of their detention under the habeas statute...and, therefore, did not concern itself with whether the petitioners had any independent constitutional rights. ... [T]he petitioners lack any viable theory under the US Constitution to challenge the lawfulness of their continued detention at Guantanamo’; *Khalid v Bush*, ‘Memorandum Opinion and Order’, US District Court for the District of Columbia, 19 January 2005, 18-21 (cf *In re Guantanamo Detainee Cases*, ‘Memorandum Opinion Denying In Part and Granting In Part Respondents’ Motion to Dismiss or for Judgment as a Matter of Law’, US District Court for the District of Columbia, 31 January 2005, 44 (Judge Green)).

⁸³² *Hamdan v Rumsfeld* 344 F Supp 2d 152 (DDC 2004) (Judge Robertson); Hovell, above n 113, 118.

Officer of the Military Commission called an ‘indefinite recess’.⁸³³ Another federal judge found in January 2005 that the Combatant Status Review Tribunal ‘fail[s] to satisfy constitutional due process requirements in several respects’.⁸³⁴ As Hovell points out, ‘Certainly, the USA government has seen fit to exempt its own nationals from the process. Those detainees who were also USA citizens, John Walker Lindh, Jose Padilla and Yaser Hamdi, were not detained at Guantanamo Bay, and all proceedings against them have been conducted in USA courts under USA law’.⁸³⁵

A number of states successfully sought the return of their citizens from Guantanamo Bay. Pressure from the highest levels of the British government led to the release of nine Britons detained at Guantanamo Bay. By January 2005, sixty-one detainees had been released to the custody of other governments, including the United Kingdom, France, Russia, Spain and Sweden.⁸³⁶

The detention without charge of these Guantanamo Bay prisoners for long periods was a great injustice,⁸³⁷ but this injustice was to be compounded by a proposed trial before a Military Commission which even members of the US Military regarded as unfair. The ordinary rules of evidence were to have no application. The accused were not to be afforded ‘choice of counsel’ and the President exercised complete control over the process. Irrespective of any findings of the Military Commission they were to have no force or effect unless and until the President personally gave his approval to the findings. Presumably he could have simply failed to ever deal with the matter and even in the case of a finding of ‘not guilty’ these prisoners could have continued to languish in Guantanamo Bay for ever, if this had been the ‘President’s pleasure’.

On June 29, 2006 the Supreme Court of the US handed down its decision in *Hamdan v Rumsfeld*⁸³⁸. The case involved a Yemeni national who had been held in custody in Guantanamo Bay since 2002 after he had been captured in Afghanistan. The President had deemed him eligible for trial

⁸³³ Hovell, above n 113, 118; Human Rights First, *Military Commission Trial Observation*, <http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary_03.htm#day2>.

⁸³⁴ *In re Guantanamo Detainee Cases*, above n 118.

⁸³⁵ Hovell, above n 113, 118.

⁸³⁶ *Ibid*; ‘Guantanamo Britons Return to UK’, *Guardian Unlimited* (25 January 2005) <<http://www.guardian.co.uk/guantanamo/story/0,13743,1398162,00.html>>.

⁸³⁷ E.F. Sherman ‘Obama Positions in the Aftermath of Supreme Court’s Rejection of the Bush Detention Policies at Guantanamo’ *Working paper No. 09-13 Tulane University Law School* December 2009 <http://ssrn.com/abstract=1518936>, 4.

⁸³⁸ *Hamdan v Rumsfeld* 584 U.S. 1 (2006).

by military commission.⁸³⁹ He filed writs of *habeas corpus* and *mandamus* to challenge the ‘Executives Branch’s intended means of prosecuting the charge’.⁸⁴⁰ The government argued that the jurisdiction of the Supreme Court to review the matter had been ousted by the Detainee Treatment Act 2005. Justice Stevens delivered the majority decision. Interestingly he said that *Ex parte Quirin* provided a compelling historical precedent for the power of civilian courts to hear challenges from military commissions.⁸⁴¹ Military commissions being ‘..neither mentioned in the Constitution nor created by statute was born of military necessity’.⁸⁴² Military commissions were justified as an exception to civilian trials or ordinary court-martials, when court-martials lacked jurisdiction or the exigencies of battle necessitated a speedy resolution of the matter. However in the case of Hamdan the so-called ‘urgent need for the imposition or execution of judgement is utterly belied by the record. Hamden was arrested in... 2001 and he was not charged until 2004’.⁸⁴³

The power of the President was limited to offences recognised by the Laws of War but the Court held that none of the overt acts in the conspiracy charge against Hamdan violated the Laws of War.⁸⁴⁴ Further conspiracy itself was not a crime known to the Laws of War.⁸⁴⁵ The procedures of the military commission would allow the accused to be convicted on evidence that he had neither heard or seen, let alone challenge, which in the circumstances would make it impossible for Hamdan to receive a fair trial.

Historically, military commissions were expected to apply the same procedural guarantees as applied to military court-martials, but no such guarantees were incorporated in the Guantanamo Bay Military Commissions. The only exception to this were the rules governing the *Yamishita* Military Commission but the ‘force of this precedent has been seriously undermined by post World War II developments’.⁸⁴⁶

The Court then turned to the government’s argument that the *Geneva Conventions* of 1949 did not apply to Hamdan because unlike the conflict between the Taliban and the United States, (which the government belatedly acknowledged did constitute an international armed conflict)

⁸³⁹ Ibid.

⁸⁴⁰ Ibid per the opinion of Justice Stevens.

⁸⁴¹ Ibid 24.

⁸⁴² Ibid 25.

⁸⁴³ Ibid 49.

⁸⁴⁴ Ibid 36.

⁸⁴⁵ Ibid 38, 40, 48.

⁸⁴⁶ Ibid 54.

the conflict between al Qaeda and the USA was not covered by the Conventions because al Qaeda was not a state. However, the court held that ‘common Article 3’ of the Geneva Conventions did apply to the conflict between the USA and al Qaeda and this Article stipulated that Hamdan could only be tried by a ‘regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilized peoples’. In the circumstances the Guantanamo Bay military commission did not meet this test.⁸⁴⁷

In response to the Supreme Courts decision in *Hamden* Congress enacted a new specific piece of legislation - the *Military Commissions Act 2006*- but this Act fails to adequately address some of the procedural flaws in the Guantanamo Bay trial process so considerable doubts still remain as to whether this legislation will facilitate a fair trial for the detainees. Fortunately the American people had the final say because upon the election of Democratic President Obama, the fair trial rights of the Guantanamo Bay detainees were restored, although trials will still be conducted before a reconstituted Military Commission.⁸⁴⁸

5.3 Conclusion

The determination of states to push through a political objective at the expense of ‘due process’ constitutes an abuse of the fair trial requirement incorporated in international criminal law. Clearly there are two competing objective – the political or military objective and the responsibility to provide just outcomes. The fundamental character of international humanitarian law is to bring the potentially two competing forces into balance. The military objective must be moderated in order to accommodate the humanitarian protection. One cannot be at the expense of the other, they must be in balance. The clear conflict of interest that arises when the politico-military has unfettered control over both responsibilities can be demonstrated when the enforcement of international criminal law is given over entirely to military commissions.

The excesses of military commissions can, at times be curtailed by civilian court, especially superior courts in their appellate divisions but this is often *ad hoc* and generally in the face of executive opposition. In

⁸⁴⁷ Ibid 68, 72.

⁸⁴⁸ As at December 2009 - The Obama Administration plan to close Guantanamo bay and to transfer the remaining detainees to a purpose built prison in Illinois. The US government will still conduct the trials by Military Commission but the rules of evidence will apply and defendants will have choice of counsel. Defendants will also have right of appeal to US civilian courts - *Chicago Tribune* (16 December 2009) <http://www.chicagotribune.com/news/chi-illinois-prison-thomson-16-dec16.0.4862605.story>; see also Sherman above n, 124.

other words, even civilian courts are at times reluctant to interfere in the prosecution of a war by the executive, as happened with the Supreme Court of the US in *Ex parte Quirin* and *Yamishita*. This reluctance to interfere may itself be political or it may be because the legislature has erected 'jurisdiction ousting provisions' in military commission legislation, hence making it extremely difficult for the judiciary to review a military commission case in any event.

One way to ameliorate the conflict of interest is to separate the executive from the judicial function by giving the trial process exclusively to civilian courts as happens with the enforcement of national criminal law. The virtue of this approach is that the appellate courts are less likely to be impeded by 'jurisdiction ousting provisions' as happens with military commissions. Civilian courts are less influenced by political considerations than military commissions and tried and tested due process rights would be more readily extended to alleged war criminals than is likely to happen when war criminals are tried by the military that defeated them in the first instance.

In view of the above it would be a significant advance on what we have now, if as a norm of customary international humanitarian law there were to emerge a customary law which prescribed that (a) military commissions were illegal and that (b) international criminal law offences could only be tried (at the state level) before the ordinary civilian courts of a state. While this would be a significant reform it is not the total solution because as we will see in the next chapter 'civilian courts' are not totally immune from political bias and so there still remains a need for supervision of state enforcement of international criminal law by an independent international body.

CHAPTER 6

'Sham Trials'

6.1 Introduction

In the previous chapter it was argued that when states were left entirely in charge of prosecuting international crimes they sometimes resort to 'judicial contrivances' such as military commissions in order to ensure the outcome that they consider to be politically desirable. In the chapter it was suggested that if international crimes could be tried in the civilian courts of a state, then this may go a long way towards removing the conflict of interest that arises when offenders are tried by the executive of government before military commissions. This however, is not the complete answer because enforcement problems can also arise when the trials take place before the civilian courts as well. There are occasions when instead of trying to ensure a conviction, states do the complete opposite; they seek to shield the accused from being punished for illegal conduct. In these circumstances the states involved erect a façade whereby they do have prosecutions for international crimes before their regular courts but they politically manipulate the process so as to ensure the victims of the crimes are denied justice.⁸⁴⁹

This is also a perversion of the international criminal justice. States often do this in an attempt to shield themselves (and those accused of having carried out their criminal enterprise) from the scrutiny of the international community consequent upon the proper enforcement of international criminal law.⁸⁵⁰ In most instances, this occurs in circumstances where international pressure has been placed upon a state to 'do something' following breaches of international criminal law that have occurred on their territory or upon territory under their control. In these cases states prefer the option of prosecuting their 'own' rather than allowing the international community to do it for them.⁸⁵¹ Rarely do the prosecutions succeed and the offenders are either acquitted or escape being punished. In these circumstances the states involved corrupt the prosecution process

⁸⁴⁹ Philippe Sands *From Nuremberg to The Hague* (2003) Cambridge U.P. p 72.

⁸⁵⁰ W.A. Schabas & S Darcy (Ed.s) *Truth Commissions and Courts* (2004) A. Hegarty 'Truth Law and Official Denial' p 207.

⁸⁵¹ In some cases states offer up truth commissions as a substitute for the proper enforcement of international criminal law. (See W.A. Schabas & S Darcy (Ed.s) *Truth Commissions and Courts* (2004) Kluwer W.A.Shabas 'Introduction' p 1).

by failing to seriously punish the offenders thereby allowing impunity for the crimes committed.

International crimes are often committed in the name of the state. Of course only individuals are capable of carrying out the *actus reas* of the crime but often the *mens reas* should, at least, be shared with the ‘corporate mind’ of the state. However (to date) there is no legal basis upon which states can be made criminally liable for international crimes. Individual criminal liability attaches to the human perpetrator. However when it comes to enforcing international criminal law against these ‘patriotic’ individuals, the state uses whatever mechanisms it has at its disposal to protect these ‘loyal subjects’. Trials may be conducted but the outcome is assured – the perpetrator is not punished - the victim receives no justice.

This behaviour by states is well recognised but not condoned under international criminal law. Measures have been taken by the international community in an effort to counter this illegal conduct by states. For example in the Statutes of the ICTY; the ICTR and the ICC, specific provisions have been incorporated to deal with this illegal practice. For instance, Article 10 of the ICTY Statute provides that:

(2) A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal (only if):

...

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Article 9 (2) of the ICTR Statute is in similar terms. Article 20 (3) (a) of the ICC Statute allows the ICC to prosecute where the prosecution in the state court was (a) for: ‘the purpose of shielding the person concerned from criminal responsibility for the crimes...’ and (b) were otherwise ‘not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner... inconsistent with an intent to bring the person concerned to justice’.

This illegal conduct by states is not ‘only a thing of the past’ it continues to persist and will persist so long as states believe they can ‘get away with it’. The ‘fig leaf’ of the misconstrued and misapplied principle of ‘non-intervention in the internal affairs of a state’ will continue to be used by states to confuse the issue until international criminal law can be strengthened to prevent this from occurring.

In this chapter two examples of where this has occurred are examined but again these are not isolated instances. The first case study is the Leipzig trials and the second is the more recent trials in Indonesia following the commission of crimes against humanity in East Timor by the Indonesian military in 1999. There are of course other examples that could be referred to such as the those cases conducted by the British following the ‘troubles’ in Northern Ireland⁸⁵² and those in the United States following the Vietnam war, in particular the My Lai massacre and the subsequent punishment of offenders such as Lieutenant Calley.⁸⁵³ So once again this behaviour by states is not limited to non-democratic regimes but applies in circumstances where the political conditions exist necessary to bring about this result. In these circumstances it is the victims of these crimes that are denied justice. What is fundamental to all of this is that justice is a ‘two way street’; not only is an accused entitled to a fair trial but the victims of crime are also entitled to see that the perpetrators of crime are appropriately made accountable for their conduct.

6.2 *The Leipzig Trials*

⁸⁵² ‘Bloody Sunday. was an incident in Derry, Northern Ireland, on 30 January 1972 in which 26 civil rights protesters were shot by members of 1st Battalion of the British [Parachute Regiment](#), during a [Northern Ireland Civil Rights Association](#) march in the [Bogside](#) area of the city. Thirteen people, six of whom were minors, died immediately, while the death of another person 4½ months later has been attributed to the injuries he received on the day. Two protesters were injured when run down by army vehicles. Many witnesses including bystanders and journalists testify that all those shot were unarmed. Five of those wounded were shot in the back Two investigations have been held by the [British Government](#). The [Widgery Tribunal](#), held in the immediate aftermath of the event, largely cleared the soldiers and British authorities of blame, but was criticized as a “whitewash” by many. The [Provisional Irish Republican Army](#)’s (IRA) campaign against Northern Ireland being [a part of the United Kingdom](#) had begun in the two years prior to Bloody Sunday, but perceptions of the day boosted the status of and recruitment into the organisation. Bloody Sunday remains among the most significant events in the recent [troubles](#) of Northern Ireland, arguably because it was carried out by the army and not [paramilitaries](#), and in full public and press view. Northern Ireland: Eyewitness accounts of 1972 "Bloody Sunday" massacre indict British army By Robert Stevens 31 January 2001 <http://www.wsws.org/articles/2001/jan2001/inq-j31.shtml>

⁸⁵³ The USA overwhelmingly disapproved of the verdict in the Calley case. President Nixon ordered Calley removed from the stockade (after spending a single weekend there) and placed under house arrest. He announced that he would review the whole decision. Nixon's action prompted Aubrey Daniel to write to the President in the following terms "the greatest tragedy of all will be if political expediency dictates the compromise of such a fundamental moral principle as the inherent unlawfulness of the murder of innocent persons". On November 9, 1974, the Secretary of the Army announced that William Calley would be paroled. In August 2009, while speaking at a Kiwanis meeting, 66-year-old Calley offered a public apology for his role at My Lai: ‘Not a day goes by that I do not feel remorse for what happened that day at My Lai. I am very sorry’. Doug Linder An Introduction to the My Lai Courts-Martial. <http://www.law.umkc.edu/faculty/projects/ftrials/mylai/Myl_intro.html>; see also Geoffrey Robertson Crimes Against Humanity: The Struggle for Global Justice (Penguin Press 1999) p167.

Following World War I an attempt was made to establish an international criminal tribunal to try the war crimes perpetrated by individuals in the defeated armies during the war.⁸⁵⁴ A commission of inquiry investigated crimes committed by German troops who came under the supreme command of the Kaiser, Wilhelm II.⁸⁵⁵ The crimes included the ‘bombardment of undefended cities and towns, attacks against hospital ships, and the slaughter of the Armenians by the Turks’. While the Prime Minister of Britain, Lloyd George, was committed to the idea of international trials, many obstacles were placed in his path in order to prevent this from happening.⁸⁵⁶ Willis argues that the best opportunity to hold the trials arose as a consequence of the negotiations of the *Versailles Treaty* of 1919 but the Treaty provisions relating to these trials were so weak, that escaping their enforcement became relatively easy.⁸⁵⁷

Article 227 of the *Versailles Treaty* did however provide that the Kaiser would be arraigned before a special Allied ‘international’ tribunal but the proposed charges were meaningless and had no foundation in law.⁸⁵⁸ The offences created were crimes ‘against international morality and the sanctity of treaties’, the meaning of such an offence was never revealed because the Kaiser had secured sanctuary in the Netherlands and although Article 227 provided that a request for his surrender would be addressed to the government of Netherlands, no such request was ever made.⁸⁵⁹

There was however, an Allied investigation which uncovered a total of 854 potential German defendants including notable figures such as Hindenburg.⁸⁶⁰ However as Willis notes, conservative opposition to international trials within Germany was intense and from the outset a weak Weimar Republican Government was accused of ‘selling out’ Germany. German right wing opponents successfully played on the threat

⁸⁵⁴ Geoffrey Robertson *Crimes Against Humanity: The Struggle for Global Justice* (Penguin Press 1999) p15

⁸⁵⁵ *Ibid* 197.

⁸⁵⁶ *Ibid*.

⁸⁵⁷ James F. Willis *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War criminals of the First World War* (1982) Greenwood Press p 80.

⁸⁵⁸ *Ibid* Appendix p 175.

⁸⁵⁹ Robertson above n 8,197; See also Articles 228 and 229 of the Treaty of Versailles which asserted that the Allies had the authority to prosecute German soldiers who had committed acts in violation of the laws and customs of war either before their national military tribunals or international military tribunals composed of relevant Allied members. However the Articles failed to give the Allied tribunals primacy because they expressly recognised the authority of German military tribunals to exercise complimentary jurisdiction. As a consequence the decision to ultimately leave prosecutorial action to the Germans became much easier.

⁸⁶⁰ Willis above n 9, 113.

of a communist take over⁸⁶¹ if the trials proceeded. As a consequence Allies backed down and international trials never took place.⁸⁶²

As the Allies procrastinated on the question of whether or not to hold international trials the Germans seized the initiative. On December 1919 the German National Assembly passed a law giving exclusive jurisdiction to try German ‘war criminals’ to the Reichsgericht in Leipzig.⁸⁶³ While post World War 1 Germany was generally in disarray, the one unifying influence was the long standing military tradition which resisted the demoralising consequence that international trials would bring.⁸⁶⁴

The Allies were invited by Germany to provide a list of the ‘so called’ offenders but the Allies could not reach agreement on who should be tried by the Reichsgericht for war crimes. Meanwhile, as more time passed opposition to the trials in Germany intensified. Willis observes that when the Allies finally drew up their list the German Ministry of Justice complained that the Allies had not provided sufficient evidence to indict any of the persons accused. The first trial did not commence until January 1921, the defendants were minor functionaries selected by the Germans and not on the list supplied by the Allies.⁸⁶⁵ The Germans continued to ignore the Allied list until the Allies threatened to occupy the Rhur. It was only the threat of occupation by the Allies that forced the Germans to act, belatedly starting the trials on 23 May 1921.⁸⁶⁶

The German media took a strong anti-prosecution stance over the trials, raising the *tu quoque* defence, namely that the Allied war crimes were much worse yet no prosecution action had been taken in respect of those crimes.⁸⁶⁷ Willis notes that the prosecutors were reluctant to present the cases against their fellow countrymen, foreign witnesses were intimidated, jeered and ridiculed and public demonstrations were regularly held outside the court building.⁸⁶⁸ Willis refers to one case, involving the killing of prisoners of war, where the prosecutor declared that the accused had not acted ‘dishonourably’ but that his conduct was at times ‘unworthy’ – this accused was sentenced to 6 months

⁸⁶¹ Hitler was also to use the ‘communist card’ as a means of destroying German democracy 14 years later.

⁸⁶² Willis above n 9 116.

⁸⁶³ Ibid 118 – Reichsgericht – Germany’s Supreme Court.

⁸⁶⁴ Ibid 125.

⁸⁶⁵ Ibid 130. The three accused were ‘privates’ accused of robbing a Belgian innkeeper in October 1918.

⁸⁶⁶ Ibid 131. Belgian and French troops actually occupied some towns at the entrance of the Rhur valley.

⁸⁶⁷ Ibid.

⁸⁶⁸ Ibid 132.

imprisonment.⁸⁶⁹ In the more famous case of Lieutenant Karl Neumann, a U-boat commander, he was charged with the sinking of a hospital ship the *Dover Castle*, the prosecutor presented no evidence. In the *Ramdohr* case the accused was charged with torturing children but his case was dismissed when the court declared that he could not be convicted on the ‘imaginative stories of impressionable adolescents’.⁸⁷⁰

In the *Llandoverly Castle* case the commander of the U-Boat could not be charged because he was ‘outside the jurisdiction of the German court’ and no effort had been made to secure his attendance at the trial. Accordingly two subordinates were charged with the sinking of the hospital ship. What made conviction inescapable was the fact that both the accused admitted that they knew the ship was a hospital ship and that after it sank the U-Boat surfaced and then open fired on the survivors. Nevertheless the prosecutor declared in open court that it ‘caused him great discomfort to proceed against two German officers who had fought... bravely and faithfully for their Fatherland...’. The two accused were sentenced to 4 years imprisonment.⁸⁷¹

The Leipzig trials were an unmitigated failure.⁸⁷² The Allies officially repudiated the whole process. The Reichsgericht then proceeded to *nolle prosequi* the cases. By 1925, 861 out of 901 allegations had been disposed of without even requiring the accused to attend the hearing. In 1928, the two convicted *Llandoverly Castle* offenders had their convictions overturned.⁸⁷³

It should have been obvious then as it is now that national war crimes trials would not work under these circumstances. Yet there were no lessons from history to be learnt from this because as we shall see this failure was to be repeated again.⁸⁷⁴ French dissatisfaction with the trial process led to a demand for strict compliance with the balance of the *Versailles Treaty* provisions. This in turn, led to widespread demonstrations by conservative right wing nationalists in Germany in the spring of 1922. One then little known agitator who participated in these demonstrations was Adolf Hitler.⁸⁷⁵ One of the first measures adopted by

⁸⁶⁹ Ibid 133.

⁸⁷⁰ Ibid, 134.

⁸⁷¹ Ibid, 107-134.

⁸⁷² M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003) Transnational p 402; Geoffrey Robertson *Crimes Against Humanity: The Struggle for Global Justice* (Penguin Press 1999) 197; see also R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) Oxford U.P. 206.

⁸⁷³ Willis above n 9, 146.

⁸⁷⁴ M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003) Transnational p 403

⁸⁷⁵ Willis above n 9, 140.

the Nazis when they came to power in 1933 was to quash all war crimes convictions of the Reichsgericht at Leipzig.⁸⁷⁶

6.3 The Conduct of Prosecutions before the Ad Hoc Human Rights Court in Indonesia in Respect of Crimes Committed in the Former East Timor in 1999

The small island of East Timor voted for its political future in a United Nations supervised ballot held in 1999.⁸⁷⁷ The path to independence was anything but smooth. Political intimidation and violence before and after the popular ballot of 30 August 1999 was widespread.⁸⁷⁸ The international community paid close attention to these events⁸⁷⁹ and drew attention to the fact that crimes against humanity had been committed.⁸⁸⁰ The Security Council, in resolution number 1264 of 15 September 1999, ‘condemned the acts of violence in East Timor and demanded that those responsible be brought to justice’.⁸⁸¹ In resolution number 1272 of 25 October 1999, the United Nations established the Transitional Administration in East Timor (UNTAET) and again called for the prosecution of those responsible for committing crimes against humanity.⁸⁸²

A special session of the Commission on Human Rights was also convened in September 1999.⁸⁸³ The Commission adopted resolution number S-4/1 which affirmed that the international community ‘would

⁸⁷⁶ Ibid, 146.

⁸⁷⁷ Clinton Fernandes, ‘Indonesia and East Timor: Against Impunity, for Justice’ *Austral Policy Forum* April 2008 <http://gc.nautilus.org/Nautilus/Australia/apsnet/policy-forum/2008/impunity-vs-justice> accessed November 2008 p1

⁸⁷⁸ Ibid.

⁸⁷⁹ Security Council Resolution 1262 (1999) 27 August 1999 S/Res/1262

⁸⁸⁰ Commission on Human Rights Report of the High Commissioner on human rights situation in East Timor Fourth Special Session 23 – 24 September 1999 hchr,rep 990917 In early September 1999, the Security Council sent a mission both to Jakarta and to Dili to investigate the allegations. Amnesty International & Justice Monitoring Programme Indonesia: Justice for Timor-Leste – The Way Forward ASA 21/006/2004 p 7 citing Report of Security Council Mission to Jakarta and Dili, 8 – 12 September 1999, UNDoc s/1999/976, para.21. <http://news.amnesty.org/library/index/engasa> 210062004 Three United Nations special rapporteurs also visited East Timor in October 1999 and drew similar conclusions to those found by the Security Council mission and the International Commission of Inquiry. (see A/54/660) Also referred to in the Amnesty International and Justice System Monitoring Programme report Justice for Timor Leste: The Way Forward (AI Index: ASA 21/006/2004), p. 7; See also Grant Niemann ‘Report to the UNHCHR on the Conduct of Prosecutions before the Ad -Hoc Human Rights Tribunal in Indonesia and the Serious Crimes process in Timor Leste in respect of Crimes Committed in the former East Timor in 1999’ Geneva 2004

⁸⁸¹ Amnesty international & Justice Monitoring Programme *Indonesia: Justice for Timor-Leste – The Way Forward* ASA 21/006/2004 p 7

⁸⁸² Ibid.

⁸⁸³ Ibid, 8.

exert every effort to ensure that those responsible for the violence would be brought to justice.’⁸⁸⁴

The International Commission of Inquiry on East Timor and the three special rapporteurs recommended the creation of an international criminal tribunal for East Timor.⁸⁸⁵ However, the impetus to create the tribunal lost momentum because the government of Indonesia promised to prosecute those within its jurisdiction who had committed serious violations of international humanitarian law on the territory of East Timor during 1999.⁸⁸⁶ As Lowry notes, had the government successfully prosecuted these crimes, ‘considerable benefits could have ensued for the emerging democratic society of Indonesia because the Indonesian Army (TNI) had long dominated Indonesian political life and had always crushed moves for civilian reforms that had threatened its perceived interests.’⁸⁸⁷ Punishing the delinquent behaviour of the TNI by Indonesia itself could have had a highly beneficial and enduring effect on the future behaviour of the army.

However the government of Indonesia rejected allegations of institutional involvement in the violence.⁸⁸⁸ While it reluctantly acknowledged the possibility that ‘individual military or police personnel might have committed acts of violence in contravention of Indonesian policy’ it denied any institutional involvement by the TNI or East Timorese Indonesian officials. In a letter to the Secretary General in January 2000, the then Indonesian Minister for Foreign Affairs, Dr. Alwi Shihab, rejected the recommendation of the International Commission of Inquiry on East Timor for the creation of an international criminal tribunal, insisting that, ‘Indonesian laws are the only applicable laws to those violations and the Indonesian judicial mechanism is the exclusive mechanism for bringing the perpetrators of the violations of human rights to justice’.⁸⁸⁹

In an attempt to deflect pressure for the creation of an international tribunal by the Security Council, the Indonesian government requested their National Commission on Human Rights (Komnas-HAM) to

⁸⁸⁴ Ibid 8.

⁸⁸⁵ Amnesty above n 33; see also W.A. Schabas & S Darcy (Ed.s) *Truth Commissions and Courts* (2004) Kluwer P Burgess ‘Justice and Reconciliation in East Timor’ p 139

⁸⁸⁶ Amnesty above n 33.

⁸⁸⁷ B. Lowry - Research paper 23 1998-99 *Indonesian Armed Forces (Tentara Nasional Indonesia-TNI)* Parliamentary Library – Parliament of Australia p10

⁸⁸⁸ Amnesty above n 33, 2.

⁸⁸⁹ Letter Dated 26 January 2000 from the Foreign Affairs Minister to S-G UN Doc. A/54/727-S/2000/65 cited in Amnesty above n 33, 2.

establish a National Commission of Inquiry into the alleged human rights violations in East Timor. Subsequently, Indonesia passed legislation to create an ad hoc human rights court with jurisdiction to try crimes against humanity and genocide.⁸⁹⁰

Amnesty International observed that ‘for a while it looked as though the Indonesia government were genuinely committed to the idea of bringing the perpetrators to justice.’ The KPP-HAM process was a serious investigation and surprisingly frank having regard to the history of the influence of the TNI in Indonesia.⁸⁹¹ KPP-HAM was established on 23 September 1999.⁸⁹² Its terms of reference were to ‘investigate violations of human rights in East Timor since January 1999, focusing in particular on gross violations of human rights including genocide, massacres, torture, forced displacement, crimes against women and children and systematic destruction of property.’⁸⁹³ It was also mandated to investigate the degree of involvement of the ‘State apparatus and other national and international agencies in human rights violations’.⁸⁹⁴ The findings of the inquiry were to be the basis of establishing preliminary evidence for the investigation and prosecution of these crimes in the new human rights court.⁸⁹⁵

In its report of 31 January 2000, KPP-HAM noted that, [T]he violence in East Timor escalated after the Indonesian military invaded the territory in 1975.⁸⁹⁶ This violence was further promoted by the arming of civilian groups some of whom were later organized into the TNI or through a program of militarization of the militia as soldiers, whereby they had rank and were paid as regular soldiers. Senior military officials in Jakarta often referred to these militia soldiers as regional sons of the TNI.⁸⁹⁷

KPP-HAM found that when President Habibie facilitated the ‘two options’ choice for the East Timorese people,⁸⁹⁸ these old militia groups were revived and supported in order to achieve victory for ‘autonomy’

⁸⁹⁰ Amnesty above n 33, 2.

⁸⁹¹ Ibid 25; Clinton Fernandes, ‘Indonesia and East Timor: Against Impunity, for Justice’ *Austral Policy Forum April 2008* <http://gc.nautilus.org?Nautilus/Australia/apsnet/policy-forum/2008/impunity-vs-justice> accessed November 2008 p 2

⁸⁹² D. Cohen, *“Intended to Fail - Trials Before the Ad Hoc Human Rights Court in Jakarta”*, International Centre for Transitional Justice, Occasional Paper Series (August 2003), 16.

⁸⁹³ Ibid.

⁸⁹⁴ *Report of the Indonesian Commission on Human Rights Violations in East Timor – Jakarta*, January 2000 (KPP-HAM Report) par 6 [http://www.jsmp.minihub.org/Resources/2000/KPP%Ham%20\(e\).htm](http://www.jsmp.minihub.org/Resources/2000/KPP%Ham%20(e).htm)

⁸⁹⁵ Cohen above n 44, 16.

⁸⁹⁶ KPP-HAM Report above n 46, par 15.

⁸⁹⁷ Ibid.

⁸⁹⁸ The East Timorese were given the choice by the ballot to vote in favour of unification with Indonesia or independence.

(autonomous integration with Indonesia), as opposed to independence.⁸⁹⁹ The militias were recruited, trained and funded by the TNI, especially Kopassus (army intelligence).⁹⁰⁰ KPP-HAM did not limit responsibility to local Indonesian officials in East Timor, it identified individuals at the highest level of the Indonesian military, including Army General Wiranto.⁹⁰¹ KPP-HAM found that TNI directly armed the militia with Indonesian army-issue weapons such as SKS, M16, Mauser, G-3, grenades and pistols. TNI and the pro-integration militia also carried out joint patrols and exercised together.⁹⁰² Apart from the active role of the Indonesian military, the Commission found that the ‘bureaucratic apparatus were also involved with the militia in the process of violence against the civilian population of East Timor.’⁹⁰³ It found that the violence that had occurred in East Timor was ‘not as a result of a civil war, but was the result of a systematic campaign of violence.’⁹⁰⁴

In terms of the crimes committed, KPP-HAM considered that what had happened was ‘far more than just gross violations of basic human rights.’⁹⁰⁵ They uncovered ‘definite policies issued both by those in charge of security in East Timor and the local government, which made possible the continuation of the criminal acts, and that such crimes were widespread and systematic.’⁹⁰⁶ They determined that the criminal acts could be linked to the perpetrators through their political motives. In nearly every case of violence carried out by the militia, there was ‘evidence that the torture and mistreatment of the civilian population was politically motivated’. During the referendum process, civilians who participated in the process of registering for the ballot were mistreated. After the announcement of the ballot, ‘acts of terror, including destruction of physical infrastructure and various cases of attacks on columns of refugees, were committed.’⁹⁰⁷

KPP-HAM found that the victims were specially chosen by the militia, the military and the civilian authorities. They included ‘university students and activists of the pro-independence National Council of Timorese Resistance (CNRT),⁹⁰⁸ many were civilians who had no political affiliations of any kind. Among them were children, church

⁸⁹⁹ KPP-HAM Report above n 46.

⁹⁰⁰ Ibid pars 16-18.

⁹⁰¹ Ibid par 17.

⁹⁰² Ibid par 19.

⁹⁰³ Ibid.

⁹⁰⁴ Ibid par 21.

⁹⁰⁵ Ibid par 22.

⁹⁰⁶ Ibid .

⁹⁰⁷ Ibid pars 22-25.

⁹⁰⁸ Ibid, par 52

people, journalists and humanitarian workers. Hundreds of thousands of civilians were forced to leave their homes and become refugees living in camps under the guard of the militia.⁹⁰⁹

KPP-HAM concluded its report by stating that it had been successful in collecting evidence ‘strongly indicating that serious violations of human rights had been carried out in a planned and systematic manner and on a large and wide scale in the form of mass murder, torture, maltreatment, forced disappearance, violence against women and children (including rape and sexual slavery), forced evacuations, scorched earth policies and destruction of property, all of which constitute crimes against humanity.’⁹¹⁰

The KPP-HAM report was a ‘bold indictment of TNI and unprecedented in Indonesian politics’ since independence few had ever dared to criticize TNI in such an official and public manner.⁹¹¹ However the next phase of the investigation was far less progressive.

For Indonesia to continue with the investigation and prosecution of, among others, senior members of TNI in the same vein as was pursued by KPP-HAM would have meant that Indonesia had taken a significant step forward in reducing the unhealthy all-powerful authority of the TNI’s influence over political power. Linton notes that the next move did,

⁹⁰⁹Ibid par 53.

⁹¹⁰ The recommendations of the KPP-HAM were especially significant. It recommended that ‘(a) the Attorney-General carry out an investigation of the perpetrators thought to be involved in serious human rights abuses but not limited to the names mentioned above; (b) the Government make protocol arrangements to gain access to all new facts and evidence about the violations of human rights in East Timor uncovered by UNTAET and other international bodies; (c) a human rights court be created with the authority to try cases of human rights violations and crimes against humanity. Such a court should have the authority to try violations that had occurred previously, including those that had occurred in East Timor up to the present; (d) Indonesia ratify international human rights instruments that are important for the affirmation of human rights in Indonesia including, but not limited to, the International Covenant on Civil and Political Rights and its Optional Protocol; (e) the security of all witnesses and victims be guaranteed; (f) victims be rehabilitated and compensated; (g) that the Indonesian Government declare every case of gender-based violence a violation of human rights; (h) the National Human Rights Commission carry out a thorough investigation into all human rights violations in East Timor since 1975; (i) that the role of TNI be defined so that it becomes an institution for defence in a democratic nation that upholds human rights; (j) that the institutions of the Indonesian Police and TNI be fully separated; (k) that State intelligence functions be carried out wholly in the interests of national and community security so that they do not become instruments for violating human rights; (l) that the Government and the Attorney-General, in prosecuting perpetrators of crimes against humanity, carry out that process freely and independently and against all perpetrators, including members of TNI, without interference from anybody; (m) the Government facilitate the return of refugees wanting to return to their place of origin and remove all impediments thereto.’ *Report of the Indonesian Commission on Human Rights Violations in East Timor – Jakarta, January 2000* pars 76-88

⁹¹¹ Suzannah Linton *International Tribunals – Unravelling the First three Trials at Indonesia’s Ad Hoc Court for Human Rights Violations in East Timor* *Leiden Journal of International Law*, 17 (2004) 303 at 306.

however, shift the investigation from the ‘relatively independent KPP-HAM to the centre of Indonesian authority and power, the Office of the Attorney-General.’⁹¹² The Attorney-General’s Office, like many other branches of the government, was heavily influenced by TNI.⁹¹³ The KPP-HAM report was referred to the Office of the Attorney-General and it was for him to appoint the investigation team. The team he subsequently appointed consisted of career attorneys, members of the military and police officers. A 15-member panel of experts was also appointed. The investigative team completed its investigation on 1 September 2000.⁹¹⁴

Cohen points out in *Intended to Fail*,⁹¹⁵ that there was almost no consultation or discussion between KPP-HAM and the Attorney-General concerning the findings of the commission.⁹¹⁶ It would appear that by this stage the Attorney-General had already decided that he would present a case that would do little harm to TNI, thus making his case fundamentally different from that envisaged by KPP-HAM.

It became apparent that the KPP-HAM findings (directly implicating senior levels of TNI) obviously shocked the Indonesian government, which, in turn brought about a major shift in the government's political resolve to seriously address the gross human rights violations in East Timor.⁹¹⁷ Instead of being a thorough and open inquiry, the Attorney-General's investigation turned out to be a carefully crafted exercise in damage control designed primarily to protect TNI and possibly, the Indonesian government itself.⁹¹⁸

⁹¹² Ibid 309.

⁹¹³ D. Cohen, *Intended to Fail - Trials Before the Ad Hoc Human Rights Court in Jakarta*, International Centre for Transitional Justice, Occasional Paper Series (August 2003), 49

⁹¹⁴ Ibid 18.

⁹¹⁵ Ibid 19.

⁹¹⁶ Ibid 19.

⁹¹⁷ Ibid 21.

⁹¹⁸ Grant Niemann ‘Report to the UNHCHR on the Conduct of Prosecutions before the Ad -Hoc Human Rights Tribunal in Indonesia and the Serious Crimes process in Timor Leste in respect of Crimes Committed in the former East Timor in 1999’ *Geneva 2004* The UN Special Observer appointed to monitor the trials, Professor Cammack, pointed out in his reports that the Attorney-General's investigators only made one trip to East Timor in preparation for the Jakarta trials. M.E. Cammack Report on the Trials Before the Ad Hoc Human Rights Court for East Timor (Unpublished) p 3 Cited with permission of UNHCHR October 2004 The majority of witnesses interviewed in East Timor were either members of the military police or the civil administration. M.E. Cammack Report on the Trials Before the Ad Hoc Human Rights Court for East Timor (Unpublished) p 3 Cammack reported that in gathering the victim witness testimony, “no attention was paid to whether these witnesses were able to give any evidence of the relationship between the Indonesian authorities and the militia”. M. E. Cammack, Report of the Trials Before the Ad Hoc Human Rights Court for East Timor (Unpublished) p13 Cammack discovered that many of the prosecution witnesses identified by the Attorney-General’s investigators were Indonesian government officials. Most of these witnesses were themselves named as suspects in the KPP-HAM report. Not surprisingly, most of these witnesses gave statements favourable to the accused. M.E. Cammack Report on the Trials Before the Ad Hoc Human Rights Court for East Timor (Unpublished) p 3 Prosecutors in the summary of findings contained in the

The legislation creating the Indonesian Ad Hoc Human Rights Courts,⁹¹⁹ was defective in that it placed limitations on the court's jurisdiction as to both time and place. The inadequacy of the jurisdiction of the Court did not escape the attention of the Secretary General who reported to the Security Council that 'the relevant decree signed by President Wahid on 24 April 2001, limits the jurisdiction [of the Court] to acts committed after the ballot on 30 August 1999. As a consequence, the massacres in Liquiça and Suai and several other serious crimes ... would not be prosecuted'.⁹²⁰ In October 2001, the Secretary General, in another report to the Security Council, noted that:

President Megawati Soekarnoputri issued an amendment [to the decree] ... while the new decree expanded the jurisdiction [of the Court], it is still restrictive in that it allows the trials of only those cases that occurred in the months of April and September 1999, and only in the districts of Liquiça, Dili and Cova Lima. This excludes several egregious crimes committed in 1999.⁹²¹

Considering the inadequacies of the investigations conducted by the Attorney-General's Office it was not surprising that the subsequent indictments ultimately were weak and unsatisfactory. They failed to address the magnitude of the crimes committed or to adequately attribute responsibility to the perpetrators.⁹²² They contained contradictory facts, Amnesty International reported that 'the indictments failed to present a version of events which adequately reflected the widespread and systematic nature of the crimes and failed to address the role of TNI in setting up and supporting the militia. In all but one case, the defendants were not charged with direct involvement in the crime as reflected by the evidence, but as accomplices, or of failing in their command responsibilities. No one was charged with planning or ordering the alleged crimes'.⁹²³

On their face the indictments failed to raise the issue of whether a crime against humanity had in fact been committed because they did not attempt

dossier of the cases provided no evidence to support the conclusion that the defendants were aware of any of the attacks before or during the time they were committed; on the contrary, the facts included specific findings that the defendant was not aware of several of the incidents until after they had occurred Professor Cammack found that prosecutors failed to distinguish crimes against humanity from ordinary crimes such as murder and produced no evidence of the widespread and/or systematic nature of the attack directed against the civilian population. M.E. Cammack Report on the Trials Before the Ad Hoc Human Rights Court for East Timor (Unpublished) p 3.

⁹¹⁹ *Human Rights Court Act 26/2000* of November 23, 2000.

⁹²⁰ *Interim report of the Secretary-General on East Timor* UNDoc S/2001/436, para. 18.

⁹²¹ *Ibid* para 31.

⁹²² D. Cohen, *"Intended to Fail - Trials Before the Ad Hoc Human Rights Court in Jakarta"*, International Centre for Transitional Justice, Occasional Paper Series (August 2003), p 14.

⁹²³ Amnesty International, *Indonesia and Timor-Leste: International Responsibility for Justice* (AI Index: ASA 03/001/2003), p. 5.

to establish the ‘widespread and/or systematic character of the attacks’.⁹²⁴ As happened with the Leipzig trials, the high ranking offenders (both military and civilian) were not targeted for prosecution action.⁹²⁵

Again like Leipzig, the trials turned into a sham. Many of the witnesses were biased against the East Timorese victims. A lot of the prosecution witnesses were either defendants themselves or were otherwise sympathetic to the defence on the basis of their connection with the military, the police or the civil administration. The thrust of much of the evidence brought by the prosecution ‘erroneously portrayed a picture of anti-integration groups terrorizing those who favoured integration with Indonesia’. The Indonesian military, police and civil administration were portrayed by the Indonesian witnesses as ‘disciplined, professional and scrupulously impartial, trying to do their best in the face of insurmountable odds’.⁹²⁶

⁹²⁴ Amnesty International noted that “the indictments were formulated in a manner that minimizes the defendant’s culpability, mostly to a failure to control subordinates rather than active participation in violent acts, despite credible evidence to the contrary. In addition, the indictments minimised, if not eliminated altogether, any suggestion of government involvement, creating a picture of sporadic, isolated incidents, whereas in fact there was strong evidence of organized, systematic violence, in which the military, police and civil authorities played an active role.” Amnesty international & Justice Monitoring Programme *Indonesia: Justice for Timor-Leste – The Way Forward* ASA 21/006/2004 p 37.

⁹²⁵ Amnesty pointed out that whereas KPP HAM publicly identified 32 persons who fell into one of three categories of perpetrators the Attorney-General’s Office identified only 18 people – 10 military and five police officers, two civilian government officials and a militia leader. The most senior official to be indicted was the Regional Military Commander Major-General Adam Damiri.” Amnesty international & Justice Monitoring Programme *Indonesia: Justice for Timor-Leste – The Way Forward* ASA 21/006/2004 p 37 KKP-HAM had also emphasized that its list of suspects was not complete and that the subsequent investigation would identify more offenders, not fewer. Amnesty also noted that by ‘relying entirely on command responsibility and not accusing any of the defendants of direct responsibility allowed the defence to exploit the absence of proof that any of the crimes were in fact committed by the defendants, thus undermining the strength of the prosecution’s case’. As it happened, none of the defendants were accused of planning or ordering the alleged crimes, or for that matter of any form of direct participation, even by way of aiding and abetting. Despite a great deal of evidence to the contrary, the indictments merely alleged that the defendants were either “accomplices to the commission of such crimes committed by others or, on the basis of command responsibility, had failed to prevent, stop or take steps to investigate and prosecute the commission of crimes against humanity committed by persons under their command or authority” Amnesty international & Justice Monitoring Programme *Indonesia: Justice for Timor-Leste – The Way Forward* ASA 21/006/2004 p 38.

⁹²⁶ Niemann above N 70 citing The UN Special Observer appointed to monitor the trials, Professor Cammack, pointed out in his reports that the Attorney-General’s investigators only made one trip to East Timor in preparation for the Jakarta trials. M.E. Cammack Report on the Trials Before the Ad Hoc Human Rights Court for East Timor (Unpublished) p 43. As a consequence of the so-called “civil unrest” generated by the pro-independence factions, the civil administration in East Timor had no option but to reactivate the civilian security forces in order to provide support to the State security forces. Some prosecution witnesses went so far as to suggest that the militia did not exist at all. Many witnesses argued that the ‘arrival of UNAMET undermined the authority of the Indonesians because they openly supported independence, thus giving weight to the illegal activity of the pro-independence militia’. In particular, the violence and destruction that occurred after the vote had been taken was said to be a “spontaneous reaction to the fraud perpetrated by the United Nations.” M.E. Cammack Report on the Trials Before the Ad Hoc Human Rights Court for East Timor (Unpublished) p38.

On the basis of the findings of KPP-HAM there is no question that this evidence failed to reflect the true situation and that it demonstrated an intention on the part of the Indonesian prosecutors to portray a version of the events that not only favoured the accused but completely exonerated the upper echelons of TNI and the Indonesian government from any involvement. Had the prosecutors genuinely wanted to present a true version of the facts, there is no question that they could easily have done so. In the circumstances, one is left with the inescapable conclusion that the prosecutors, (at least), manipulated the process to serve the needs of their political masters.

The conflict in 1999 occurred amid significant international media coverage. Despite an abundance of photographic and physical evidence, little of it was introduced at trial.⁹²⁷ As Amnesty International observed: [H]aving regard to the fact that the prosecution case was predicated on the erroneous contention that the crimes were perpetrated by pro-independence groups, with the Indonesian military and civilian authorities struggling to maintain law and order, Western media coverage - which actually demonstrated quite the opposite - was presumably not considered helpful.

The prosecution could doubtless have had access to a large amount of documentary evidence from Indonesian government files had it wished to avail itself of this evidence in support of a proper case. However, very little documentary evidence was produced to the court.⁹²⁸

The East Timorese victim witnesses were badly treated and very differently to the way pro-Indonesian defence witnesses were treated.⁹²⁹ The court failed to provide interpreters in circumstances where interpreters could have easily been made available.⁹³⁰ Not only was there a failure to respect their dignity while testifying, but little or no effort was made to guarantee their safety in Jakarta.⁹³¹

⁹²⁷ Amnesty international & Justice Monitoring Programme *Indonesia: Justice for Timor-Leste – The Way Forward* ASA 21/006/2004 p 45.

⁹²⁸ Ibid 46.

⁹²⁹ Clinton Fernandes, 'Indonesia and East Timor: Against Impunity, for Justice' *Austral Policy Forum April 2008* <http://gc.nautilus.org?Nautilus/Australia/apsnet/policy-forum/2008/impunity-vs-justice> accessed November 2008 p 3

⁹³⁰ Niemann above n 70 citing The UN Special Observer appointed to monitor the trials, Professor Cammack, pointed out in his reports that the Attorney-General's investigators only made one trip to East Timor in preparation for the Jakarta trials. M.E. Cammack Report on the Trials Before the Ad Hoc Human Rights Court for East Timor (Unpublished) p49.

⁹³¹ Niemann above n 70 citing The UN Special Observer appointed to monitor the trials, Professor Cammack, pointed out in his reports that the Attorney-General's investigators only made one trip to East Timor in preparation for the Jakarta trials. Cammack also observes that on many occasions defence counsel and spectators in the back of the courtroom laughed at the testimony being given by victim witnesses. At times spectators could be heard to say "liar". M.E. Cammack Report on the Trials

Only 6 out of the 18 defendants tried by the Indonesian Court were found guilty of crimes against humanity.⁹³² All the accused except one non-Indonesian received less than the minimum sentence. The fact that anyone was convicted at all is perhaps surprising, in view of the completely unsatisfactory way in which the prosecutions were conducted. However, any belief that some measure of justice may have been afforded the victims was short-lived because by July 2004, the Indonesian Appeals Court had acquitted or overturned the convictions of all indicted Indonesians.

Throughout the process the Secretary General reported the deteriorating situation to the Security Council. In his report of 24 July 2001 the Secretary General reported that the 'Indonesian Attorney-General has not yet appealed the extremely light sentences handed down by a Jakarta court to six men in connection with the murder of three workers of the Office of the United Nations High Commissioner for Refugees (UNHCR) in Atambua on 6 September 2000'.⁹³³ In his report of 17 April 2002 the Secretary General noted that 'on 7 March 2002, the Central Jakarta District Court sentenced Jacobus Bere, one of the four persons accused of killing Private Leonard Manning (a member of the UNTAET New Zealand contingent) to six years' imprisonment. On 20 March the charges against the remaining defendants were dismissed. The decisions of the Court can only be regarded as inadequate and disappointing'.⁹³⁴ In his report of 13 August 2004 the Secretary General reported that 'widespread and serious concerns were voiced following the recently announced decisions by the Appeals Court in Jakarta overturning the four convictions handed down by the Ad Hoc Human Rights Tribunal of Indonesia, and reduced sentence given in another case'.⁹³⁵

The insistence by the Indonesian government that it have exclusive jurisdiction over these cases to the exclusion of the international

Before the Ad Hoc Human Rights Court for East Timor (Unpublished) p47 Members of TNI and pro-integration militia groups attended the trials throughout the whole process. The numbers of TNI present ranged from 10 to 25 on any given day. Some were armed. TNI admitted that members had been ordered by their superiors to attend the trial in order to support the accused. On most occasions TNI members occupied the front rows of the public gallery and often witnesses were required either to sit near them or to pass close by. The TNI and militia in attendance sometimes became unruly when evidence contrary to their interests was given. There can be little doubt that the presence of TNI and pro-integration militia was a deliberate attempt to intimidate the court, the victim witnesses and the prosecution. D. Cohen, "Intended to Fail - Trials Before the Ad Hoc Human Rights Court in Jakarta", International Centre for Transitional Justice, Occasional Paper Series (August 2003), p56.

⁹³² <http://news.amnesty.org/library/index/engasa210062004>

⁹³³ *Interim report of the Secretary-General on East Timor* UNDoc S/2001/719, para. 308.

⁹³⁴ *Ibid* para. 38.

⁹³⁵ *Ibid* para 20.

community demonstrates its political objective of wanting to undermine the legitimate enforcement of international criminal law. Interestingly, the fact that KPP-HAM was able to undertake a satisfactory investigation suggests that, at least at one level, the government of Indonesia had the capacity to investigate crimes of this magnitude should it have chosen to do so.

Armed with the KPP-HAM report, the Attorney-General's investigators should have followed the line of inquiry taken by KPP-HAM. That this did not occur suggests that their investigations were deliberately manipulated to protect TNI and Indonesian government officials. The question arises of how much blame should be cast on the government of Indonesia for the failure of this process, as Bernd Häusler sympathetically observed:

It must be considered that also other states, which are considered as exemplary, would have difficulties to have documents presented in Court proceedings, which may give a negative impression of military, police or public authorities. An additional factor is that Indonesia is a country in transition and in a process of democratization. This makes it even more difficult for the persons responsible in Indonesia to release the necessary records. At the same time it is important to support this process of democratisation.⁹³⁶

However it must be remembered that it was the government of Indonesia that insisted on conducting the trials itself. Consideration for protecting the emerging Indonesian democratization process does little to comfort the victims of these crimes in their search for justice. An interesting parallel may be made with the Leipzig trials. At Leipzig the international community had resolved to conduct international war crimes trials in relation to war crimes committed by Germany and its allies during the course of the war. In a similar way, the hand of the international community was stayed by a plea from Germany that it should conduct the trials itself, and like Leipzig the prosecution action was a failure.⁹³⁷

One could also argue with the proposition that conducting international trials would impede the Indonesian democratisation process, because bringing members of TNI who committed war crimes to justice may well be one of the fundamental ways of achieving an enduring democracy in the Indonesian state.

⁹³⁶ B. Häusler, *Justice for Victims: A Legal Opinion on the Indonesian Human Rights Trials Concerning the Crimes Committed in East Timor in 1999*, German Commission *Justitia et Pax* (2002), p. 89.

⁹³⁷ Geoffrey Robertson *Crimes Against Humanity: The Struggle for Global Justice* (Penguin, 2000) pp. 210–211.

The fundamental evil of states failing to bring the perpetrators of these crimes to justice is that impunity in the short term leads to even greater instability in the long term.⁹³⁸ According to Joinet,⁹³⁹ ‘impunity is the exemption or freedom from punishment for violations, whether criminal, civil, administrative or disciplinary’.⁹⁴⁰

The international community attaches great importance to eliminating impunity because as Joyner observes ‘where and when such acts of gross violence are escaping prosecution, the very core of international law is being offended, namely the *Universal Declaration of Human Rights*. If contemporary international society is to be governed by the rule of law, rather than by the savagery of men, those who perpetrate these gross violations of human rights must be held personally accountable for their unlawful acts’.⁹⁴¹ It is often the government itself that facilitates impunity at a national level.⁹⁴² Redressing impunity is a necessary healing process for the people of a state as well as for the state itself. Without such healing it is likely that an enduring peace and national reconciliation will be severely diminished.⁹⁴³

6.4 Conclusion

These are just two examples of where states have manipulated the criminal justice system in order to achieve some short term political advantage when attempting to enforce international criminal law. One usually associates such behaviour with tyrannical dictatorships. At least in the cases of the tyrant one can only hope that eventually the dictatorial regime will be overthrown and that the introduction of a democratic system will ensure that humanitarian interests are respected. It is disturbing when democratic states behave in this way, as instanced above. Democratic states justify debasing the trial procedure because the majority discriminate against people who are foreign to their state and who they perceive do or have posed a threat to them. This is not however a valid justification for abandoning the rule of law. Community support should not be the basis upon which responsible governments deviate from or abandon fundamental principles of law enforcement. These principles

⁹³⁸ M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003) Transnational p 705

⁹³⁹ Louis Joinet Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission for the Promotion and Protection of Human Rights), UNDoc /CN.4/Sub.2/1997/20/Rev.1

⁹⁴⁰ Ibid.

⁹⁴¹ C.C. Joyner, “Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability”, *The Denver Journal of International Law and Policy*, vol. 26, No. 4 (2003), p. 596.

⁹⁴² Ibid 611.

⁹⁴³ Ibid 615.

are fundamental to the whole of humanity, they transcend state borders. Governments have a duty to look beyond local domestic issues and towards their international responsibilities. They have a duty to educate their people so that the community they represent also respect the rights of all humanity. It is simply not tenable for democratic states to pander to the narrow interests of their domestic environment.

What is particularly disturbing in this regard is that if the state has the political will to properly enforce international criminal law then it can do so without the need to resort to contrivances such as sham trials. The important consideration here is that the regulation of laws such as the *Geneva Conventions* are the expression of the will of humanity because it is the preservation of humanity that is sought to be protected by them. It is the regulation of these laws, along with other important international humanitarian laws that government often try to exclude by attempting to rely on outmoded sovereign principles. The struggle is for civil society to prevail in having its superior position respected and applied so as to ensure that the greater interest of humanity is recognized and respected. As things stand, states simply cannot be trusted to exclusively enforce international criminal law in respect of breaches that occur on their territory or fall under their domestic jurisdiction. There needs to be grafted onto the process a suitable 'check and balance' so as to ensure that states cannot abuse the authority entrusted to them by civil society.

CHAPTER 7

International Criminal Tribunals as Enforcers of ICL

7.1 Introduction

One of the contentions of this thesis is that international tribunals are fairer institutions than state military commissions or some state courts because they are more remote from the political agenda of any one nation state. Hence there is generally an absence of local state bias. As the international tribunals have no vested interest in protecting the political or military elite of a particular state they have no specific conflict of interest. However, international tribunals (at least in the past) have not all been entirely satisfactory because they were imposed by the victors over the vanquished thus favouring the victors and as a consequence the justice that they dispensed was rightly labelled ‘victor’s justice’. In more recent times, the international community has been better able to influence the establishment and functioning of international tribunals such that the quality of justice they deliver has improved. In this chapter the early international military tribunals of Nuremberg and Tokyo are examined, so too are the later international tribunals including the ad hoc and hybrid tribunals.⁹⁴⁴

Arguably the later ad hoc tribunals and the permanent International Criminal Court (ICC) if supported by international civil society are better placed to dispense international justice notwithstanding their imperfections, which although significant, are far better and more just institutions than their corrupted state counterparts.⁹⁴⁵ Also, as the international tribunals exercise universal jurisdiction⁹⁴⁶ (as opposed to national criminal jurisdiction) they are often better positioned to enforce international criminal law free from the political interests of individual states. International tribunals have evolved over time and have arguably improved as they successively gained experience. In this chapter the historical development of the tribunals will be examined and analysed in order to assess their effectiveness.

⁹⁴⁴ The Chapter is only a summary of the immense work of these international tribunals.

⁹⁴⁵ Gerry Simpson *Law, War and Crime War Crimes Trials and the Reinvention of International Law* (2007) Polity p 30.

⁹⁴⁶ Alexander Zahar & Goran Sluiter *International Criminal Law* (2008) (Oxford UP) p29.

7.2 Pre-Nuremberg

International criminal tribunals have mostly developed since World War II. Although arguably at least one international criminal law tribunal is recorded to have existed as far back as 1474, when the Governor of Breisach, Peter von Hagenback was tried before an international criminal tribunal made up of judges from the Holy Roman Empire.⁹⁴⁷ He was held responsible for the crimes committed by his troops during the occupation of Breisach. His troops had killed, raped and pillaged innocent civilians. The crimes were described as being ‘against the laws of God and humanity’. His defence of superior orders was dismissed and he was sentenced to death. This is the first case where liability was based on ‘command responsibility’ and the defence raised was ‘superior orders’.⁹⁴⁸ This tribunal did little to advance the development of international criminal law because it was largely a historical anomaly which soon disappeared from the international scene. McCormack questions the claim that it was an international tribunal at all.⁹⁴⁹

The next tribunal to be proposed was a much more credible institution, which had it been successful, may well have significantly changed the emerging international humanitarian law landscape. In 1870 Gustave Moynier, a former president of the International Red Cross, proposed a permanent court which would be automatically activated in the event of an armed conflict between states. However this concept was well ahead of its time and did not find favour with nation states.⁹⁵⁰ Had it been accepted it could well have operated in a similar way to the International Criminal Court. However it was not established,⁹⁵¹ so the opportunity to contribute to the development of humanitarian law never arose.

As mentioned in the previous chapter, during the course of World War 1, the first call in modern times for having war crimes trials came from civil

⁹⁴⁷ McCormack argues that caution needs to be exercised when declaring this trial to be the first international war crimes trial because it is not clear the crimes were ‘war crimes’, that the tribunal was genuinely ‘international’ or that the law applied was ‘international’:- see T.L.H. McCormack & G Simpson (eds) *The Law of War Crimes: National and International Approaches* (1997 Kluwer) Chap. 2 by T. L. H. McCormack “From Sun Tzu to the Sixth Committee The Evolution of an International Criminal Law Regime” p38.

⁹⁴⁸ E. Greppi ‘The Evolution of Individual criminal Responsibility under International Law’ (1999) *International Review of the Red Cross* no 835, p 531.

<http://www.icrc.org/web/eng/siteeng.nsf/html/571q2x>

⁹⁴⁹ McCormack above n 4, 38.

⁹⁵⁰ E.K. Leonard *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (2005) Ashgate p 19

⁹⁵¹ M Glasius ‘How Activists Shaped the Court’ (2003) Crimes of War Project – *The ICC (Magazine)*
<http://www.crimesofwar.org/print/icc/icc-glasius-print.html>.

society not from governments, the latter being more interested in extracting war reparations once they had comprehensively defeated the Germans.⁹⁵² In France, church leaders and women's groups supported the idea of the trials. Legal academics urged the French government to include war crimes trials as a condition of any negotiated peace treaty.⁹⁵³ However, the French government showed little enthusiasm for the idea. In Britain the public call for war crimes trials was picked up by the press. The British government was more supportive of the idea.⁹⁵⁴ British civil society leaders demonstrated quite advanced thinking for the time. They proposed a permanent international criminal tribunal which would sit in The Hague. They foresaw the dangers of 'victor's justice' and in order to avoid the appearance of victors revenge suggested that the permanent tribunal should be free of Allied control. They argued that agreements should be sought with neutral states in order to prevent war criminals obtaining sanctuary on their territory after the war. They proposed that this should be debated at an international conference attended by the leading international NGO's of the time.⁹⁵⁵

Public opinion in the United States favoured international war crimes trials but President Wilson, a staunch anti-monarchist, was more committed to changing the political structure of 'old Europe' than going down the uncertain path of war crimes trials.⁹⁵⁶

In Britain, the lead up to the December 1918 elections was dominated by the call for war crimes trials. Willis notes that public opinion played a significant role in 'propelling British foreign policy down the path of international war crimes trials'.⁹⁵⁷ Prior to the November 11, 1918 armistice, intense public pressure obliged the British Prime Minister, Lloyd George to seriously commit his government to the idea of international war crimes trials. The British War Cabinet directed the Attorney-General to establish a committee to gather evidence in preparation for the trials and to make recommendations on the establishment of an international tribunal.⁹⁵⁸

⁹⁵² James. F Willis *Prologue to Nuremberg: The politics and Diplomacy of Punishing War criminals of the First World War* Greenwood Press 1982 p 12

⁹⁵³ Ibid, 14.

⁹⁵⁴ Ibid, 15.

⁹⁵⁵ Ibid, 31. Willis refers to a call by Dr Hugh H. Ballot, Secretary of the Grotius Society, who called on the American Society of International Law and the Societe Francaise de droit international to develop and agenda for the international conference. Willis cites an article by Bellot titled "War Crimes: Their Prevention and Punishment" *The Nineteenth century and After* 80 (Sept 1916) ;636-60

⁹⁵⁶ Ibid, 43 – 44. Leonard above n 7, 22.

⁹⁵⁷ Ibid, 48.

⁹⁵⁸ Ibid, 53.

Lloyd George did however encounter opposition to the idea, Winston Churchill, (backed by the Australian Prime Minister, William Hughes), opposed trying the German Kaiser, who by this stage had obtained sanctuary in the Netherlands, because Churchill considered that ‘making war is not a crime – it is the prerogative of every sovereign’.⁹⁵⁹ The fact that the Kaiser was related to the British Royal family was another reason why many British conservatives opposed the idea of putting the Kaiser on trial. The French and the Americans were ambivalent but Lloyd George did manage to secure the creation of an International Commission of Inquiry.⁹⁶⁰ Willis contends that the American representative on the Commission, Secretary of State, Robert Lansing, totally opposed the idea of international war crimes trials and set about scuttling the whole project.⁹⁶¹ Lansing insisted on respecting the principle of ‘head of state immunity’⁹⁶² for the Kaiser and argued that the trying of ordinary soldiers was solely the business of the nation state.⁹⁶³ Nevertheless Lloyd George persisted with his intention to hold the international trials but was ultimately defeated by Lansing’s clever drafting of Articles 227 to 230 of the *Versailles Treaty*, which ensured that the Kaiser would never be tried for international crimes and ordinary soldiers would be dealt with (if at all) by national courts.⁹⁶⁴ While Articles 227 to 230 of the Treaty provided for the alternative of national or international trials intense German opposition to international trials made the choice of national trials, the easier option.⁹⁶⁵ As a result national trials were held at Leipzig, (as discussed in Chapter 6) which predictably turned out to be nothing more than a sham.

The inability of the international community of the time to achieve any kind of consensus on the idea of having international war crimes trials significantly set back the development of international criminal law.⁹⁶⁶ Had the world leaders shared the vision of those who promoted the creation of a truly independent permanent international criminal court the history of the 20th century may have read very differently.⁹⁶⁷ As it transpired this failure to create a system of international criminal justice, meant that the world community were without an internationally

⁹⁵⁹ Ibid, 57.

⁹⁶⁰ J.N. Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) Transnational p 45.

⁹⁶¹ Willis above n 9 74; Maogoto above n 17, 48; Leonard above n 7, 22..

⁹⁶² This has been a long held principle of international law see discussed in *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* [2000] 1 AC 61.

⁹⁶³ Willis above n 9, 76.

⁹⁶⁴ Ibid 80; Maogoto above n 17 49.

⁹⁶⁵ Willis above n 9 82; Maogoto above n 17 51.

⁹⁶⁶ Maogoto above n 17 57.

⁹⁶⁷ Maogoto above n17, 67.

recognised precedent when the worst crimes against humanity ever known to humanity were perpetrated during World War II.

7.3 Nuremberg

In October 1943 the Allies set up a commission of enquiry to investigate crimes committed, or being committed by Nazi Germany. The Commission was charged with the responsibility of investigating both political and military leaders responsible for waging an aggressive war, for war crimes and crimes against humanity. The Commission issued a *Declaration in Moscow* in 1943 warning both Germany and Japan that those responsible for these crimes would be prosecuted following the conclusion of the war.⁹⁶⁸

On 8 August 1946, the victorious Allies, the UK, USA, France and Soviet Union signed the Agreement for the Establishment of the International Military Tribunal – ‘*The London Agreement*’. The concept of establishing such an international tribunal tested international law of the time. Although this was to be labelled ‘victors justice’ it was far preferable to the alternatives of either doing nothing or as Churchill suggested ‘shooting the perpetrators without trial’.⁹⁶⁹ In creating the Nuremberg Tribunal it was accepted that international law had a very different foundation to national law.⁹⁷⁰ The Nuremberg prosecutors argued that ‘international law rested upon the consent of nations - once consent had been given it could not be unilaterally withdrawn – ‘immediately a State accepts international obligations it limits its sovereignty’.⁹⁷¹ The prosecutors contended that international law had no legislative base; it ‘grows as did the common law, through decisions reached from time to time in adapting settled principles to new situations’.⁹⁷² The Nuremberg prosecutors argued that the legitimate jurisdictional base of the Nuremberg Tribunal was essentially the Charter itself and the long standing right of belligerent states to punish enemy war criminals ‘who fall into their hands’.⁹⁷³ It would seem that at the time the prosecutors wrote their opening speeches the principle of ‘universal jurisdiction’ was

⁹⁶⁸ McCormack above n 4, 57.

⁹⁶⁹ Geoffrey. Robertson *Crimes Against Humanity: The Struggle for Global Justice* (1999 Penguin Press) p 198.

⁹⁷⁰ Maogoto above n 17,71.

⁹⁷¹ National Archives of Australia - NAA- M1417 Nuremberg War Crimes Trials – Opening Speeches of Chief Prosecutors see speech of Chief prosecutor for UK.

⁹⁷² National Archives of Australia - NAA- M1417 Nuremberg War Crimes Trials – Opening Speeches of Chief Prosecutors see speech of Chief prosecutor for the USA.

⁹⁷³ National Archives of Australia - NAA- M1417 Nuremberg War Crimes Trials – Opening Speeches of Chief Prosecutors - Chief Prosecutor for France.

not generally accepted as being applicable to these crimes as it did not feature in their jurisdictional argument.⁹⁷⁴

The Tribunal had its seat in Nuremberg, the city where Hitler had proclaimed his racist anti-Semitic laws of 15 September 1935.⁹⁷⁵ The Charter for the Nuremberg Tribunal provided for 3 types of offences: - [1] Crimes against peace, [2] war crimes and [3] crimes against humanity.⁹⁷⁶

The inclusion of crimes (other than war crimes) was controversial.⁹⁷⁷ A crime against peace made persons individually responsible for planning, preparing, initiating or waging a war of aggression.⁹⁷⁸ The question to be addressed by the Nuremberg prosecutors was how could the introduction of such a crime in the *Nuremberg Charter* be justified, having regard to the fact that it had not been previously articulated as a crime, either nationally or internationally. The prosecutors argued that while the *Hague Conventions* of 1899 and 1907 did not outlaw war they created an obligation on states to only resort to war when mediations had failed, and this had not been respected in the case of Nazi Germany during World War II. Following World War I, the *Treaty of Versailles* which contained within it, the Covenant of the League of Nations, demonstrated that nation states had made wars of aggression an international crime. One of the most significant developments in this regard was the Geneva Protocol of 1924 for the *Pacific Settlement of International Disputes* which declared that a war of aggression was ‘an international crime’.⁹⁷⁹ This was reaffirmed by the 8th Assembly of the League of Nations in 1927 when the Assembly passed a resolution affirming that a war of aggression was an international crime. Germany was one of the countries that had voted in favour of this resolution. *The Briand-Kellogg Pact* of 1928 made every war of aggression illegal and by inference, those responsible for causing it, criminals.⁹⁸⁰ While this argument was accepted by the Tribunal, one wonders whether it would have been so readily accepted,

⁹⁷⁴ For a contra argument see R. S. Clark Chapter 7 ‘Nuremberg and Tokyo in Contemporary Practice’ in McCormack above n 4, 172; Maogoto, above n 17, 112.

⁹⁷⁵ *Agreement for the Prosecution and Punishment of Major War criminals of the European Axis* (London Agreement) Signed at London, August 1945 82 UNTS 279. Charter of the International Military tribunal annexed to the Agreement; William L. Shirer *The Rise and Fall of the Third Reich* 1964 (Pan) p 341.

⁹⁷⁶ *Ibid* (London Agreement) Art. 6.

⁹⁷⁷ McCormack above n 31 174.

⁹⁷⁸ Maogoto above n 17 108.

⁹⁷⁹ McCormack above n 31 174.

⁹⁸⁰ National Archives of Australia - NAA- M1417 Nuremberg War Crimes Trials – Opening Speeches of Chief Prosecutors.

had the Tribunal been ‘truly’ independent and had not been exclusively made up of judges drawn from the ‘victorious powers’.

Another equally controversial issue was attaching individual criminal responsibility to the perpetrators of the alleged international crimes.⁹⁸¹ It was argued, that under international law at the time, ‘if a state could not be found guilty of a crime, then how could a person acting for and on behalf of the state be criminally liable?’ The Nuremberg prosecutors countered that the notion of a state not being criminally liable was not correct. They reasoned that as a pirate was criminally liable under international law, then so too could a state be criminally liable as a pirate. They argued that it was not correct to suggest that these international crimes, which had existed prior to 1939, (namely war crimes and crimes against humanity), could not attach individual criminal responsibility for their commission. They pointed to the *Leipzig* trials following the First World War, which they said definitely established international war crimes where individuals could be held criminally liable. They argued that the contention that international law only applied as between states and not to individuals was incorrect.⁹⁸² However as was noted in Chapter 6 the *Leipzig trials* were state trials and there was a great deal of difference between what a state could do with its soldiers as opposed to what could be done under international law at the time.

War crimes, namely violations of the laws or customs of war including ill-treatment of prisoners of war, deportation, plunder wanton destruction of cities, towns or villages, not justified by military necessity, clearly predated Nuremberg,⁹⁸³ but they had not been previously considered as applicable to criminal acts perpetrated against the civilian population (or part thereof) during the course of an internal armed conflict. Nor were such crimes considered enforceable against the sovereign leaders of a nation state. The Nuremberg prosecutors countered that sovereign immunity or head of state immunity was a principle that applied by reciprocal courtesy between states, it had no application to international criminal tribunals.⁹⁸⁴ While this may not be controversial today, it was much more uncertain in 1946.

Another area of controversy concerned ‘crimes against humanity’. Crimes against humanity included, murder, extermination, enslavement,

⁹⁸¹ Maogoto above n 17, 113.

⁹⁸² National Archives above n 37.

⁹⁸³ McCormack above n 4, 174.

⁹⁸⁴ National Archives of Australia - NAA- M1417 Nuremberg War Crimes Trials – Opening Speeches of Chief Prosecutors see Lord Wright.

deportation and other inhumane acts committed against any civilian population before or during the war, or persecution on political, racial or religious grounds. These crimes were committed when the attack was committed as part of a widespread or systematic attack directed against the civilian population. While such an act may be a war crime, it became a crime against humanity if the crime, e.g. murder, extermination or enslavement was committed because the victim belonged to a targeted civilian group. The motivational element of a crime against humanity was a policy which required that a certain community be targeted. The Nuremberg prosecutors argued that such crimes had existed at the international level, at least since the Peace Conference of Versailles.⁹⁸⁵ Having regard to the fate of the proposed international trials following World War I, this is not an easy argument to make but again the Nuremberg Tribunal appeared to have little difficulty in accepting it.

Another issue for the prosecutors was the fact that the crimes committed by the Nazi government against the Jewish people of Germany prior to the war was permitted under German law and at a time when there was no ‘international armed conflict’;⁹⁸⁶ as things stood in 1946 this excluded the operation of international criminal law and the Nuremberg prosecutors did not argue to the contrary. But what was the effect of these discriminatory German laws during the course of World War II (an international armed conflict)? The prosecutors argued that ‘during the war’ such national laws could not override or exclude international law. This argument was accepted by the Tribunal and by so doing it overturned a long held principle of international law.⁹⁸⁷ Thus German law could not shield the offender from international sanction provided the offence was committed during the course of an international armed conflict. The Nuremberg prosecutors further maintained that as the Nazi perpetrators had been warned on several occasions during the course of the war that they would be punished for their crimes at the end of the war, they could not now raise an argument of *ex post facto* criminal law. The accused knew what they had done was wrong and they knew that they would eventually be punished for their acts.⁹⁸⁸

A similar controversy surrounded the defence of ‘superior orders’. Under the Nuremberg Charter it was no defence to show that such crimes were committed in circumstances where the offender was acting under superior

⁹⁸⁵ Ibid.

⁹⁸⁶ The pre War Nazi Nuremberg Racial Laws of 15 Sept 1939; see William L. Shirer *The Rise and Fall of the Third Reich* 1964 (Pan) p 536.

⁹⁸⁷ McCormack above n 31, 179.

⁹⁸⁸ National Archives of Australia - NAA- M1417 Nuremberg War Crimes Trials – Opening Speeches of Chief Prosecutors see France, USSR USA and UK.

orders.⁹⁸⁹ The Nuremberg prosecutors pointed out that a defence of superior orders had never applied to a manifestly illegal order. The Chief Prosecutor for the UK argued – ‘There comes a point when a man must refuse to answer to his leader if he is also to answer to his conscience’.⁹⁹⁰ This argument may sound good in principle but when the relevant offender is compelled under pain of death to follow the dictates of a tyrannical despot, then expecting the subordinate to put his/her own life at risk is ‘unrealistic’. As the Nuremberg defendants pleaded ‘it was harsh to hold a person criminally liable for a crime because in a life or death situation they chose to live’.⁹⁹¹

Following the Nuremberg Trials in 1950 the International Law Commission (ILC) adopted the ‘*Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*’. However the Nuremberg approach to superior orders was adopted by the International Law Commission. Under the ILC Nuremberg Recognition Principles the ‘no superior orders defence’ only applied if the perpetrator had a ‘moral choice’ open to him/her at the time.⁹⁹²

Another defence ignored by the Nuremberg Tribunal was the *tu quoque* argument. Since only perpetrators on one side of the conflict were prosecuted, this was a particular problem because there is no doubt that war crimes had been committed by both sides of the conflict, especially in the case of the Soviet Union’s invasion of Germany.⁹⁹³ Also the ‘carpet bombing’ of German cities by the Allies was indiscriminate in so far as civilian casualties were concerned and arguably would have offended the ‘military necessity’ principle.⁹⁹⁴ However repeated attempts by the Nuremberg defendants to raise this argument were dismissed.

Another controversial provision of the Nuremberg Charter was the right of the Tribunal to try an accused in *absentia*.⁹⁹⁵ Martin Bormann was tried in *absentia*, the Tribunal recognised that the defence counsel

⁹⁸⁹ *London Agreement* above n 32 Art. 6.

⁹⁹⁰ NAA- M1417 above n 45.

⁹⁹¹ Silva Hinek The Superior Orders Defence Embraced at Last? *New Zealand Postgraduate Law E-Journal* Issue 2/2005 p 15 – 16.

⁹⁹² I. Bantekas & S. Nash *International Criminal Law* 2003 (2nd Ed.) (Cavendish) p 133.

⁹⁹³ Leonard above n 7 25.

⁹⁹⁴ The bombing of Dresden by the RAF the US Air Force between 13 - 15 February 1945 remains one of the more controversial Allied actions of World War II. Although international humanitarian law relating to air warfare was not highly developed at the time, the fact that Dresden was not a significant military target suggests that the primary purpose of the bombing was to terrorise the civilian population and cause unnecessary civilian casualties. <http://www.spartacus.schoolnet.co.uk/2WWdresden.htm>

⁹⁹⁵ *London Agreement* above n 32 Art.12.

assigned to Bormann ‘laboured under difficulties’ in trying to defend Bormann in *absentia*.⁹⁹⁶ However jurisdictional challenges were severely restricted with there being no right to challenge the Tribunal or its judges.⁹⁹⁷ The prosecutors of the member states also encountered difficulties over the notion of ‘aggressive war’. The Soviet Union insisted that a crime would only be committed if an aggressive war was initiated by a party.⁹⁹⁸

The absence of any neutral judge on the Tribunal, meant that no judicial voice other than those of the victorious powers, could be heard. The Nuremberg Charter provided that each Allied government had to appoint one member and one alternative to serve as judges on the Tribunal.⁹⁹⁹ A conviction and sentence could only be imposed by an affirmative vote of 3 out of the 4 members of the Tribunal.¹⁰⁰⁰ The Tribunal could impose any just punishment, including the death penalty, following the conviction of an accused.¹⁰⁰¹ Each of the four governments appointed one of the four chief prosecutors,¹⁰⁰² who in turn had the task of drafting the rules of procedure.¹⁰⁰³ The test of admissibility of evidence was relevance and no other technical rules of evidence applied.¹⁰⁰⁴ The Tribunal had the power to compel the presence of witnesses and order the production of documents.¹⁰⁰⁵

While the Nuremberg Tribunal had many flaws the magnitude of the crimes committed by the German Nazi government compelled some form of response. Arguably the victorious allies could have exacted far more severe reprisals, than a trial based on questionable law, had they been minded to do so. At least the Nuremberg trial was far more satisfactory than state run military commissions as discussed in Chapter 5. For example unlike the military commissions the accused were guaranteed far more fair trial rights than those offered by military commissions. At Nuremberg the rights of the accused included:-the right to be served with a copy of the indictment in a language understood by the accused at a reasonable time before trial; the right to give any explanation relevant to the charges made against the accused; the right to translation of proceedings before the tribunal in a language which the accused

⁹⁹⁶ *Nuremberg Judgment* page 166.

⁹⁹⁷ *Ibid* art. 3.

⁹⁹⁸ Telford Taylor *The Anatomy of the Nuremberg Trials* (1992) p75 and following.

⁹⁹⁹ *London Agreement* n 32 art. 2

¹⁰⁰⁰ *Ibid (London Agreement)* art. 4.

¹⁰⁰¹ *Ibid* art. 27.

¹⁰⁰² *Ibid* art,14.

¹⁰⁰³ *Ibid* art. 14 (c).

¹⁰⁰⁴ *Ibid* art. 19.

¹⁰⁰⁵ *Ibid* art. 17.

understood; the right to assistance of counsel; the right to be present and to cross-examine any witness called by the prosecution.¹⁰⁰⁶

Notwithstanding the validity of criticism that may be levelled at the Nuremberg Tribunal there is no question that the work of the Tribunal made a significant inaugural contribution to the development of international criminal law. The Tribunal removed once and for all the lingering argument that individuals could not be made the subject of international criminal liability.¹⁰⁰⁷ More importantly it did not allow the atrocious crimes committed by the Nazi to go unpunished and (for its time) it made a genuine attempt to provide the accused with a fair and regular trial. Whatever criticism can be made of the Nuremberg Tribunal it certainly surpassed, what might have been expected of the victorious states, had they been left entirely to deal with the offenders alone.¹⁰⁰⁸

7.4 Tokyo

While the Nuremberg Tribunal is often held up as the first ‘model international tribunal’ the Tokyo Tribunal does not (perhaps a little unfairly) enjoy a similar reputation.¹⁰⁰⁹ In the *Potsdam Declaration* of 26 July 1945 the allied powers announced that Japanese war criminals would be prosecuted for war crimes and crimes against humanity following the War.¹⁰¹⁰ The Nuremberg principles were adopted by the ‘International Military Tribunal for the Far East (the ‘Tokyo Tribunal’), established to prosecute Japanese war criminals.¹⁰¹¹ Unlike Nuremberg where they had 4 Chief Prosecutors, in Tokyo they only had one chief prosecutor from the United States of America.¹⁰¹² The accused were charged with war crimes; crimes against humanity and crimes against peace.¹⁰¹³

The Tokyo trial opened on 3 May 1946 at 9.30 am in the Grand Auditorium of the old Japanese War Ministry.¹⁰¹⁴ The bench of the

¹⁰⁰⁶ Ibid 16.

¹⁰⁰⁷ McCormack above n 4, 58.

¹⁰⁰⁸ While the occupying states of USA, UK, France and Russia did conduct their own trials pursuant to Control Order no. 10, (except for the Russian trials), these trials were influenced by the Nuremberg Trials which resulted in the accused receiving a more just process than might have happened had the Nuremberg precedent not been set.

¹⁰⁰⁹ M. Futamura *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy* (2008) Routledge p71.

¹⁰¹⁰ Bantekas above n 49, 334.

¹⁰¹¹ Ibid 335.

¹⁰¹² Maogoto, above n 17, 98.

¹⁰¹³ B.V.A. Roling & AQ Cassese *The Tokyo Trial and Beyond – Reflections of a peace monger* 1993 p 3.

¹⁰¹⁴ Richard H. Minear *Victors' Justice The Tokyo War Crimes Trials* 1971 Princeton University Press p 3.

Tribunal consisted of 11 judges from the 11 victorious countries. There were 28 defendants charged.¹⁰¹⁵ The defendants came from a range of backgrounds including politicians, diplomats, military and a civilian.¹⁰¹⁶ They included an ex-prime minister, foreign ministers and commanders-in-chief of the military forces. The trial lasted for two and one half years and of the 28 defendants accused 25 were found guilty.¹⁰¹⁷

As mentioned above, the Tokyo Tribunal is not considered to be as 'authoritative' as the Nuremberg Tribunal,¹⁰¹⁸ because instead of it being established pursuant to the agreement of the allied powers, (a treaty- as was the case with Nuremberg), the Tokyo Tribunal was established by order of General Macarthur¹⁰¹⁹ who also appointed the judges.¹⁰²⁰ However unlike Nuremberg, Tokyo at least had the Nuremberg precedent.

Another basis upon which the Tokyo Tribunal was unfairly criticised was that the proceedings did not run smoothly, three out of the 11 judges dissented from the decision of the majority.¹⁰²¹ However this is arguably a 'positive' not a 'negative' feature of the Tribunal.

Other criticisms of the Tokyo Tribunal included the criticism that it was:

- a) 'a revenge trial by the Americans for the bombing of Pearl Harbour' but one wonders why this accusation might not also be levelled at the Nuremberg Tribunal for the destruction of Europe;
- b) 'that the American wanted it to gloss over their own guilt for the bombing of Nagasaki and Hiroshima' but again how is this more so than attempts to gloss over the carpet bombing of Dresden or the Russian atrocities committed on the Eastern Front;¹⁰²²
- c) 'that the charges included conspiracy charges which are not recognized under Japanese law or international law' but again conspiracy was charged at Nuremberg so in a sense the Tokyo Tribunal had a precedent,¹⁰²³ and

¹⁰¹⁵ Ibid 4.

¹⁰¹⁶ Roling above n 70, 3.

¹⁰¹⁷ Bantekas above n 49, 335.

¹⁰¹⁸ Maogoto above n 17.

¹⁰¹⁹ Minear above n 71 183 Proclamation by Macarthur of the court

¹⁰²⁰ *Executive Order of General Douglas Macarthur Supreme Commander for the Allied Powers in Japan of 19 January 1946*. See also Bantekas above n 49, 335.

¹⁰²¹ Minear above n 71, 86; Webb was absent for 22 sitting days in Nov – Dec 1947. Majority of 7 and 4 dissenters Australia, France, India and the Netherlands.

¹⁰²² Minear above n 71, 99. The argument that the bombing of Hiroshima and Nagasaki were war crimes is based on the 'proportionality principle' – the resultant death of civilians was disproportionate to the military advantage gained. Further because Japan was prostrate, the Japanese had asked the USSR to negotiate an end to the war as result it is argued there was no excuse for the bombing.

¹⁰²³ *Bush V Rumsfeld* US 2006.

‘that the charges/trial offended the principle of *nullum crimen sine lege*’¹⁰²⁴ but again this was also a problem at Nuremberg.

Unlike Nuremberg, the Japanese defendants at least had a judge on the Tokyo Tribunal who was sympathetic to their course. The Indian Judge, Judge Pal, took a radical stance representing Asia as an unfortunate region dominated by European Colonialists. He saw the Japanese war as an act to liberate Asia for the Asians.¹⁰²⁵ It has been suggested that Pal probably never intended to find any of the accused guilty.¹⁰²⁶

The President of the Court, an Australian Judge, Webb, was appointed by Macarthur. This did not however appear to influence his independence, because he was quite critical of Macarthur’s decision not to prosecute the Japanese Emperor Hirohito, (Macarthur prohibited the investigation and prosecution of the Japanese Emperor, Hirohito).¹⁰²⁷ Webb was described as an ‘arrogant and dictatorial man’,¹⁰²⁸ but again this may be evidence of his independence.

The American prosecutor Keenan, was described as ‘second rate’ and ‘not up to the job’.¹⁰²⁹ Certainly he was not up to the standard of the American prosecutor at Nuremberg, Justice Jackson but again this lack of competence by Keenan is unlikely to have significantly prevented the accused from receiving a fair trial.

At first the accused were represented by Japanese lawyers but as the proceeding were based on the ‘adversarial model’, with which the Japanese lawyers were unfamiliar, at the request of the Japanese lawyers, American lawyers were appointed for each of the accused except one accused who refused to be represented by an American.¹⁰³⁰ This did not happen at Nuremberg and is one important reason why the Japanese accused may well have received a fairer trial than their German counterparts. American military defence lawyers have a proud tradition of fearlessly representing their accused. At Tokyo and in other trials they

¹⁰²⁴ ‘No Crime without a law’, Roling above n 70 5.

¹⁰²⁵ Ibid 28.

¹⁰²⁶ Minear above n 71 75. The India and Philippines judges - Pal and Jaranilla both arrived late. Both Counties were not sovereign states. During the war the Philippines was a USA Colony and India was a UK colony.

¹⁰²⁷ Ibid 111. Macarthur crossed out the Emperor Hirihto from the list to be prosecuted because he said that if Hirihto he was hung he would need 1 million USA Troops to control Japan, such would be the outrage of the Japanese people. The decision to exclude Hirihto was political not legal.

¹⁰²⁸ Roling above n 70 30. See also Minear above n71 84. Webb was considered to be arrogant to defence Counsel and Prosecution . it was said he showed signs that he had pre-judged the issues.

¹⁰²⁹ Roling above n 70 31.

¹⁰³⁰ Ibid 37.

have over the years demonstrated a great capacity to fight hard for their clients notwithstanding the circumstances.

When the (American) lawyers for the defence opened their case they strenuously put the argument that the trial was unfair because:-

- no charge of conspiracy was known to Japanese law;¹⁰³¹
- no crime of waging an aggressive war crime existed before the creation of the Tribunal;¹⁰³²
- no individual criminal responsibility existed before the war - states were responsible for war crimes, not individual soldiers;¹⁰³³
- no charge of aggression could be levelled at Japan because Japan had to go to war because the US had threatened Japanese industrial survival; and
- no crimes had been committed because killing in war is not murder.¹⁰³⁴

These points of argument were not accepted by the Tribunal and the trial proceeded. The trial lasted some 417 days which consisted of 818 court sessions, 419 witnesses were called and 779 affidavits were tendered. At the end of the Trial, 7 of the accused were sentenced to be hung and 16 received life sentences.¹⁰³⁵ In addition to the international trial, each of the Allied States conducted their own national prosecutions, in most instances before less satisfactory military commissions. A total of 5700 Japanese were tried by the victorious states after WWII¹⁰³⁶

Why the Tokyo Tribunal has not enjoyed the same academic interest as the Nuremberg Tribunal, it is not clear. Perhaps some of criticisms made at the time of the trials may have influenced the shaping of its reputation and MacArthur's dominating style may have affected its standing as an impartial judicial institution.¹⁰³⁷ However the Nuremberg Tribunal was subjected to similar criticisms, so it may be that as Nuremberg came first, it dealt with the European theatre, and it addressed the 'holocaust' that it was of greater interest than its Asian-Pacific counterpart. Zahar and Sluiter suggest that the Tokyo Tribunal may not have been an

¹⁰³¹ Minear above n 71, 41 – 42. Debate over the charging of conspiracy erupted among the judges, Pal and Webb agreed that there was no crime of conspiracy known to international law. However the majority disagreed.

¹⁰³² Minear above n 71 47 – Aggressive war. Pal dissented

¹⁰³³ Minear above n 71, 43 – On the question of 'individual criminal responsibility', Pal dissented.

¹⁰³⁴ Australian War memorial Archive - AWM54-1010/6/25 Pt 1 250 - defence explanations of Japans roll in WW2.

¹⁰³⁵ Minear above n 71.

¹⁰³⁶ Ibid 6.

¹⁰³⁷ Bantekas above n 49, 335.

international tribunal at all but more in the nature of a ‘hybrid tribunal’.¹⁰³⁸ Whatever the situation, like the Nuremberg Tribunal, the Tokyo Tribunal did make a reasonable attempt to provide the accused with a fair and regular trial and importantly it went some way to addressing the atrocious crimes that had been perpetrated by the Japanese Military so perhaps its reputation is a little unjustified.¹⁰³⁹

7.5 Post Nuremberg

The International Tribunals of Nuremberg and Tokyo demonstrated for the first time that international criminal justice could be dispensed outside the parameters of a state. It established the principle that international criminal justice was not just an idea but a reality. While Nuremberg and Tokyo were ad hoc tribunals, in the immediate aftermath of these Trials the idea of a permanent international criminal court seemed feasible. In 1948 The United Nations General Assembly requested the International Law Commission (ILC) to study the desirability and feasibility of establishing an international criminal court.¹⁰⁴⁰ Following a positive report by the ILC, a committee of 17 Member states was established to prepare a draft statute of the permanent court.¹⁰⁴¹ After a period of discussion a draft Statute was produced in 1953.¹⁰⁴² Pursuant to the draft Statute the court would be able to try ‘natural persons’ including heads of state.¹⁰⁴³ The type of criminal offences that could be tried before the Tribunal were ‘crimes against the peace and security of mankind.’¹⁰⁴⁴

It was proposed that the court could assume jurisdiction over a matter when an offence was committed:

- * in a state where the crime was committed;
- * in the state of the defendant’s nationality;
- * or in both circumstances where the jurisdiction was conferred by the Convention, or by special agreement or declaration.

The United Nations could halt proceedings if this were necessary for the maintenance of international peace and security.¹⁰⁴⁵ Confirmation of the indictment was determined by a panel of 5 judges, which judges could no

¹⁰³⁸ Alexander Zahar & Goran Sluiter *International Criminal Law* (2008) Oxford U.P. p6.

¹⁰³⁹ Maogoto, above n 17, 26.

¹⁰⁴⁰ *United Nations General Assembly Resolution 260 B (III)* 9 December 1948.

¹⁰⁴¹ *United Nations General Assembly Resolution 489 (V)* 12 December 1950.

¹⁰⁴² Revised Draft *Statute for an International Criminal Jurisdiction* UN GAOR Supp. No. 12 at 23 UN Doc A/2645 (1954).

¹⁰⁴³ *Ibid* art 25.

¹⁰⁴⁴ *Ibid* art 26.

¹⁰⁴⁵ *Ibid* art. 29.

longer take part in the proceedings following confirmation.¹⁰⁴⁶ The conferring states appointed the prosecutor.¹⁰⁴⁷ The accused was entitled to receive a copy of the indictment and to be given sufficient time to prepare a defence.¹⁰⁴⁸ The Court had the power to issue arrest warrants and to compel the attendance of witnesses and production of documents, even in those states which did not confer jurisdiction.¹⁰⁴⁹ Judgments of the court were final and without appeal.¹⁰⁵⁰

Again, greater attention was given to the fair trial rights of the accused than applied to state run military commissions. In summary the rights of the accused were as follows:

- * presumption of innocence;
- * presence during the proceedings;
- * provided with the assistance of counsel;
- * to have the proceedings translated into a language understood by the accused;
- * to question witnesses and inspect documents;
- * to call evidence;
- * to have the assistance of the court in obtaining evidence;
- * the right to be heard;
- * the right to silence, with no negative inference being drawn from the exercise of this right.¹⁰⁵¹

Unfortunately the member states could not agree on an acceptable definition of ‘aggression’ thus preventing the complete drafting of the crimes against the peace and security of mankind. With the intervention of the ‘Cold War’ the process stalled and its further serious consideration did not arise until the 1990s.

7.6 International Criminal Tribunal for the former Yugoslavia (ICTY)

Arguably one of the most important steps taken by the UN Security Council (‘Security Council’) in the 20th century with respect to advancement of international criminal law was the creation of the International Criminal Tribunal for the former Yugoslavia.¹⁰⁵² The

¹⁰⁴⁶ Ibid art 33.

¹⁰⁴⁷ Ibid art. 34.

¹⁰⁴⁸ Ibid art 35.

¹⁰⁴⁹ Ibid arts 40 &42.

¹⁰⁵⁰ Ibid art 45.

¹⁰⁵¹ Ibid art. 38.

¹⁰⁵² V. Morris & M.P. Scharf *An Insiders Guide to the International Criminal Tribunal for the former Yugoslavia :A documentary History and Analysis* (1995) Irvington on Hudson, N.Y. : Transnational Publishers

Federal Republic of Yugoslavia began to break up in the early 1990s after Serbia rotated into the Federal presidency and then subsequently blocked Croatia's legitimate appointment to the rotating presidency. This had the effect of forcing Slovenia and Croatia to seek independence outside the Federal structure.¹⁰⁵³ The Balkan States had a long history of conflict exacerbated by being the 'fault line' between two great empires – the Austro-Hungarian and Ottoman Empires. This also constituted the divide between Christian Europe (both Catholic and Orthodox) and Islamic Asia.¹⁰⁵⁴ The history of tensions between these groups went back for hundreds of years and had caused or contributed to numerous military conflicts.¹⁰⁵⁵

After Slovenia and Croatia left the Federation, Bosnia-Herzegovina followed in 1992 which triggered war. One of the great tragedies of the war was the ruthless inter-ethnic struggle between the three main religious-ethnic groups of Orthodox Serbs, Croatian Catholics and Bosnian Muslim.¹⁰⁵⁶ Euphemistically coined 'ethnic cleansing',¹⁰⁵⁷ this genocidal policy became the central focus of the military program. The consequences of 'ethnic cleansing' for the civilian population were severe. Not since World War II had Europe experienced the systematic persecution of targeted ethnic/religious groups in the civilian population on such widespread scale.¹⁰⁵⁸

The international community informed by 'on the spot' Western media, such as CNN and BBC called for international humanitarian intervention.¹⁰⁵⁹ Civil society pressured reluctant Western democracies such as the USA and Britain to take action.¹⁰⁶⁰ They then turned to the United Nations in an attempt to stop the conflict.¹⁰⁶¹

By this stage the Cold War had ended which meant that the Security Council could now function (on some matters) without the threat of veto

¹⁰⁵³ *Prosecutor v Tadic* (Opinion and Judgement of the Trial Chamber) 7 May 1997 IT-94-I-T paras 72 - 76

¹⁰⁵⁴ *Ibid* para 56.

¹⁰⁵⁵ *Ibid* para 57.

¹⁰⁵⁶ *Ibid* para 122.

¹⁰⁵⁷ The term ethnic cleansing was meant to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of a given group from the area" UN Doc. S/25274 para 55

¹⁰⁵⁸ *Security Council Resolution 771* of 13 August 1992

¹⁰⁵⁹ *Tadic* above n 110, para 96.

¹⁰⁶⁰ P Akhavan & R Howse *Yugoslavia the former and the future: Reflections by Scholars from the Region* Chapter 6 contributed by Zarko Puhovski 'Yugoslav Origins of the Post-Yugoslav Situation and the Bleak Prospects for Civil Society' (1995 Brookings UNRISD) p 135; Maogoto, above n 17, n 145

¹⁰⁶¹ *Report of the Secretary-General Pursuant to Security Council Resolution 808* (UN Doc S/25704) Presented 3 May 1993 pars 1 – 17. See also Morris above n 109,.

from one or other of the permanent members.¹⁰⁶² This was an optimistic period for civil society where it was hoped that the rights of humanity might at least be considered on an equal footing with the rights of the sovereign state.¹⁰⁶³ In July 1992 the Security Council adopted Resolution 764 which called on all the parties to the Yugoslav conflict to comply with international humanitarian law. The Resolution noted that persons would be held individually responsible for the commission of crimes against international humanitarian law. A month later in August 1992 the Security Council adopted a further Resolution number 771 which threatened Chapter VII action if the parties to the conflict did not cease all breaches of international humanitarian law.¹⁰⁶⁴ Importantly Resolution 771 called on states to gather evidence of the commission of breaches of international humanitarian law. In October 1992 the Security Council adopted another resolution which called for the creation of a Commission of Experts to assess the information submitted pursuant to Resolution 771 and for the Commission of Experts to gather its own evidence of breaches of international humanitarian law in the former Yugoslavia. When it submitted its report the Commission of Experts recommended the creation of an international tribunal to try those persons responsible for committing serious breaches of international humanitarian law.¹⁰⁶⁵ After receiving the Commission of Experts report and with the support of the permanent members of the Security Council, the Security Council settled upon the idea of establishing an international criminal tribunal to try the perpetrators of these crimes. Accordingly by Resolution 808 of 1993 and acting under the authority of Chapter VII of the United Nations Charter, (which allows the Security Council to go behind a states 'sovereign shield' in circumstances where international peace and security are threatened),¹⁰⁶⁶ the Security Council requested the Secretary General to prepare a report on the creation of an international criminal tribunal to deal with crimes that had been committed on the territory of the former Yugoslavia since 1991.¹⁰⁶⁷

The Secretary General submitted his report in May 1993.¹⁰⁶⁸ This turned out to be a fine legal document, the Secretariat served the Security Council well in the Report that it produced. The Secretary General

¹⁰⁶² Antonio Cassese, *International Criminal Law* (2nd.Ed.) 2008 Oxford U.P. p 325 Morris above n 109.; Maogoto, above n 17, 146.

¹⁰⁶³ LJ van den Herik *The Contribution of the Rwanda Tribunal to the Development of International Law* (2005) Martinus Nijhoff p 1.

¹⁰⁶⁴ *Report of the Secretary-General* above n 118, pars 1 – 17. See also Morris above n 109.

¹⁰⁶⁵ *Ibid.*

¹⁰⁶⁶ Maogoto above n117, 147.

¹⁰⁶⁷ *Report of the Secretary-General* above n118 pars 1 – 17. See also Morris above n 109.

¹⁰⁶⁸ *Report of the Secretary-General* above n 118.

pointed out in his report that normally an international tribunal would be established by the conclusion of a treaty between states, like the Nuremberg Tribunal (unlike the Tokyo Tribunal). He acknowledged that the advantage of the treaty approach ‘was that it would allow for greater international scrutiny and if accepted would represent the acceptance by a larger segment of the international community, than that which would be achieved if the Tribunal was created by a Chapter VII resolution of the Security Council’.¹⁰⁶⁹ The Secretary General went on to note however that the main disadvantage of the treaty approach was that it took too long to establish.¹⁰⁷⁰ Having regard to the continuing human carnage that was occurring in the former Yugoslavia, the Security Council simply could not wait for the treaty approach to take its course.¹⁰⁷¹

The Secretary General noted that the Security Council had by earlier Resolutions indicated that the Balkan conflict had already constituted a threat to international peace and security justifying the taking of measures under Chapter VII.¹⁰⁷² This process of pre-warning of an intention to act is similar to what occurred with the *Moscow Declaration* of 1943. The Secretary General emphasized that the Security Council would not be legislating in creating this tribunal because the Tribunal would only apply existing or conventional international humanitarian law.¹⁰⁷³ This is to be contrasted with the Nuremberg Tribunal which introduced crimes against humanity and crimes against peace, which at the time could not be described as being ‘beyond doubt part of international customary law’.¹⁰⁷⁴ Because of the need to get the Statute of the Tribunal approved quickly, the usual course of allowing the Statute to ‘lay open for amendment’ was not followed. Instead states made interpretative comments about the Statute with the intention that such comments by states would be applied by the Tribunal in interpreting the provisions of the Statute.¹⁰⁷⁵

The creation of the International Criminal Tribunal for the former Yugoslavia using Chapter VII powers was a novel approach but the idea of trying individuals for war crimes and crimes against humanity had been established at Nuremberg and Tokyo.¹⁰⁷⁶ The Secretary General noted that it was well recognised that any state could conduct such trials

¹⁰⁶⁹ Ibid par 19.

¹⁰⁷⁰ Ibid par 20.

¹⁰⁷¹ Ibid par 20.

¹⁰⁷² Ibid pars 22-28.

¹⁰⁷³ Ibid par 29.

¹⁰⁷⁴ Ibid par 35.

¹⁰⁷⁵ Record of Security Council meeting 3217, UN Doc. S/PV.3217 (1993).

¹⁰⁷⁶ *Report of the Secretary-General* n 118 par 55.

provided the accused was given a ‘fair trial’.¹⁰⁷⁷ Later conventions reinforced the requirement that an accused person be given a fair trial by a competent, impartial and independent tribunal established by law.¹⁰⁷⁸ Because the Tribunal was established as a measure to restore international peace and security, the Tribunal would not be a permanent body because once peace and security had been achieved, then it would have exhausted the mandate given it by the Security Council.¹⁰⁷⁹ However determining whether or not there existed any longer a threat to international peace and security is a political decision for the Security Council, not the Tribunal.¹⁰⁸⁰

At the time there was some doubt whether the creation of the ICTY was a legally justified response by the Security Council to the restoration of international peace and security, under Chapter VII of the UN Charter.¹⁰⁸¹ Although the Tribunal was limited in its geographical and temporal jurisdiction to the former Yugoslavia, the Statute of the Tribunal was an innovative step. The Tribunal was competent to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.¹⁰⁸² It had concurrent jurisdiction with national courts, but had ‘primacy’ over national courts with respect to its specific jurisdiction. To this end it could formally request national courts to defer to the jurisdiction of the ICTY.¹⁰⁸³

The ICTY was given jurisdiction over War Crimes, Crimes Against Humanity and Genocide.¹⁰⁸⁴ The Tribunal structure followed the form of an ordinary criminal court, save that the investigation and prosecution function were merged under the authority of the prosecutor. The Statute required the prosecutor to investigate and present prosecutions before the court.¹⁰⁸⁵ The judges were to be served by an independent registry, so too were the defence and the Office of the Prosecutor.¹⁰⁸⁶ The United Nations had not established a criminal court before. It had little idea of how many

¹⁰⁷⁷ *High Command Trial* UN War Crimes Commission, LRTWC [1949] vol. XII p 62-3.

¹⁰⁷⁸ Article 14 of the *International Covenant on Civil and Political Rights*, 999 UNTS 171 (1966).

¹⁰⁷⁹ *Report of the Secretary-General* n 118 pars 10 & 28.

¹⁰⁸⁰ *Ibid* par 12. See also *Prosecutor v Karemera and others* ICTR Decision 29 March 2004 par 7. See also Morris above n 109.

¹⁰⁸¹ A Cassese *International Criminal Law* 2003 Oxford) p 337; Maogoto above n117 147; William A. Schabas *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge) (2006) p 22.

¹⁰⁸² *Ibid* (Cassese) 349.

¹⁰⁸³ *Ibid* 349.

¹⁰⁸⁴ *Statute of the International Criminal Tribunal for the former Yugoslavia* Basic Documents UN ICTY 1995 Arts 2 – pp 5- 9.

¹⁰⁸⁵ *Ibid* arts 18 p 17.

¹⁰⁸⁶ *Ibid* arts 11 & 17 pp 13 & 17.

cases the Tribunal would prosecute or what size staff that would be ultimately required to run the organisation.¹⁰⁸⁷

As the ICTY had no police force or law enforcement mechanism and depended on states for this purpose, it took a long time to gather momentum. However, eventually it gained the support of nation states that assisted it with investigating suspected war criminals. States also eventually assisted it with arrest and transfer of accused persons to The Hague for trial.¹⁰⁸⁸ In the early days many sceptics questioned whether the ICTY would succeed.¹⁰⁸⁹ Others claimed that so long as the major perpetrators of the Balkan war crimes remained at large, it could not claim to be a success.¹⁰⁹⁰ Critics also claimed that it was too expensive and that it lacked relevance due to the fact that trials were conducted in The Hague which was too remote from the victims of the crimes. Those critics have now largely been silenced particularly, since the arrest of many of the major perpetrators.¹⁰⁹¹

Unlike Tokyo and Nuremberg the Judges of the Tribunal did not represent any particular ‘victorious’ state in the ongoing Yugoslav conflict. The Tribunal originally had 11 judges appointed from separate countries.¹⁰⁹² Six of the judges were to serve on the two Trial Chamber and 5 on the Appeals Chamber.¹⁰⁹³ The Judges had to be persons of ‘high moral character, impartiality and integrity’ who possessed ‘qualifications required in their respective countries for appointment to the highest judicial office’.¹⁰⁹⁴ The Judges were nominated by their respective countries, one judge nominee per country. The Security Council then selected 22 of judges by way of a screening process. The General Assembly then made the final selection of 11 judges. In the first election, the General Assembly elected judges from Egypt, Italy, Canada, Nigeria, France, China, United States, Costa Rica, Pakistan, Australia, and Malaysia.¹⁰⁹⁵

¹⁰⁸⁷ Robertson above n 26, 277.

¹⁰⁸⁸ Ibid 282.

¹⁰⁸⁹ Cassese above n 138 336; Maogoto above n117, 142; Schabas above n 138 21.

¹⁰⁹⁰ Cassese above n 138 338; Kenneth Anderson ‘Global Governance: The Problematic legitimacy Relationship Between Global Civil Society and the United Nations’ *American University Washington College of Law Research Paper NO. 2008-7* <http://ssrn.com/abstract=1265839>, accessed February 2009 p 13.

¹⁰⁹¹ Leonard above n 7, 34.

¹⁰⁹² Schabas above n 138 23.

¹⁰⁹³ *Statute of the ICTY* above n 141 art 12.

¹⁰⁹⁴ Ibid art 13, The language adopted here is similar to that required for appointment to the International Court of Justice, see Article 2 of the *Statute of the International Court of Justice*.

¹⁰⁹⁵ General Assembly decision of 17 September 1993-47/328.

Appeals could be brought to the Appeals Chamber at the interlocutory stage or following sentence. By contrast, Nuremberg, Tokyo and most state military commissions did not entertain appeals. The right of appeal from a court at first instance is an internationally recognized human right, respected by the United Nations.¹⁰⁹⁶

In addition to traditional rights of appeal to the Appeals Chamber, the ICTY has a Bureau of Judges which consists of the President and the Vice President and a representative of the other judges. The Bureau's function is to consider matters relevant to the qualification of the judges and to allow issues to be considered which might ultimately be brought to the attention of the plenary meeting of the judges.¹⁰⁹⁷

In contrast with state military commissions the ICTY has been far more accountable for defects or perceived defects in practice and procedure. For example military commissions do not entertain challenges directed at whether or not they are biased or have the appearance of bias or at any irregularities associated with the appointment of the judges. However challenges of this kind were routinely received by the ICTY.¹⁰⁹⁸

The ICTY Judges have the responsibility of adopting the *Rules of Procedure and Evidence* of the Tribunal.¹⁰⁹⁹ The Statute is general in nature, while the Rules are specific. While the Rules can illustrate the meaning of the Statute, they cannot vary the Statute.¹¹⁰⁰ However provided the Rule is consistent with the spirit and intent of the Statute, it does not matter that the Statute does not expressly provide for a specific matter or thing.

¹⁰⁹⁶ Article 14 (5) *International Covenant on Civil and Political Rights*.

¹⁰⁹⁷ Rule 23 of the *Rules of Procedure and Evidence of the ICTY*. Basic Documents UN ICTY Doc. 1985.

¹⁰⁹⁸ *Prosecutor v Delalic et al* Appeals Chamber Judgement, 20 February 2001, IT-96-21-A. The Appeals Chamber heard argument to the effect that a trial judge, Judge Odio Benito had ceased to be legally qualified for the position of judge of the Tribunal because during the course of sitting on the Delalic case she had been elected to the position of Vice President of Costa Rica, which by the laws of her country precluded her from holding or being qualified to hold judicial office. It held that as Judge Odio Benito had not exercised any executive functions in Costa Rica during the time she could be a Judge of the Tribunal, she had not acted impartially or with prejudice and as a consequence the appeal was dismissed. See also *Prosecutor v Furundzija* IT-95-17/1-T Decision of the Bureau, 11 March 1998. the defence made an application to the Bureau requesting that Judge Mumba be disqualified because she had previously been a member of the United Nations Commission on the Status of Woman and that as the charges concerned various allegations of rape and sexual assault she could not be relied upon to render an impartial deliberation of the issues of the case. The Bureau ruled that it had no competence in the matter because it was for the defence to raise the issue before the Judge during the course of the trial, which they had failed to do. The Bureau did comment however that there was no evidence that Judge Mumba had acted unfairly or in any way prejudicial towards the accused.

¹⁰⁹⁹ *Statute of ICTY* above n 141 art 15.

¹¹⁰⁰ *Prosecutor v Tadic* (Decision on Motion to expand time) IT-94-1-A; App. Ch., 15 October 1998 para 36.

The prosecutor is given the responsibility of investigating crimes *ex-officio*. If satisfied that there exists a *prima facie* case he may then go on to prepare the indictment.¹¹⁰¹ The prosecutor is required to act independently as a separate organ of the Tribunal and is not to seek or receive instructions from any government or other source.¹¹⁰² Once the indictment had been signed by the prosecutor it is referred to the judges for confirmation. The surrender of person accused of war crimes to an international tribunal is to be distinguished from extradition.

The ICTY is not authorized to conduct trials in *absentia*. The accused must be physically before the Tribunal before the trial can commence.¹¹⁰³ When at the beginning of the operation of the Tribunal the failure to arrest accused persons threatened the existence of the Tribunal, many argued that *in absentia* trials should have been included in the Tribunal's Statute.¹¹⁰⁴ However unlike Nuremberg, the right to be present at trial is now recognized as a right under international law.¹¹⁰⁵ There was no support for *in absentia* trials, when the Statute was first debated before the Security Council.¹¹⁰⁶

Notwithstanding the prohibition on trials in *absentia* there was much to be said for having some mechanism to show that serious crimes had been committed thus arousing public condemnation, which would otherwise go unnoticed in cases where an accused successfully escaped arrest. In part the solution to this problem was achieved by having a review of the indictment at the confirmation hearing once a *prima facie* case could be made out. However these hearing were *in camera* so details of the extent of the criminal conduct was not made public even though the hearings could occur in the absence of an accused. Accordingly a procedure was devised under Rule 61 whereby the *prima facie* evidence could be reviewed by the judges in public and they in turn could pronounce upon the evidence in open court.¹¹⁰⁷ In the early days of the Tribunal there were a number of cases where the *prima facie* case was made out against an accused by the Prosecutor, in open court, in the absence of the accused.¹¹⁰⁸ These public Rule 61 hearings did much to embarrass

¹¹⁰¹ *Statute of ICTY* above n 141 art 18.

¹¹⁰² *Ibid* art 16 (2).

¹¹⁰³ *Ibid* art 20 (3). The trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instructs the accused to enter a plea. The trial Chamber shall then set a date for trial.

¹¹⁰⁴ Cassese above n138, 401.

¹¹⁰⁵ *International Covenant on Civil and Political Rights* Art. 14 (2) (d).

¹¹⁰⁶ *Report of the Secretary-General* n 118 par 101.

¹¹⁰⁷ *Rules of the ICTY* above n 154, R 61.

¹¹⁰⁸ Robertson above n 26, 283.

reluctant states into taking appropriate action to arrested indicted war criminals. Following the Rule 61 hearings arrests began to occur, at first it was merely a ‘trickle’ but in time the arrests took place at a steady rate.¹¹⁰⁹

When an accused is brought before the Tribunal for trial, the accused is afforded certain fundamental rights. These rights are not only far more extensive than that afforded to accused persons before military commissions but also exceed those provided to accused persons before the Nuremberg and Tokyo tribunals. The ICTY rights may be summarised as follows:

- * all persons are be equal before the International Tribunal. The Prosecutor successfully argued that when it came to a fair trial, the ‘victims’ like the accused were also entitled to a fair trial;
- * the accused is entitled to a fair and public hearing;
- * the accused is entitled to be present;
- * to be informed of the charges against him/her;
- * to be allowed time to prepare for trial;
- * to communicate with counsel of his/her choosing;
- * to be tried without undue delay;
- * to defend him/her self in person or through counsel;
- * to have legal counsel assigned where the interests of justice so require;
- * to examine or have examined witnesses against him/her;
- * to the free assistance of an interpreter, and
- * not to be compelled to testify against him/herself or to confess guilt.¹¹¹⁰

One right that an accused before the Tribunal does not have is the right to be released on bail. In many national jurisdictions there is a presumption of bail,¹¹¹¹ (although not before military commissions) but no such presumption exists at the international level. One reason why bail is not readily available is because the Tribunal is located in The Hague, and the government of the Netherlands, the host state, was not keen on the idea of having suspected war criminals ‘walking around’ in the Dutch

¹¹⁰⁹ The author was a Senior Trial Attorney in the Office of the Prosecutor of the ICTY from 1994 to 2000. The shortage of cases in the early life of the Tribunal had a greater impact upon the judges who were looking for cases to try than the Prosecutor where case investigation could proceed notwithstanding the lack of trials as such. The President of the ICTY Judge Cassese was especially concerned about the lack of cases and the failure of states to arrest indicted persons. It was against this background that the Rule 61 procedure was devised. After these hearings and the Tadic case, which the author prosecuted (see discussed in Chapter 8) the USA and UK in particular began to carry out arrests.

¹¹¹⁰ *Statute of ICTY* above n 141 Art 21 Note this article is primarily based on Article 14 of the International Covenant on Civil and Political Rights.

¹¹¹¹ *Bail Act* 1989 of South Australia.

community.¹¹¹² Further the arrest of an accused can often be a dangerous and expensive process, if bail were to be granted and the accused were to immediately escape, then state cooperation with respect to future arrests might decline. As these crimes are the most serious in the criminal calendar, there is a very real danger that accused might abscond or threaten witnesses. However there is provision in the rules for pre-trial release if the accused can satisfy the Tribunal that he/she will appear for trial and will not interfere with witnesses.¹¹¹³ Initially the Tribunal was slow to grant pre-trial release but in time pre-trial release became much more common.¹¹¹⁴

The ICTY has been criticised because it has taken a long time to complete its task,¹¹¹⁵ but for a number of years it was not assisted by states in securing the arrest of indicted persons and this slowed down the presentation of the prosecutions. Further it has been criticised for being too expensive,¹¹¹⁶ but again the task it had to perform was huge and could not be achieved inexpensively. Compared to the cost that states are willing to spend on military hardware, the cost of running the ICTY was not excessive.¹¹¹⁷ The ICTY has done much to contribute to the development of international criminal law and had it not been for the success of the ICTY the ICC may not have come about as quickly as it did. More will be said about the work of the ICTY in Chapter 8 but notwithstanding the criticisms made of it, it was a considerable improvement on both the Nuremberg and Tokyo Tribunals.

7.7 International Criminal Tribunal for Rwanda (ICTR) – Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was established by Security Council Resolution 955 of 8 November 1994, after it commissioned a report on the genocide and other breaches of international humanitarian law that occurred in Rwanda in 1994.¹¹¹⁸ The Security Council determined that the situation in Rwanda ‘constitute(d) a threat to international peace and security’¹¹¹⁹ The Statute and Rules of the ICTR have much in common with those of the ICTY, departing (in most

¹¹¹² This information was conveyed to the author by officials from the Government of the Netherlands during the time that the author was a Senior trial Attorney at the ICTY (1994 – 2000).

¹¹¹³ *Rules of the ICTY*, above n 154, R 65.

¹¹¹⁴ The author represented the Prosecutor when a number of these applications were brought by accused persons during the period 1994 – 2000.

¹¹¹⁵ Schabas above n 138,7.

¹¹¹⁶ Cassese above n 138 332.

¹¹¹⁷ One source suggests that the USA alone spends well in excess of US\$1 Billion a day on defence - <http://www.warresisters.org/piechart.htm>.

¹¹¹⁸ Herik above n 120, 31.

¹¹¹⁹ UN Doc. S/RES/955 of 8 Nov 1994.

cases) only to reflect minor differences.¹¹²⁰ The seat of the Tribunal was in Arusha, Tanzania. The main difference between the establishment process of the ICTY and ICTR was that the Rwandan government was largely responsible for initiating the process but when it could not get all that it wanted out of the Security Council, it ended up voting against the resolution.¹¹²¹

The ICTR was slow to commence its work and suffered from a number of management problems.¹¹²² The ICTR has not decided as many cases as the ICTY and the anticipated number of cases that the Prosecution is expected to present is only in the region of about 65 cases.¹¹²³ This very small number of cases stands in stark contrast with the 120,000 persons that at one time were imprisoned by the Rwandan government for crimes committed during the Rwandan Genocide.¹¹²⁴ The prosecution of so many cases was well beyond the capability of both the ICTR and the Rwandan government. Eventually the Rwandan government was forced to release many of the suspects and for the rest it created *gacaca* courts, where the accused had no defence lawyer and the judge, who was not legally qualified, performed the role of prosecutor and judge. As it turned out these *gacaca* courts did not prosecute as many cases as had originally been expected.¹¹²⁵

Part of the reason why the ICTR did not prosecute as many cases as the ICTY was logistical, Rwanda is not an easy country to travel around and many of the witnesses are widely dispersed. However most of the problems faced by the Tribunal can be traced back to the Rwandan government. The ICTR is heavily dependant on the Rwandan government for security and travel within Rwanda.¹¹²⁶ Further it is almost impossible for the ICTR to get witnesses to Arusha without the assistance of the Rwandan government. As occurred in the former Yugoslavia, international crimes were committed on both sides of the conflict and in order for the ICTR to contribute to the 'restoration of peace and security' within Rwanda and for it to achieve general credibility, it had to prosecute offenders who not only opposed the Rwandan government but also those on the side of the government who were suspected of having committed international crimes. However any attempt to do this was fiercely opposed by the Rwandan government to the point where at one

¹¹²⁰ Herik above n 120, 27.

¹¹²¹ Ibid 31, – at the time Rwanda had a seat on the Security Council. See also Schabas above n 138, 29.

¹¹²² Herik above n 120 57.

¹¹²³ Ibid 66.

¹¹²⁴ Ibid 50.

¹¹²⁵ Ibid 50 – 53.

¹¹²⁶ Schabas above n 138 31.

stage all cooperation with the Tribunal was suspended.¹¹²⁷ The Rwandan government sought to influence the work of the ICTR and complained about having to share the Prosecutor with the ICTY. In 2003 the Secretary General gave-in to the Rwandan government and appointed a separate Prosecutor for the ICTR.¹¹²⁸

One example of interference by the Rwandan government occurred in the *Barayagwiza* Case.¹¹²⁹ In this case the ICTR Appeals Chamber quite properly dismissed the Prosecutor's indictment, because of improper conduct by the Prosecutor relating to the defendants procedural rights. The Rwandan government immediately threatened to withdraw all further assistance to the ICTR.¹¹³⁰ Incredibly the Prosecutor brought a subsequent appeal to a differently constituted Appeal Chamber.¹¹³¹ The Prosecutor argued that without the support of the Rwandan government the operations of the ICTR would come to a halt. The second Appeals Chamber reversed the decision of the first Appeals Chamber on the basis of 'new facts'.¹¹³²

Despite these difficulties the ICTR has still made a significant contribution to the development of international criminal law.¹¹³³ One area of progress was the 'theme cases', where prosecutions were brought on the basis of a particular class of criminal conduct. This method of prosecution was used by the United States prosecutors following World War II in the Control Law No. 10 prosecutions. The cases prosecuted by the Americans after World War II included the *Medical Case*;¹¹³⁴ *The Hostage Case*;¹¹³⁵ and the well known *Einsatzgruppen Case*.¹¹³⁶ The advantage of this prosecution method is that it allows a representative sample of offenders to be brought to trial rather than having to prosecute everyone who has committed this particular type of crime. This is particularly important for international criminal tribunals because the resources of the tribunals are invariably so limited that they cannot prosecute every offender but the deterrent effect of the theme prosecution is still achieved. Theme prosecution were considered for the ICTY but practical difficulties prevented early prosecutions being presented in this

¹¹²⁷ Herik above n 120 48.

¹¹²⁸ Ibid 64.

¹¹²⁹ *Prosecutor v Barayagwiza* Appeal Decision ICTR 31 March 2000.

¹¹³⁰ Herik above n 120 59.

¹¹³¹ Schabas above n 138 31.

¹¹³² Herik above n 120 60; Ibid Schabas n 138..

¹¹³³ Ibid Schabas..

¹¹³⁴ *US v Brandt* "The Medical Case" 186 TWC 212.

¹¹³⁵ *US v Wilhelm List* "The Hostage Case" XI TWC 1230.

¹¹³⁶ *US v Ohlendorf and Others* (1953) 15 Ann. Dig 656.

way.¹¹³⁷ The ICTR prosecutors faced a number of significant difficulties in bringing ‘theme’ prosecutions but ultimately prevailed.¹¹³⁸ Some of the ‘theme’ prosecutions brought by the ICTR included *The Military cases*; *The Government cases and the Media Case* where offences related to these specific activities were dealt with by the court in relation to a sample number of offenders rather than dealing with each offender on a case by case basis.¹¹³⁹

The other major contribution made by the ICTR to the development of international criminal law concerned the law of genocide. What occurred in Rwanda in 1994 was clearly genocide, (this was in contrast with the crimes committed in the former Yugoslavia where initially some doubt existed for a while as to whether genocide had been committed). Prior to the ICTR genocide prosecutions, no prosecutions for genocide had ever been brought at the international level.¹¹⁴⁰ Cases such as *Akayesu*¹¹⁴¹ (discussed in Chapter 2) and *Ruzindana*¹¹⁴² are seminal cases on the law of genocide.

While some of the criticisms directed at both the ICTY and ICTR are justified and while there is always room for improvement, the existence of both Tribunals did contribute to the restoration of peace and security within their subject countries.¹¹⁴³ There was little doubt that the national courts in the former Yugoslavia and Rwanda were (at the time) not up to the task of performing this role in a satisfactory way, so had it not been for the intervention of the international tribunals, little progress would have been made in providing justice to the victims.

7.8 *The Ad Hoc Tribunals – The End of an Era?*

¹¹³⁷ When I was a senior trial attorney at the ICTY Cherif Bassiouni visited The Hague and discussed with me the idea of presenting ‘theme’ prosecutions before the ICTY. Although I quite liked the idea I considered that there were two major obstacles to these type of prosecution, (1) it was still early days (1995) and we simply did not have the luxury of being selective in the cases that we could bring to trial because we simply had no guarantee that those suspects that we did indict would be arrested and brought to The Hague and (2) I believed that the Trial Chamber would support defence applications for separate trials as ‘theme’ prosecutions would run foul of the principles relating to joinder. I maintained that the Control Law no.10 prosecutors were given much greater latitude than what we could expect from the ICTY.

¹¹³⁸ Herik above n 175 75-79.

¹¹³⁹ Cited by Herik above n 175 78.

¹¹⁴⁰ Herik above n 120 87.

¹¹⁴¹ *Prosecutor v Akayesu* ICTR Judgement 2 September 1998

¹¹⁴² *Prosecutor v Kayishema and Ruzindana* ICTR Judgement 21 May 1999.

¹¹⁴³ Leonard above n 7, 152; See also Diane Orentlicher ‘Shrinking the Space for Denial: The Impact of the ICTY in Serbia’ *Open Society Justice Initiative* May 2008 p 53.

The optimism surrounding the creation of the ad hoc Tribunals was short lived and by the time the ICTR had been established ‘tribunal fatigue’ had begun to set in.¹¹⁴⁴ One criticism that could justifiably be levelled at both tribunals was that they represented selective justice in that they could only investigate and punish crimes committed within the geographical and temporal jurisdiction. The consequence of this was that other equally heinous crimes committed in other parts of the world went unpunished. This deficiency exemplified the need for a properly functioning permanent international criminal court which would not be limited by time and place.

After 2001 the ad hoc tribunals began to lose vital support in the Security Council, in part because of the cost to the UN budget but mostly because their success was seen as a potential threat to state sovereignty. Each of the Permanent Members of the Security Council soon realised that an ‘uncontrolled’ prosecutor could cause them great inconvenience. A number of the Permanent Members had concerns about their activities which could be at risk of being interfered with by an independent international prosecutor. At the time, Russia was dealing with the ongoing conflict in Chechnya, China with internal human rights issues in Tibet and the United States (in the aftermath of September 11, 2001) with conflicts in Iraq, Afghanistan and Guantanamo Bay. These Permanent Members were in no mood to allow interference in their internal affairs by an international criminal court.

As a consequence the Permanent Members of the Security Council looked for an alternative that would restore their influence (and the influence of other states) over these international tribunals. For some time the Permanent Members had complained that the ad hoc tribunals were less effective because they were remote from the place of the conflict. They argued that the function of the ad hoc tribunals was to contribute towards the restoration of peace and security by way of the educative effect of the criminal trial. It was argued that with the ICTY and ICTR where the trials took place in The Hague and Arusha, the ad hoc tribunals lacked the ability to influence public opinion on the ground in the former Yugoslavia and Rwanda. They provided no empirical evidence to support this contention and on the contrary, there was every reason to believe that the work of the ICTY and ICTR had significantly influenced the restoration of peace in these countries.¹¹⁴⁵

¹¹⁴⁴ Referred to by Cassese above n 138, 340, where in footnote 32 he noted that the term was coined by David Scheffer Senior Counsel to the UN.

¹¹⁴⁵ Orentlicher above n 200, 53.

The solution settled upon was the ‘hybrid’ tribunals. It was argued that ‘hybrid’ tribunals would have the desired educative effect on the local judiciary and at the same time would be more cost effective. What was not said was that the hybrid process would restore state influence over the courts. Conveniently no consideration was given to the obvious conflict of interest in having the relevant state directly involved in the process. Ignoring these important considerations was disingenuous and no oversight because the permanent members of the Security Council were very aware of Rwanda’s attempts to influence the ICTR and it was this very reason why both the ICTY and ICTR were given primacy over the courts of their target states.

Accordingly the ‘hybrid tribunals’ were popular among states because they were cheaper to run but more importantly they do not offend the principle of state sovereignty.¹¹⁴⁶ The problem is that by allowing states back into the process all the problems of bias and political interference as discussed in Chapter 4 arose once again. In terms of the development of international criminal justice, the ICTY and ICTR were ‘one step forward’ and the hybrid tribunals were ‘one step backwards’.

7.9 *The Special Court for Sierra Leone* – ‘The First Hybrid Tribunal’

An internal conflict erupted in Sierra Leone (West Africa) in 1991 between the Revolutionary United Front and the All People’s Congress. The ongoing conflict was marred by serious breaches of international humanitarian law including murder, mass rape, abduction, forced recruitment of children and torture. In 2000 the democratically elected government of Sierra Leone asked the UN to establish an international tribunal.¹¹⁴⁷ Sierra Leone had in mind an ad hoc tribunal after the model of the ICTY/ICTR but the permanent members of the Security Council were against creating another *ad hoc* tribunal. Accordingly on 14 August 2000 the Security Council instructed the Secretary General to negotiate a treaty with Sierra Leone that would form the foundation of the new court.¹¹⁴⁸ On 4 October 2000 the Secretary General Reported to the Security Council that agreement had been reached with the government of Sierra Leone and a copy of the agreement and the statute of the tribunal were attached to his Report.¹¹⁴⁹ The agreement took effect on 16

¹¹⁴⁶ I. Simonovic ‘Dealing with the Legacy of War Crimes and Human Rights Abuses’ *Journal of International Criminal Justice* 2 (2004) 701 p 710.

¹¹⁴⁷ D. Roper & L.A. Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (2006) Ashgate p 36.

¹¹⁴⁸ *Special Resolution 1315* of 14 August 2000 UN Doc S/2000.

¹¹⁴⁹ *Report of the Secretary general on the Establishment of the Special Court for Sierra Leone* UN Doc S/2000/915 (4 October 2000)

January 2002. The Special Court was made up of judges appointed by the Secretary General and the government of Sierra Leone, but with the majority being appointed by the Secretary General.¹¹⁵⁰ The Secretary General appointed the prosecutor but the government of Sierra Leone appointed the deputy prosecutor.¹¹⁵¹ The court was funded by voluntary contributions from the international community but there was a management committee of ‘interested states’.¹¹⁵² Pursuant to the Agreement the government of Sierra Leone gave an undertaking not to interfere in the ‘free and independent’ work of counsel for the defence.¹¹⁵³

Under the Statute of the Court the Special Court was given jurisdiction to prosecute persons who ‘bear the greatest responsibility for serious violation of humanitarian law committed in Sierra Leone since 30 November 1996’.¹¹⁵⁴ The crimes within the jurisdiction of the Court were/are Crimes Against Humanity (Article 2); Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (Article 3); other serious violations of humanitarian law including intentional targeting of civilians *hors de combat*; attacking peace keepers and forced recruitment of children (Article 4) and crimes under Sierra Leonean Law relating to abusing girls under 13 years of age (Article 5).¹¹⁵⁵

The Special Court had concurrent jurisdiction with the national courts of Sierra Leone but primacy in relation to its special jurisdiction.¹¹⁵⁶ The rights of the accused were the same as that provided in other international tribunals such as the ICTY and the ICTR.¹¹⁵⁷ The court took on 4 major prosecutions against 11 defendants (originally 13 defendants) the most significant being Charles Taylor, ex-President of the Republic of Liberia.¹¹⁵⁸ Ironically the Taylor prosecution is now being conducted in The Hague by the Special Court of Sierra Leone.¹¹⁵⁹ This defeats the whole purpose of the ‘hybrid’ tribunals because if neighbouring Arusha was remote to Rwanda and The Hague was remote from the former

¹¹⁵⁰ Article 2 of *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* <http://www.sc-sl.org/Documents/scsl-agreement.html>

¹¹⁵¹ Ibid art. 3.

¹¹⁵² Ibid art. 6 & 7.

¹¹⁵³ Ibid art 14 .

¹¹⁵⁴ Article 1 of *Statute of the Special Court for Sierra Leone* <http://www.sc-sl.org/Documents/scsl-statute.html>

¹¹⁵⁵ Ibid art. 2- 5.

¹¹⁵⁶ Ibid art. 8.

¹¹⁵⁷ Ibid.

¹¹⁵⁸ Fourth Annual report of the President of the Special Court of Sierra Leone January 2006 to May 2007.

¹¹⁵⁹ Ibid.

Yugoslavia then Sierra Leone is considerably more remote to the Netherlands.

The prosecution of child soldiers has been a source of conflict between Sierra Leone and the hybrid court. The government of Sierra Leone wanted child soldiers punished along with the adult offenders but the international community wanted the children rehabilitated. After much debate a compromise was reached with only children above the age of 15 years being prosecuted, with the proviso that if suitable alternative ‘truth and reconciliation’ measure could be utilised, then these were to be preferred over prosecution. However there is considerable doubt whether this compromise arrangement will endure.¹¹⁶⁰

Also if it were hoped that locating the court in the midst of the conflict would be a significant improvement over the ICTY and ICTR then this appears to have failed. Few of the local citizens of Sierra Leone have ever visited the court and most complain that it has cost far too much. While it is expected to cost a total of \$210 million by the time it completes its work in 2010, (significantly less than the ICTY and ICTR), to people living in a poor country like Sierra Leone, \$210m is a huge sum of money which they consider could be better spent on their daily ‘survival’ needs.¹¹⁶¹ While this attitude is quite reasonable from their perspective, the significance of international justice is that it is directed to the preservation of humanity and the need to suppress criminal conduct that threatens all of humanity so to that extent it serves a purpose beyond the local victims. While one has great sympathy for the local victims of these crimes and where possible, compensation should be paid to these victims, it is not inappropriate for these trials to take place in The Hague as this is the centre of international justice, chosen by the international community for the prosecution and punishment of those persons who offend against the whole of humanity.

7.10 The Timor-Leste Serious Crimes Unit and the Special Panels

The Serious Crimes Unit (SCU) was established on 6 June 2000 to carry out investigations into war crimes, crimes against humanity and genocide alleged to have been committed in East Timor between 1 January 1999 and 25 October 1999.¹¹⁶² The Deputy Prosecutor was a United Nations

¹¹⁶⁰ ‘Sierra Leone Special Court’s Narrow Focus’ *Washington Post* by Craig Timberg March 26, 2008 War Crimes Prosecution Watch Volume 3 - Issue 16 March 31, 2008.

¹¹⁶¹ *Ibid.*

¹¹⁶² Regulation 14 of *UNTAET regulation No. 2000/16 On the Establishment of Department of Prosecution of Serious Crimes*. F.F. Martin, S.J. Schnably, R.J. Wilson, J. S. Simon & M. V. Tushnet, *International Human Rights & Humanitarian Law: Treaties, Cases, & Analysis* (2006) Cambridge

international appointee and had particular experience in prosecution work. After East Timor gained independence on 20 May 2002, the Deputy Prosecutor was subordinate to the Prosecutor General, an East Timorese appointee, who (as it turned out) was less qualified than the Deputy Prosecutor. The Regulation creating the Deputy Prosecutor was remarkably brief and failed to specify with any degree of particularity the objective, mandate or powers of the Deputy Prosecutor.¹¹⁶³ The Deputy Prosecutor, was however responsible for presenting ‘serious crimes’ prosecutions before the Special Panels. The Special Panels of the District Court in Dili were created on 6 June 2000.¹¹⁶⁴

The serious crimes process in East Timor evolved out of the United Nations Administration originally in place after the events of 1999 and then for a while operated as part of the East Timorese judicial system.¹¹⁶⁵ It was a ‘hybrid process’ – in that it was a combination of an international tribunal and a national court.¹¹⁶⁶ Like Sierra Leone, the hybrid model was favoured by the Security Council because it was cheaper to run than an international tribunal, it operated in closer proximity to the victims, and it was hoped that it would contribute to the development of the local judicial system.¹¹⁶⁷ The mandate of the Serious Crimes Unit ended on 5

U.P. p 21; S.D. Roper above n 204 50; see generally G. R. Niemann, *Report on the Conduct of Prosecutions before the Ad Hoc Human Rights Court in Indonesia and the serious crimes process in Timor-Leste in respect of crimes committed in the former East Timor in 1999- September 2004*

¹¹⁶³ Regulation 14.4 of *UNTAET Regulation 2000/16* above n 219, consists of 3 lines and is the primary source of authority for the deputy prosecutor. This lack of precision was to lead to problems between the Prosecutor General and the Deputy prosecutor following the issuing of the Wiranto Indictment.

¹¹⁶⁴ *UNTAET regulation No. 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.*

¹¹⁶⁵ The Office of the Prosecutor General for Timor –Leste was divided into two sections: ordinary crimes and serious crimes. The Serious Crimes was divided into four regional teams comprised of United Nations prosecutors, case managers, investigators and training staff with separate forensic investigation, evidence management and witness support teams. The regional investigation and prosecution teams covered all 13 districts of Timor-Leste. The regional investigation teams operated from offices in Dili, Maliana and Manufahi. The staffing levels fluctuated over time. In 2003 it had 124 staff, in 2004 the SCU had 110 staff members, including 37 United Nations international civilian staff consisting of prosecutors, investigators, forensic specialists and translators, as well as 8 United Nations police investigators and 34 United Nations national staff including translators and mortuary staff. In addition, 12 Timorese trainee staff worked with SCU, including prosecutors. A total of 17 Timorese police investigators received practical training in SCU district investigation teams with United Nations investigators and United Nations police trainers. By 2005 this had reduced to 74 staff, in May 2005 it ceased to operate as a ‘hybrid’ organisation when the international staff left Timor-Leste.

¹¹⁶⁶ Cassese refers to them as ‘mixed’ or ‘international listed’ courts, see Cassese above n 138, 343, but they are commonly referred to as ‘hybrid tribunals’ see S. Katzenstein, ‘Hybrid Tribunals: Searching for Justice in East Timor’, *Harvard Human Rights Journal*, vol. 16 (Spring 2003) and *Judicial System Monitoring Programme (JSMP) Issue Report The Future of the Serious Crimes Unit Dili, East Timor – January 2004.*

¹¹⁶⁷ Roper above n 204 51.

May 2005 pursuant to Security Council Resolutions 1543 and 1573.¹¹⁶⁸
The last indictments of the SCU were filed on 17 December 2005.¹¹⁶⁹

The SCU prosecuted trials at the Special Panels for Serious Crimes within the Dili District Court. During the period of the ‘hybrid tribunal’ - January 2001 until May 2005 the Special Panels heard 55 cases involving 87 defendants of which 84 were convicted and 3 were acquitted.¹¹⁷⁰ The SCU filed indictments with the Special Panels against some 392 accused persons, 304 of whom were in Indonesia.¹¹⁷¹

The failure of the government of Indonesia to cooperate with SCU was a problem that persisted for the life of the hybrid tribunal.¹¹⁷² UNTAET and the Indonesian Attorney-General had agreed in April 2000, in a memorandum of understanding, (MOU) that they would cooperate on serious crime issues. This agreement was one of the KPP-HAM recommendations and was clearly the only way that a genuine cooperative solution to bringing the perpetrators of the 1999 violence to justice could be achieved. The Attorney-General's investigators had utilized the MOU for the purposes of conducting their own investigation,¹¹⁷³ but when it came to reciprocal use of the MOU by SCU, the cooperation of the Indonesians was not forthcoming.¹¹⁷⁴ In his report of 16 January 2001 the Secretary General noted Indonesia's obligations under the MOU but reported that ‘cooperation on legal, judicial and human rights matters... was not forthcoming’.

From the outset the arrangement with Indonesia began to break down. In his report of May 2001 the Secretary General reported that UNTAET had not received access to evidence and witnesses as provided for in the MOU.¹¹⁷⁵ By July of that year, the Secretary General was complaining

¹¹⁶⁸ Web Site of the Serious Crimes Unit of Timor-Lest

http://socrates.berkeley.edu/~warcrime/Serious%20Crimes%20Unit%20Files/About_SCU.html

¹¹⁶⁹ Press Release of SCU of 17 December 2004

http://socrates.berkeley.edu/~warcrime/Serious%20Crimes%20Unit%20Files/About_SCU.html

¹¹⁷⁰ Megan Hirst and Howard Varney, ‘Justice Abandoned? – Assessment of the Serious Crimes Process in East Timor’ *The International Center for Transitional Justice – Occasional Paper Series* June 2005 p 9 ; Included in the overall number of indictments were 10 priority cases. The 10 priority case indictments included the Liquiça church attack, the Suai church massacre, the September attack on the compound of Bishop Belo, the Maliana police station attack and the TNI Battalion 745 killings. Of the total number of accused persons charged with crimes against humanity in the 10 priority case indictments, 183 of those accused were at large in Indonesia.

¹¹⁷¹ *Ibid* Hirst 16 citing a *Progress Report of the Secretary General on UNMSET*, S/2005/99 Feb 18, 2005 para 30.

¹¹⁷² *Ibid* Hirst 16; Roper above n 204, 53.

¹¹⁷³ *Ibid* 11.

¹¹⁷⁴ *Ibid* 16.

¹¹⁷⁵ *Report of the Secretary-General to the Security Council* Dated May 2001 UN Doc S/2001/436, para. 18.

that ‘despite persistent efforts by UNTAET, the MOU has so far failed to yield results. The Indonesian authorities remained reluctant to implement section 9 of the MOU, which allows for the transfer of persons for purposes of prosecution’¹¹⁷⁶ By January 2002 Indonesia had still not honoured its obligations under the MOU. The Secretary General reported that, in accordance with the MOU, a number of requests had been transmitted to speak to witnesses, to provide documentary evidence and to execute several arrest warrants issued in East Timor. However, no positive response has ever been received from Indonesia. The United Nations Committee against Torture, at its twenty-seventh session in November 2001, recommended that Indonesia fully cooperate with UNTAET by providing mutual assistance in investigations or court proceedings in accordance with the MOU.¹¹⁷⁷ In his report of April 2002 the Secretary General reported that the Serious Crimes Unit had charged 101 persons, 13 with crimes against humanity. Fifty-seven suspects were thought to be in West Timor. Although requests had been made to the Attorney-General of Indonesia for their arrest and transfer, no positive response was ever received.¹¹⁷⁸

At no stage did the Indonesians cooperate with SCU in surrendering persons who had been indicted for committing crimes against humanity in 1999. This had the unsatisfactory consequence of many low level offenders in Timor-Leste being prosecuted but many more serious offenders who had secured sanctuary in Indonesia being allowed to escape prosecution.¹¹⁷⁹ The whole process began to break down completely in January 2004, when the SCU issued an indictment against General Wiranto who at that stage was running for President of Indonesia.¹¹⁸⁰ Even though Wiranto had been named as a suspect in Indonesia’s own KPP-HAM investigation and even though no one ever seriously discredited the legal validity of the indictment, the Wiranto indictment brought about an extremely hostile political reaction from the government of Timor-Leste itself.¹¹⁸¹ Having regard to Indonesia’s completely unsatisfactory handling of all of these cases, it is perhaps not surprising that they reacted angrily to the Wiranto indictment. But this opposition was not limited to Indonesia, an intimidated government of Timor-Leste and even more incredibly, the United Nations as well opposed the issue of this indictment.¹¹⁸² This incredible behaviour by the

¹¹⁷⁶ Ibid par 30.

¹¹⁷⁷ Ibid par. 43.

¹¹⁷⁸ Ibid par. 34.

¹¹⁷⁹ Hirst above n 227 16. Timor-Leste was the name given to East Timor after independence.

¹¹⁸⁰ Ibid 25.

¹¹⁸¹ Roper above n 204, 55.

¹¹⁸² Hirst above n 227 25.

United Nations left the hybrid process without support, which in turn largely contributed to its ultimate demise. Without support from any quarter it was just a matter of time before the whole hybrid process broke down, which it did in May 2005.¹¹⁸³

This lack of adequate support by the UN was not isolated to the Wiranto indictment. The UN created the Serious Crimes Unit but for most of its life the funding of the Unit was inadequate.¹¹⁸⁴ Further no provision was initially made for defence counsel. Belatedly funds were provided for defence counsel but only after considerable pressure was brought to bear on the UN by international non-government organisations (INGO's).¹¹⁸⁵ When funding for defence counsel was ultimately provided the INGOs had to provide half of the defence counsel budget. Even this funding failed to produce an adequate number of defence counsel. The funding situation for judges was a little better.¹¹⁸⁶ In a number of the early cases no defence witnesses were called. Many of those cases were delayed owing to a shortage of judges or translators.¹¹⁸⁷ The Special Panel of the Appeals Court did not operate for a period of time owing to a shortage of judges. For a considerable time, judges were not provided with secretaries, court reporters or legal clerks. As a consequence, they had to do their own research, write and edit their own judgements, answer their own phones and schedule their own meetings.¹¹⁸⁸

Many of the public defenders had little or no litigation experience.¹¹⁸⁹ They too, lacked administrative support, adequate accommodation and research facilities. Unfortunately, the justice system was one of the weakest sections of the East Timor administration. The violence in 1999 left the country without judges, prosecutors or defence lawyers, many of them having departed with the previous Indonesian administration. As a consequence, East Timor had to build a new justice system from the bottom up.¹¹⁹⁰

Hirst and Varney note that the capacity-building role, so fundamental to the hybrid system was not realised because the excessive workload of the prosecutors coupled with the shortage of resources meant that mentoring programmes were sidelined as priority was given to investigating and

¹¹⁸³ Ibid 8.

¹¹⁸⁴ Ibid 19.

¹¹⁸⁵ Ibid 20.

¹¹⁸⁶ Katzenstein, above n 223, 252.

¹¹⁸⁷ Ibid. 253.

¹¹⁸⁸ Ibid. 259.

¹¹⁸⁹ Hirst above n 227 20.

¹¹⁹⁰ Ibid 24.

prosecuting the crimes.¹¹⁹¹ United Nations support for the hybrid tribunal deteriorated rather quickly. It did not help that countries such as Australia failed to give the tribunal international backing.¹¹⁹² Indonesia was hostile towards the prosecutions and when the government of Timor-Leste failed to back the tribunal even the United Nations continued position became untenable. In resolution 1543 (2004) the Security Council emphasized that the Serious Crimes Unit should complete all investigations by November 2004 and should conclude trials no later than 20 May 2005. This was nonsense because there was no way the Serious Crimes Unit and the Special Panels could complete their work by that date. But completion of the prosecutions was not negotiable. Cynically the Security Council took the view that the prosecutions could be continued by Timor-Leste if they chose to do so. The problem was that there was simply no way that the Timor-Leste justice system could pick up the task of taking over the process from the international participants in the Serious Crimes Unit and the Special Panels even if the will existed for this to happen. What is worse is that the UN was in the best position to know this. But having regard to the political reluctance by the fledgling government of Timor-Leste¹¹⁹³ to continue the prosecution process after the departure of the international staff there was no doubt, (even in 2004 when the Security Council made resolution 1543), that once the international community removed themselves from the hybrid tribunal in May 2005 the whole serious crimes process would grind to a halt – and that is precisely what happened.¹¹⁹⁴

The hybrid process in Timor-Leste was a failure because both the UN and Timor-Leste abandoned the process before it was completed. It is not however appropriate, to simply blame the United Nations and Timor-Leste for this failure. The United Nations is in the service of powerful states and in this and many other instances, where the United Nations has failed, responsibility lies at the feet of those states for such failure, not the

¹¹⁹¹ Ibid 24; In fact many of these problems of the hybrid system could be traced to a lack of funding. However, it would be unfair to visit these failures on the dedicated and hardworking international staff who achieved impressive results having regard to the conditions under which they were expected to work. Amnesty International acknowledged this dedicated commitment when they reported in 2004 that: "... after a slow and sometimes faltering start there has been a steady build-up of momentum in the work of the Serious Crimes Unit and the Special Panels set up in 2000.... The progress is commendable, particularly in view of the severe difficulties faced in the first years of operation due to lack of resources, including suitably qualified and experienced international officials, for administration and lack of organisational planning. However, the impressive achievements should not distract attention from the scale of the task yet to be accomplished.... Only half of the estimated 1400 murders that were committed during 1999 will have been investigated by the end of this year (2004). Numerous other cases of torture, rape and other crimes of sexual violence, forced deportation, destruction of property and other serious crimes also remain outstanding. In the meantime, in cases where there are already indictments the Special Panels have yet to hear cases against some 283 individuals."

¹¹⁹² In 2003 Australia joined the United States and Britain in the War in Iraq. Australia was keen for Indonesia not to claim that Australia had started a war against Islam. To this end Australia was anxious not to push Indonesia too hard on 'human rights' issues.

¹¹⁹³ Hirst above n 227 25.

¹¹⁹⁴ Ibid 30.

United Nations. Inaction and lack of interest by powerful states caused the Timor-Leste project to fail – not the United Nations. But fail it did and once again impunity prevailed, as the price for short term political expediency. The problem with the Timor-Leste hybrid tribunal is that instead of inheriting the best qualities of both the ICTY/ICTR and the national courts (as was planned) it appears to have inherited the worst traits of both the international and national systems.¹¹⁹⁵

7.11 *Extraordinary Chambers in the Courts of Cambodia*

The Khmer Rouge engaged in widespread genocide of the Cambodian urban intellectual community after they seized power in 1975.¹¹⁹⁶ Inaction by the United Nations as a consequence of Cold War politics meant that little was done about these massive crimes until the late 1990s. In 1997 the General Assembly resolved to appoint a Group of Experts to report on the feasibility of conducting trials as a result of the Cambodian genocide.¹¹⁹⁷ The Group of Experts recommended the establishment of an ad hoc tribunal similar to the ICTY/ICTR.¹¹⁹⁸ The Cambodian government rejected this recommendation and insisted that the Tribunal be based on Cambodian law with the judges (including the international judges) being appointed by Cambodia's Supreme Council of Magistracy. The Extraordinary Chamber in the Courts of Cambodia is 'hybrid' in nature but unlike other hybrid models, the Cambodian judges are in the majority.¹¹⁹⁹ The UN reluctantly agreed to this process because it was wary of the widespread corruption in the judicial system of Cambodia.¹²⁰⁰ It feared that national judges beholden to the government for their appointment would do the governments 'bidding' when the circumstances so required. Most of the national judges received their law degrees in the former Soviet communist bloc - places such as East Germany, Russia, Kazakhstan and Vietnam - where carrying out the state's wishes counted more than maintaining the appearance of impartiality. Two of the judges have already been criticised internationally for their handling of other high profile cases.¹²⁰¹

¹¹⁹⁵ Katzenstein above n 223. 246.

¹¹⁹⁶ Roper above n 204,34.

¹¹⁹⁷ *GA Res 52/135* (12 December 1997).

¹¹⁹⁸ Report of the Group of Experts for Cambodia, UN Doc A/53/850-s/1999 231.

¹¹⁹⁹ *Tribunal Memorandum of Understanding Between the United Nations and the Royal Government of Cambodia* Art 2 <http://www.yale.edu/cgp/mou-v3.html>.

¹²⁰⁰ Roper above n 204 40.

¹²⁰¹ Christina Son and Grant Niemann 'Cambodian Extraordinary Chambers: A Mixed Tribunal Destined to fail' 2009 *Criminal Law Journal*.

The prosecutorial system is based on the civil law with investigative judges, one Cambodian and one international.¹²⁰² Although a large number of amnesties from prosecution were previously granted to various people by the Cambodian government this is not supposed to be a bar to prosecution¹²⁰³ but just how this will work out in practice is uncertain.

The Extraordinary Chambers commenced work in late 2006 so investigations into the genocide are still ongoing.¹²⁰⁴ The international component of Extraordinary Chambers is funded by UN Trust Fund contributed to by interested states. The outlook for the future of the Chambers is not encouraging as the national and international judges have already had considerable disagreement over the drafting of the rules of procedure and evidence, particularly with respect to the incompatibility of Cambodian law with international criminal law principles.¹²⁰⁵ Further the ability of Cambodia to dominate the Chambers does not auger well for the perceived impartiality of the court.¹²⁰⁶

As the tribunal will only prosecute a few top perpetrators many of the lower level perpetrators responsible for serious crimes will escape punishment thereby adding to the ‘sense of impunity’. The issue of ‘impunity’ is exacerbated when one considers that Pol Pot, the most important figure in the Khmer Rouge and the one primarily responsible for the massacres, effectively escaped prosecution action before he died.¹²⁰⁷

While it may be too soon to completely dismiss the work of the hybrid tribunals, there are ominous signs that they will not satisfactorily deliver justice to the victims of these crimes,¹²⁰⁸ so once again the victims quest for justice may be sacrificed on the ‘altar of sovereignty’.¹²⁰⁹

7.12 *The International Criminal Court (ICC)*

It may have been thought that the next logical step after the successful creation of ICTY/ICTR would have been the establishment of a

¹²⁰² *Tribunal Memorandum* above n 256; Son above n 258.

¹²⁰³ *Ibid.*

¹²⁰⁴ *Annual Report on the Achievements of the ECCC* for 2006.

¹²⁰⁵ *Ibid* 23.

¹²⁰⁶ Roper above n 204 44.

¹²⁰⁷ Son above n 258.

¹²⁰⁸ P.K. Mendez, ‘The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?’ Vol 20. No 1, 2009 *Criminal Law Forum* 54.

¹²⁰⁹ Chandra Lekha Sriram ‘Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone’ *Fordham International Law Journal*, Vol. 29, No. 3, May 2006.

permanent international court. The fact that the Cold War had ended and that the ICTY/ICTR had worked successfully suggests that the time may have been ripe to bring into existence a permanent court.¹²¹⁰ However events did not quite work out that way and the ‘hybrid’ concept temporarily interrupted this development. Nevertheless while the Security Council pursued the ‘hybrid’ process, other forces within the international community pressed on with their vision for a permanent international court. In 1994 the General Assembly again requested the International Law Commission (ILC) to produce a draft statute suitable for the functioning and procedure of a permanent International Criminal Court (ICC).¹²¹¹ Following the completion of the draft, a Conference of all States was organised to consider and if possible implement the statute by way of international treaty.¹²¹² On July 17, 1998 the representatives of some 120 nations met in Rome and after a 5 week program voted to adopt the Statute for the ICC. Only 21 states abstained, 7 opposed and over 90 states supported the creation of the court. Unfortunately the 7 opposing states constituted most of the world’s population. They included the USA, China, Indonesia and India.¹²¹³

The creation of the ICC was an historic event and represented the successful conclusion of a long history of failed attempts to establish the court by civil society.¹²¹⁴ While many states considered that the new Court was a threat to their sovereignty the truth is that the coming into existence of the Court poses no threat to states if they uphold the rule of law.¹²¹⁵ International civil society, duly represented by INGO’s played a major role in ensuring the successful negotiation of the Rome Treaty.¹²¹⁶ The negotiation process was one of the most important achievements for

¹²¹⁰ Leonard above n 7, 152.

¹²¹¹ D. McGoldrick, P. Rowe, & E. Donnelly (eds.) *The Permanent International Criminal Court: Legal and Policy Issues* (2004) Hart Publishing Chapter 1 contributed by D. McGoldrick “Criminal Trials Before International Tribunals’ p 42.

¹²¹² Ibid 42 in footnote 217 referring to UN Doc. A/Res/50/46 GA Res 46 (50th Session).

¹²¹³ Ibid.

¹²¹⁴ 1870 Gustave Moynier founder and former President of ICRC proposed a permanent court which would be automatically activated in the event of an armed conflict between states – this proposal failed to gain acceptance. 20th Century attempts to create an international criminal court included the proposal to prosecute Kaiser Wilhelm II and 896 German accused identified. They were not prosecuted when the Kaiser sought sanctuary in the Netherlands and Germany brokered a deal to prosecute itself. Only 12 accused were tried at Leipzig and even fewer were convicted. There was also a proposal to establish an international criminal court as a sister court to ICJ but again this failed. In 1939 an International Criminal Court was proposed to try terrorists - Geneva Convention for the Creation of an ICC of 16 November 1937 but again this proposal failed. Following the Nuremberg Trials 1947 the UN General Assembly requested the ILC to produce a draft statute for the court in 1951 which was further revised in 1953. This proposal was shelved with the onset of the ‘cold war’.

¹²¹⁵ B.N. Schiff, *Building the International Criminal Court* (2008) Cambridge U.P. p 68.

¹²¹⁶ H.J. Steiner & P Alston *International Human Rights in Context: Law, Politics, Morals* (2000) Oxford U.P. p 940; Leonard above n 7, p 7

international civil society during the 20th century.¹²¹⁷

Unfortunately the compromises that were made during the negotiation process, in an effort to induce the ‘opposition states’ to ratify the treaty, (which they subsequently did not do), permanently weakened the court, leaving it vulnerable to state manipulation. In places the Statute of the ICC almost invites state manipulation. For example, one of the strengths of the ad hoc Tribunals (ICTY/ICTR) was that they had ‘primacy’ over state courts. This means that attempts by states to preclude the ICTY/ICTR from exercising jurisdiction by usurping jurisdiction themselves, could be resisted by the ad hoc tribunals because of the primacy of their jurisdiction. With the ICC, the principle of ‘complementarity’¹²¹⁸ means that if a state wants to keep the ICC out of its affairs, it only has to conduct an investigation into the matter itself and this may be sufficient to frustrate attempts by ICC’s to exercise jurisdiction.¹²¹⁹ Preventing the ICC from exercising jurisdiction may leave the victims without any effective alternative mechanism to redress the wrongdoing.

In order for the ICC to exercise jurisdiction, the crime must have been committed on the territory of a ratifying state, or the person who committed the crime must be a national of a ratifying state.¹²²⁰ The commencement of a prosecution can occur in three ways (1) a state party refers a matter to the court; (2) the Security Council refers a matter to the court under Chapter VII of the UN Charter; and (3) the prosecutor initiates an investigation of a state party which the court then approves.¹²²¹ All of this leaves the initiation of prosecutorial action in the hands of the sovereign state or the Security Council or the prosecutor which all are the international creation of the sovereign state in the first place.¹²²² If the member states of the Security Council wish to stall the prosecutor’s investigation, they may do so for a period of 12 months, which 12 months may be extended from year to year indefinitely.¹²²³

While the Security Council may refer a matter to the prosecutor, acting under Chapter VII of the UN Charter, having regard to the power of veto of the permanent members of the UN, it is unlikely that crimes committed

¹²¹⁷ Marlies Glasius *International Criminal Court :a global civil society achievement* (2006) Routledge

¹²¹⁸ *Rome Statute of the International Criminal Court* - Preamble, www.un.org/law/icc/statute;

Philippe Sands *From Nuremberg to The Hague* (2003) Cambridge U.P. p 74.

¹²¹⁹ *Ibid Rome Statute* art 17; Sands 75.

¹²²⁰ *Ibid Rome Statute* art.12; Sands 75.

¹²²¹ *Ibid Rome Statute* art 13.

¹²²² *Ibid* art.15(3).

¹²²³ *Ibid* art 16.

by the nationals of any of the permanent members will be referred to the Court. Hence the criticism made of the ad hoc tribunals, that they only represented 'selective justice' is likely to be repeated in the case of the ICC in any event.

Even where a state party refers a matter to the prosecutor, then that state can change its mind and inform the prosecutor that it has decided to investigate the matter after all, whereupon the prosecutor may have to defer to that state.¹²²⁴ In the Uganda reference, the President of Uganda initially referred the 'Lords Army Case' to the ICC in order to bring the rebel leader Kony to the negotiating table.¹²²⁵ However the 'deterrent effect' of a potential international prosecution quickly ensured that Kony would only negotiate if the ICC was excluded from the process. Both Kony and the Ugandan government started insisting on national prosecutions only and calling for the ICC to withdraw.¹²²⁶ The refusal of the ICC to withdraw has led to the unjustified criticism that the ICC process acts as a barrier to achieving peace.¹²²⁷ What is completely ignored here is that Kony would have never come to the negotiating table in the first place had the matter not been referred to the ICC. If the ICC prosecutor is forced to withdraw any future deterrent effect will be lost.

Further a state can attempt to remove the investigation from the ICC prosecutor if it does not like who or what the prosecutor is investigating. In the Sudan Case the threat to prosecute the President of Sudan has led to calls from Sudan for the ICC prosecutor to be removed from this investigation. Similarly if there is a change of government in the referring state, a subsequent government may call for the removal of the ICC prosecutor. These criminal investigations are very expensive, with limited resources and with uncertainty surrounding the prospect of ever being able to bring cases to trial, the prosecutor could be intimidated by powerful sovereign states and hence more susceptible to interference. Even after the investigation is complete and the trial has commenced, the relevant state party may have the case removed to their own national courts.¹²²⁸

With so many obstacles placed in the 'path' of the prosecutor it is unlikely that the ICC will ever proceed with many cases, particularly if

¹²²⁴ Ibid art. 18(2).

¹²²⁵ *Situation in Uganda Case* No. ICC-02/04-101 (10 August 2007)[98].

¹²²⁶ 'Sierra Leone Special Court's Narrow Focus' *Washington Post* by Craig Timberg March 26, 2008 War Crimes Prosecution Watch Volume 3 - Issue 16 March 31, 2008.

¹²²⁷ Samuel Okiror Egadu 'Ugandan Peace Talks Stall' *Institute for War and Peace Reporting* January 16, 2008.

¹²²⁸ *Rome Statute* above n 275 article 19(4).

they are not fully supported by the relevant sovereign state,¹²²⁹ or the Security Council, (in a Chapter VII referral). The collective will of the sovereign states expressed during the negotiation phase of the Rome Statute has succeeded in ensuring that (without change) the ICC prosecutor can never seriously threaten the sovereign interests of states. Furthermore the fact that the Prosecutor is entirely dependant upon the subject state in order to conduct the investigation, means that as a matter of practicality, the ICC prosecutor can be frustrated in his/her attempts to collect the necessary evidence to proceed in any event.¹²³⁰

From an historical perspective the whole concept of ‘complementarity’ is flawed.¹²³¹ The reality is that nation states have a very poor record when it comes to prosecuting their own nationals for war crimes and crimes against humanity. One only has to instance, *The Leipzig trials*¹²³², *The trial of Lieutenant Caley*,¹²³³ *The Pinochet trial*,¹²³⁴ and *The Rainbow Warrior case*,¹²³⁵ to appreciate just how unsatisfactory it is to leave this process up to the sovereign states concerned.

A further problem with the principle of ‘complementarity’ is that it does not give ‘universal jurisdiction’ to third states.¹²³⁶ If it did, then the problem may not be so bad because if the ICC were denied jurisdiction and if the subject state failed to act, then another state may be able to take on the prosecution itself.¹²³⁷ However there is no provision in the Rome Statute that would confer ‘universal jurisdiction’ on third states in these circumstances. Accordingly if the ICC does not prosecute and the subject state does not prosecute, then the offender is not brought to justice at all.

Even from the outset the ICC has been the victim of political manipulation by powerful sovereign states.¹²³⁸ The United States was never enthusiastic about the ICC but the government of the United States under President G.W. Bush was positively hostile to the Court.¹²³⁹ Shortly

¹²²⁹ McGoldrick, above n 268, 55; Schiff, above n 272 68.

¹²³⁰ M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003) Transnational p 588

¹²³¹ Schiff, above n 272 73.

¹²³² C. Mullins, *The Leipzig Trials* (1921).

¹²³³ *United States v First Lieutenant William L. Calley, Jr* 46 CMR 1131 (1971) (USA) see also US Military Court of Military Appeals 21 December 1973, 22 US Ct Mil. Apps 534 (1973) 382.

¹²³⁴ *R v Bow Street Metropolitan Stipendiary Magistrate and ors, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No 3) [1999] 2 All ER 97.

¹²³⁵ *Rainbow Warrior Arbitration* (New Zealand v France) (1990) 82 ILR 499.

¹²³⁶ Alexander Zahar & Goran Sluiter *International Criminal Law* 2008 (Oxford. UP) p29.

¹²³⁷ *Pinochet* above n 291 97.

¹²³⁸ Schiff, above n 272 70.

¹²³⁹ Ruth Wedgwood, ‘The International criminal Court: an American View (1999) 10 (1) *Eur J Int Law* 93; William A. Schabas, ‘United States Hostility to the International Criminal Court: It’s All About

after the coming into effect of the Rome Statute, the Bush Administration ‘unsigned’ the Rome Statute that had been signed by former President Clinton.¹²⁴⁰ The United States government then embarked upon a diplomatic program to ‘bully’ small states into signing Article 98 Agreements in a contemptuous attempt to undermine the Court.¹²⁴¹ Article 98 was not intended for this purpose but to allow states to maintain extradition treaties already in existence at the time they ratified the *Rome Statute of the International Criminal Court 1998*. The states that have signed Article 98 Agreements are also arguably in breach of Article 18 of the *Vienna Convention on the Law of Treaties 1969*¹²⁴² that obliges states to refrain from entering into a treaty (Article 98 Treaties) that would defeat the purpose of another treaty (*Rome Statute of the International Criminal Court 1998*)¹²⁴³.

Notwithstanding these deficiencies the ICC is certainly an improvement over what existed before. Like the ICTY/ICTR the ICC was given jurisdiction over genocide, crimes against humanity, and war crimes.¹²⁴⁴ Genocide does not include conspiracy to commit genocide as was the case with the ICTY/ICTR Statutes,¹²⁴⁵ but this is an improvement because ‘conspiracy’ is not known to international criminal law in any event.¹²⁴⁶ Similarly crimes against humanity were improved because they do not require proof of an ‘armed conflict’ and it included non state actors. The perpetrator of a crime against humanity must have knowledge of the attack.¹²⁴⁷ ‘Aggression’ is also a crime under the Statute but cannot be prosecuted until a suitable definition is settled upon by the state parties.

By 11 April 2002, the 60 ratifications required for the Rome ICC Treaty to enter into force occurred. The Statute of the ICC became operative on

the Surictry Council (2004) 15 (4) *Eur J Int Law* 701; Maogoto, above n 117 271; Leonard above n 7 39; Glasius above n 274, 17.

¹²⁴⁰ McGoldrick, above n 268 414; See also E. Swaine ‘Unsigned’ *Stanford Law Review* . Vol 55, May 2003.

¹²⁴¹ McGoldrick above n 268 409; see also Amnesty International International: US Efforts to Obtain Impunity for genocide, Crimes Against Humanity and War crime Amnesty International August 2002 AI Index IOR 40/025/2002 p 24 see also F.F. Martin, S.J. Schnably, R.J. Wilson, J. S. Simon & M. V. Tushnet, *International Human Rights & Humanitarian Law: Treaties, Cases, & Analysis* (2006) Cambridge U.P. p 90.

¹²⁴² *Vienna Convention on the Law of Treaties* 1969 1155 UNTS 331.

¹²⁴³ Arguably the Bush Administration had to unsigned the Rome Statute of the International Criminal Court 1998 in order for it not to be in breach of article 18 of the *Vienna Convention on the Law of Treaties 1969* itself.

¹²⁴⁴ *Rome Statute* above n 275. art; 6; 7; & 8.

¹²⁴⁵ Ibid Article 6 see also ‘Conspiracy’ as a method of criminal offending discussion of the US Supreme Court in *Hamdan v Rumsfeld* US 2006.

¹²⁴⁶ *Hamdan v Rumsfeld* US 2006.

¹²⁴⁷ *Rome Statute* above n 275 article 7.

1 July 2002.¹²⁴⁸ The court began work almost immediately. The structure of the Court is similar to that created for the ICTY/ICTR. Innovations in the Rome Statute include the ability of the prosecutor to take a ‘unique investigative opportunity statement’.¹²⁴⁹ The purpose of this statement is to preserve evidence in those cases where a witness may not subsequently be available to testify. This could be a useful provision because of the potentially adverse effect of the ‘complimentarity principle’ where the prosecutor may be deterred from acting when the international crime is first committed. In other words it is unlikely, at least initially, that the prosecutor will be permitted to commence an investigation *proprio moto* unless it is obvious that the relevant state is not going to take prosecution action. In these circumstances while the prosecutor is in the ‘wait and see’ mode, vital evidence can still be preserved.¹²⁵⁰

Under the Statute there is a higher level of culpability for a military commander than a civilian superior. The military commander is liable if he/she ‘knew or should have known’ whereas the non military superior is liable if he/she ‘knew or consciously disregarded information’. The difference is subtle but it goes to methods of proof. With the military commander the prosecution can ask the court to draw an inference from the surrounding circumstances, that is, ‘everyone knew so the military commander must have known’. With respect to the non military superior the prosecution will probably have to produce evidence to show that the civilian superior was actually in possession of information, which indicated that subordinates were committing or about to commit such crimes.¹²⁵¹

The defence of ‘superior orders’ has long been a difficult problem, especially when the accused is from a country with a totalitarian government. As mentioned above, superior orders was not a defence at Nuremberg and Tokyo, nor was it a defence under the Statutes of the ICTY or ICTR. This is so notwithstanding that the ILC had recommended that the defence be made available in those limited circumstances where the accused had no moral choice. The ILC recommendations have been picked up by the drafters of the Rome Statute. The defence is now available if an accused can show that he/she was under a legal obligation to obey the order, that he/she did not know it was unlawful and that it was not manifestly unlawful. The important

¹²⁴⁸ McGoldrick, above n 268 43.

¹²⁴⁹ *Rome Statute* above n 275 article 56 ‘Unique Investigative Opportunity’.

¹²⁵⁰ McGoldrick, above n 268 56.

¹²⁵¹ *Rome Statute* above n 275 article 28 - ‘Command responsibility’. Higher level of culpability for a military commander than a civilian superior.

exception to this is if the crimes charged are genocide or crimes against humanity, then the defence is not available.¹²⁵² This is a balanced, sensible compromise and is much fairer than was the law previously.

The rights of a person during investigation are fair and reasonable. The suspect is afforded the ‘right to silence’, cannot be subjected to ‘coercion, duress or threat, or arbitrary detention. If questioned an accused must be allowed an interpreter, the assistance of counsel, informed of the purpose of the investigation and be advised that he/she has the right to remain silent.¹²⁵³

The ICC Statute creates an Assembly of States Parties, which acts in the capacity of rule maker, budget approver and overseer of the whole ICC operations. Decisions of the Assembly must be by two thirds majority of members. The Assembly can meet either at The Hague or the UN Headquarters in New York.¹²⁵⁴

The Court is funded by the States Parties although the General Assembly of the United Nations may provide funds to the Court, especially with respect to those investigations referred to the ICC by the Security Council under the Statute.¹²⁵⁵

The negotiations for the drafting of the Rome Statute of the ICC presented the best opportunity to deal with the problem of states preferring their ‘military objectives’ ahead of the protection of humanity. The negotiations failed to secure jurisdictional ‘primacy’, so for the moment sovereign interests still prevails over humanitarian interests. However some progress has already been made and it is just possible that international civil society will in the future force states to ensure that justice is provided to the victims of international crimes committed during the course of armed conflict. International civil society is gaining momentum, it is possible that civil society will eventually limit the reach of sovereign states and curtail their excesses.

The ICC’s mere existence may act as a deterrent.¹²⁵⁶ It is founded on treaty which means that it is not selective in the same way as the

¹²⁵² *Rome Statute* above n 275 article 33 Superior orders and prescription of law.

¹²⁵³ *Ibid* article 55. Rights of a person during investigation.

¹²⁵⁴ *Ibid* article 112 - The ICC Statute Creates an Assembly of States Parties, which acts in the capacity of rule maker, budget approver and overseer of the whole ICC operations.

¹²⁵⁵ *Ibid* article 115 - How the Court is funded.

¹²⁵⁶ During the Iraq war of 2003 the Australian defence Minister stated publicly on television that Australian Defence Forces could not and would not be targeting schools and hospitals, irrespective of whether or not it was believed that Iraqi soldiers were in them, because to do so would be in contravention of Australia’s international obligations. ABC “7.30 Report” 2003.

ICTY/ICTR. It does provide a means of redress for weaker countries. While powerful countries they have the military might to take matters 'into their own hands', weaker countries are more restricted, hence the court can provide a mechanism of justice for weaker countries.¹²⁵⁷ Further, notwithstanding the lack of 'major powers' ratifications so far, its decisions are much more likely to be accepted by the international community as a legitimate law enforcement exercise as opposed to the decisions of national courts.

7.13 Conclusion

The above survey of courts and tribunals applying and enforcing international criminal law demonstrates that while they generally do better than state military commissions and some state courts,¹²⁵⁸ they are still impeded, from time to time, by states that seek to limit their ability to deliver independent and impartial justice. The Nuremberg and Tokyo Trials were manifestations of victors' justice, ignoring as they did war crimes committed by the Russians against the Germans, the carpet bombing of Dresden by the UK and USA and the bombing of Hiroshima and Nagasaki. The ICTY and the ICTR are the best examples of impartial justice but are selective thus undermining their work as representative of international justice. Finally the ICC was severely weakened during the treaty negotiation stage thus depriving it of much needed authority. Unfortunately as many of the worlds largest states have refused to ratify the ICC treaty, it lacks a truly international character.

Having said this, if there were no courts or tribunals enforcing international criminal law, then the position of humanity would be far more perilous. Notwithstanding the deficiencies of these courts and tribunals they have made a fundamentally important contribution to the development of international humanitarian justice.¹²⁵⁹ The essential imperative of global civil society is to limit state interference and succeed in making these tribunals more successful in the future.

¹²⁵⁷ This is best illustrated by the aftermath of September 11, the USA being the worlds super power had the capacity to address the terrorist question on its own, it did not need the UN or any other state to invade Afghanistan or Iraq, although it was assisted by other States, it was in no way dependant on those States. However in the case of Bali, if Indonesia had not acted in the responsible way that it did there would be little if anything that Australia could have done about it. The ICC, if ratified by States does provide a means whereby such trials can take place.

¹²⁵⁸ Roper above n 204, 85.

¹²⁵⁹ M. Cherif Bassiouni Introduction to International Criminal Law (2003) Transnational p 675.

CHAPTER 8

Three Alternative Methods of Enforcement of ICL Compared

8.1 *Introduction*

In Chapter 5 military commissions were examined and it was argued that they were an example of a perverse method of enforcement of international criminal law by states. In some instances even the civilian courts can be subjected to political interference such that enforcement of international criminal law becomes little more than a farce and this was discussed in Chapter 6. As a consequence it is not sufficient to simply move the trials from military commissions to the civilian courts of the state in order to overcome the problem. However it would not be correct to argue that in every case where international criminal law trials are conducted in the civilian courts of a state that they are subjected to political interference. Notwithstanding this, the political nature of these trials is such, that they are often treated differently, if not at the trial level, then at the investigation stage. This interference makes them different to the traditional national criminal trial that one sees in the civilian courts on a daily basis. In this chapter we look at an example of where the civilian trial of an international crime was conducted in circumstances where it was relatively free of political manipulation but the political manipulation occurred at an earlier stage, the investigation stage, which in effect had the same result of corrupting the enforcement process.

Again in this chapter it is argued that in order for a state to justify a claim that it has a right to exercise exclusive dominion over the enforcement of international criminal law it would need to demonstrate that it has traditionally enjoyed this jurisdiction to the exclusion of all other judicial participants. However, as demonstrated in Chapter 7, the existence of International Tribunals such as Nuremberg and Tokyo and more recently the tribunals of ICTY; ICTR and the ICC demonstrate that they do not enjoy this exclusive jurisdiction. However if they were to assert that they ought to have exclusive jurisdiction they would need to demonstrate that they are more effective at enforcing international criminal law than other participants such as international tribunals or civil society instruments. This it is argued cannot (on the evidence) be demonstrated. In order to assess the effectiveness of the administration of international criminal law

by any agency, be it a state, an international tribunal or a civil society instrument, it is necessary to examine the whole process of enforcement from the investigation stage through to conviction/acquittal, sentence and appeal. It is not sufficient just to point to a conviction and sentence. The rights of an accused to challenge matters such as jurisdiction, the investigation process and the testing of the evidence, are all essential prerequisites to this evaluation and are concepts encapsulated in the *rule of law*. Finally, no system can claim that it has delivered a just result if the interests of the victim are not adequately catered for as well.

In this chapter three different means of enforcement of international criminal law are analysed and compared. The three trials involve one conducted by a state, one conducted by an international tribunal and one conducted by a civil society instrument. The first trial considered was a trial conducted before an Australian civilian court - Ivan Timofeyovich Polyukhovich. Polyukhovich was charged with having committed war crimes and crimes against humanity in Ukraine during the Second World War. Overriding political considerations adversely affected the timely investigation of this case. However when the trial did eventually take place before a civilian court the interests of the accused were adequately protected but the victims of the crimes were denied justice because of the delayed investigation. In order to make a fair comparison, the trial selected is not one conducted before an obviously politically 'rigged' military commission, but one conducted before a state civilian court where political interference was at a minimum.

The next trial considered is the trial of Dusko Tadic. Tadic was the first trial to be conducted before International Criminal Tribunal for the former Yugoslavia. Tadic was afforded an extensive opportunity to challenge the jurisdiction of that tribunal. His defence team was fully funded by the tribunal and took numerous points of law including whether or not there existed an international armed conflict and the application of the grave breaches provisions of the Geneva Conventions. It is argued that not only did Tadic receive a fair trial, but the victims of the crimes and the international community benefited from this trial process as well.

The final case considered is a 'people's trial' conducted in Tokyo, Japan by civil society, concerning the victims of forced sexual slavery, practiced by the Japanese military during the Second World War. The practice is sometimes referred to as the 'comfort women' system. The charges and facts of the case are considered, so too is the functioning and operation of a 'people's tribunal'. This case represents an analysis of the

enforcement of international criminal law by civil society. The trial occurred because states courts and international courts failed to deliver justice to the victims of these crimes.

While the accused suffered no direct consequence – in terms of actual punishment, the process did at least, attempt to correct the injustices suffered by the women victims of this state sanctioned criminal offending.

The analysis of these three trials leads on to the final argument of the thesis concerning the need to develop and strengthen the mechanisms for enforcement of international criminal law. The argument of the thesis is that there is certainly a place for state-run trials as well as international trials but the conduct of both these jurisdictions needs to be supervised by global civil society so as to ensure that these enforcement mechanisms are not corrupted by undue political influence, hence the need to develop a civil society mechanism for this purpose.

8.2 *The Trial of Nazi War Criminals in Australia.*

The enforcement of international criminal law by Australia, in relation to European suspects, occurred in circumstances where the jurisdictional connection to the state was based on citizenship and presence in Australia of the accused at the relevant time. Although this could be sufficient to invoke ‘national’ jurisdiction, Australia (quite properly), reinforced this claim by relying on universal jurisdiction.¹²⁶⁰

During the 1980s a wave of investigations and subsequent prosecutions commenced in relation to war crimes suspects who had fled Europe following World War II and taken up residence in countries such as Canada and Australia.¹²⁶¹ In relation to Australia, Canada and the UK, domestic legislation was introduced so that the national laws of these countries were extended to try any Nazi War crimes suspects.¹²⁶² Several

¹²⁶⁰ A-M Slaughter; Chapter 9 ‘Defining the Limits’ in S. Macedo (ed.) *Universal Jurisdiction: National courts and the Prosecution of Serious crimes under International Law* (2004) Penn p 172; Universal jurisdiction has particular significance when the international crimes involved have achieved jus cogens status.

¹²⁶¹ War crimes and crimes against humanity are not barred in time by statute of limitations. In 1968 the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* 75 UNTS 73 obliged States not to have in their domestic law any statute of limitations operating in respect to war crimes and crimes against humanity.

¹²⁶² In the United States of America the position was different. Persons suspected of these offences were not subjected to criminal trial but were deprived of their US citizenship and deported. This was a civil proceeding and the court decided the issue according to the civil standard. The cases were brought on the basis that the offenders had falsely completed their immigration papers when entering the USA. The standard US immigration questionnaire specifically questioned the entrant on whether or not they

prosecutions followed, but many were unsuccessful in obtaining a conviction.¹²⁶³

While in Australia there is little evidence of any political interference in the trial itself, the same could not be said of the process leading up to the trials which was infected with the customary political manipulation commonly associated with the enforcement of international criminal law by states. By way of contrast, the same appetite shown by Australia for prosecuting Japanese war criminals before military commissions following World War II (discussed in Chapter 5) did not exist with respect to the prosecution of Nazi war criminals who had migrated to Australia as displaced persons.¹²⁶⁴

The vulnerability of Australia during World War II due to its small population, convinced the government in the immediate post-war period, that Australia had no choice but to increase its population. Accordingly the government set about rapidly increasing the population by significantly expanding the migrant intake employing the catch cry, ‘populate or perish’.¹²⁶⁵ The government was acutely aware of the political sensitivity associated with diluting the ‘White Australia Policy’.¹²⁶⁶ Accordingly for any mass migration to be politically viable it had to be a migration of Europeans and the more they ‘looked like British migrants the better’.¹²⁶⁷ Fortunately for the government, the displaced persons program involved a great many ‘blond haired blue eyed’ northern Europeans who fitted nicely within the desirable criteria.¹²⁶⁸

In the turbulent and confused environment of post World War II Continental Europe, burdened as it was with urgent reconstruction and the need to accommodate millions of displaced persons, the ability to identify and separate Nazis war crime suspects from the displaced persons population was an almost impossible task. Nevertheless the Commonwealth Intelligence Service warned the government of the presence of members of the Nazi SS in the displaced persons who were

had been ‘involved with or connected with the commission of war crimes or crimes against humanity on behalf of the Nazi Government of Germany or others associated entities during the course of World War II’.

¹²⁶³ The era of prosecuting Nazi war criminals has now largely ended. The accused are either too old or infirmed to stand trial or victim/witnesses have died or the accuracy of their testimony can no longer be trusted due to the lapse of time. However the World War II trials made a significant contribution to the development of international criminal law, notwithstanding the fact that they did little to provide either justice or closure to the victims of these crimes.

¹²⁶⁴ Mark Aarons, *War Criminals Welcome—Australia a Sanctuary for Fugitive War Criminals Since 1945* (2001) Black Inc.

¹²⁶⁵ Ibid 245.

¹²⁶⁶ Ibid.

¹²⁶⁷ Ibid.

¹²⁶⁸ Ibid 246.

migrating to Australia but the government rejected this advice because it interfered with the success of its immigration program.¹²⁶⁹

The lack of enthusiasm to address the issue was carried further by subsequent governments then preoccupied with the international anti-Communist movement. While the government was not exactly sympathetic to the Nazis, they certainly preferred them to Communists.¹²⁷⁰ In 1961 the matter came to a head when the Soviet Union sought the extradition of an alleged Nazi collaborator Ervan Viks.¹²⁷¹ The Attorney-General, Garfield Barwick, preferred to grant amnesty than have to cooperate with the Soviet government.¹²⁷²

The failure to extradite or investigate/prosecute Viks and the other identified Nazi war crimes suspects, while probably not a breach of international law at the time, was certainly irresponsible and particularly callous in so far as the victims were concerned.¹²⁷³ The government policy of effectively giving, what Aarons famously term 'sanctuary', to Nazi war criminals may have continued unchecked if it had not been for the coming together of two important events namely (1) the election in 1986 of the Labor Prime Minister, Robert Hawke, who was opposed to the 'sanctuary policy' and (2) Mark Aaron's tireless campaigning to address the Nazi war criminal problem in Australia.¹²⁷⁴

Following a series of ABC radio programs in 1986 by Aarons, on the presence of alleged Nazi war criminals living in Australia,¹²⁷⁵ the government appointed lawyer Andrew Menzies to investigate Aaron's allegations¹²⁷⁶. When Menzies presented his report to the government in November 1986, he confirmed that Nazi war criminals were living in Australia.¹²⁷⁷

¹²⁶⁹ Ibid 251.

¹²⁷⁰ Ibid 269.

¹²⁷¹ Ibid 444.

¹²⁷² Ibid 447.

¹²⁷³ The grave breach provisions of the Geneva Conventions of 1949, which imposed a positive obligation to investigate and if necessary try, or failing this to extradite war crimes suspects, did not bind Australia with respect to Viks, or the others, because these Conventions operated prospectively. However the Conventions were arguably reflective of an international responsibility and was certainly within Australia's legal capacity because the obligation to investigate/prosecute or extradite Nazi suspects had been clearly articulated in numerous UN Resolutions at that time.

¹²⁷⁴ Aarons above n 5, 462.

¹²⁷⁵ Ibid.

¹²⁷⁶ Some twelve years later Robert Hawke paid tribute to the work of Mark Aarons by writing the forward to his book Aarons, above n 5 forward.

¹²⁷⁷ Ibid 463.

In 1987 a Special Investigations Unit (SIU) attached to the Attorney-Generals Department was established to investigate the allegations.¹²⁷⁸ The first case to be investigated by the SIU, that subsequently went to trial, was that of Ivan Timofeyovic Polyukhovych.

Ivan Polyukhovych was a forest warden from the village of Sernicki in the Ukraine. In December 1986 allegations were made that Ivan Polyukhovych, a resident of Seaton, a suburb of Adelaide was in fact 'Ivanechko'; a war criminal. Polyukhovych had arrived in Australia in December 1949 onboard the ship 'Castel Bianco'.¹²⁷⁹ Since arriving in Australia, Ivan Polyukhovych had lived a quiet life in suburban Adelaide. Even his immediate family were apparently unaware of the role that he had played during the war.¹²⁸⁰

Members of the Special Investigations Unit went to the Ukraine and located a number of witnesses in the village of Sernicki¹²⁸¹ who had known Ivan Polyukhovych prior to and during the War.¹²⁸² One witness, Fyodor Polyukhovych¹²⁸³ claimed that Ivan Polyukhovych had been involved in the mass killing of some 850 Jews on the outskirts of the village of Sernicki in 1942. A pine forest had subsequently been grown over the grave site, but Fyodor Polyukhovych was still able to point out where he considered the mass execution took place. In order to corroborate his evidence a partial exhumation of some of the executed bodies confirmed the existence of the mass grave. Subsequently Polyukhovych was charged with 24 individual murders plus involvement in the mass killing.

The committal hearing was in July 1990. However on the night before the hearing Polyukhovych attempted suicide; his injuries were not fatal but from then on his frail health dominated the whole trial process.¹²⁸⁴ The defence challenged the constitutional validity of the *War Crimes*

¹²⁷⁸ Robert Greenwood was appointed Director of the SIU. Greenwood was a criminal lawyer who had been a member of the National Crime Authority and subsequently appointed the Deputy Director of Public Prosecutions of the Canberra Office of the Federal DPP before taking up his position as the Director of SIU. Subsequently Graham Blewitt was appointed Deputy Head of the SIU.

¹²⁷⁹ David Bevan, *A Case to Answer: the Story of Australia's First European War crimes Prosecution* (1994) Wakefield Press p16.

¹²⁸⁰ Ibid 14 – 19.

¹²⁸¹ Ibid 33.

¹²⁸² The author of this thesis also went to the Ukraine as a prosecutor but this visit was subsequent to the trip discussed at this point.

¹²⁸³ Many of the Villegers in Serniki had the same family name of the accused, indeed one witness had the exact name of the accused.

¹²⁸⁴ Some tried to argue that it was not an attempted suicide but that someone had tried to take the life of Polyukhovich. There was never much substance in this version of the events, after all the rifle used in the shooting belonged to Polyukhovych.

*Amendment Act 1988*¹²⁸⁵ by arguing that that the Act was beyond the legislative power of the Parliament. They also argued that the ‘*ex post facto*’ nature of the charges rendered them invalid. However in 1991 the High Court upheld validity of the *War Crimes Amendment Act*.¹²⁸⁶

The delay of over 40 years in enacting appropriate legislation in order to facilitate prosecution action was fatal to the success of any trial. Very old, frail, often illiterate, non English-speaking, victim witnesses, who had been traumatised by events that had occurred to them in their childhood (50 years earlier) faltered under heavy cross examination during the course of the jury trial. Inevitably inconsistencies crept into their testimony. In these circumstances it not surprising that some of the witnesses could not recall the colour of the uniforms worn by the Nazi collaborators or exactly how they were armed or specific distances. When these witnesses came to testify they truthfully attempted to give their evidence but could not recount the circumstances to the degree of accuracy required for a modern murder trial.¹²⁸⁷

The inconsistency problems were compounded by translation difficulties, for example the Ukrainian language does not differentiate between the hands and the arm or the foot and the leg. Children are referred to as males irrespective of whether they are male or female. Accordingly a child can be described as ‘he’ when in fact that child is a female.¹²⁸⁸ In the end the jury acquitted Polyukhovych of all charges and no further Nazi prosecution cases were ever presented to an Australian jury.

While the victims did not receive justice, the same could not be said for the accused. The government fully funded the defence who were given every opportunity to challenge the jurisdictional basis of the prosecution case, the investigation process and the evidence.

The failure of Australia to take timely action due to political considerations resulted in this being a failed attempt to properly enforce international criminal law and amounted to sovereign interests improperly prevailing over international humanitarian law. However the trial that eventually did take place in the 1990s demonstrated that a state can

¹²⁸⁵ Polyukhovich was charged under Sections 6, 7, 8 & 9 of the *Australian War Crimes Amendment Act 1988* of the Commonwealth.

¹²⁸⁶ *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

¹²⁸⁷ This information came to the author through participating as counsel at the trial and conducting the examination and re-examination of many of the witnesses.

¹²⁸⁸ Reference L. Stern interpreters paper presented by the author (prosecutor) as an exhibit at trial (unpublished).

effectively prosecute international crimes if it elects to do so. Australia assigned the trials to the civilian courts, there was no political interference in the trial process itself, the accused did receive a fair trial and had the trials occurred 30 years earlier there is every reason to believe that the victims too would have received some reasonable measure of justice.

The history of the Polyukhovich trial classically illustrates that had suitable external pressure been placed on Australia at an earlier stage the investigation process may have commenced earlier and the victim witnesses would have been able to recount their stories at a time when the events were much fresher in their minds. As it turned out these victim witnesses struggled with their memories and suffered under cross examination all because the process had been delayed. It is apparent that in the 1950 – 60s the forces within Australia pressing the government to investigate these crimes here, were insufficient to bring about this result. The fact that the accused was acquitted in the circumstances, demonstrates the success of conducting the trials in the civilian courts of Australia. Little criticism can be directed at the way the civilian courts conducted the trial, which in turn, supports the argument that states can be effective enforcers of international criminal law provided they allow the civilian courts to have the carriage of the trials.

8.3 International Criminal Tribunals Operating with State Cooperation - International Criminal Trial of 'Dusko' Tadic

The ICTY was the first criminal tribunal established by the United Nations. Attempts to appoint a Prosecutor proceeded slowly even the Deputy Prosecutor did not commence duty until February 1994. When the Deputy Prosecutor did eventually take up his post unreal expectations of an early start to prosecutions had built up both within and outside the Tribunal. The Deputy Prosecutor was under pressure to rapidly put together in a very short time an investigation and prosecution team, which would, as it turned out, undertake one of the largest criminal investigations ever attempted in history.

A related debate centred on 'who should be the targets of this investigation' – the 'big fish or the little fish'.¹²⁸⁹ The advantages of only concentrating on the high profile political and military leaders were that the Tribunal could be said to be focussing on the most culpable. The

¹²⁸⁹ Geoffrey Robertson *Crimes Against Humanity: The Struggle for Global Justice* (1999) Penguin p 266.

disadvantage of this approach was that it would make the investigation much more difficult – and as a consequence much slower. Working from the ‘top – down’ meant that vital ‘base level evidence’ could not be collected as a consequence of a specific target investigation. Strong foundational evidence is most important in these cases because the ‘leaders’ seldom involve themselves physically in committing the actual atrocities.¹²⁹⁰ It is their link to the actual perpetrators that constitutes their offending.¹²⁹¹ However if the Office of the Prosecutor (OTP) started at the bottom it would be criticised for ‘wasting resources on the little fish’.

At the time, the reality was that the OTP had to commence work on whatever case it could have regard to the meagre resources it had at its disposal.¹²⁹² The ICTY was in a very different position to Nuremberg prosecutors, unlike Nuremberg, the war was ongoing in 1994, the OTP had no real access to the former Yugoslavia where the evidence was to be found. Government documents, the backbone of the Nuremberg investigations, were not available to the OTP, and there were no soldiers or police at the disposal of the OTP to force the surrender of evidence or suspects.¹²⁹³

It was against this background that the *Tadic Case* emerged.¹²⁹⁴ Dusan aka ‘Dusko’ Tadic was born on 1 October 1955, a Bosnian Serb cafe proprietor from the small village of Kozarac in the Opstina of Prijedor in the north-west corner of Bosnia–Herzegovina.¹²⁹⁵ In August 1993 Tadic travelled to Munich where he stayed with his brother who operated a night club.¹²⁹⁶ In early 1994 a Muslim Omaska camp survivor, who had been given refugee status in Germany, informed the German authorities that he had seen Tadic walking about the streets of Munich. The German Federal police then commenced an investigation. The police placed Tadic brother’s Munich house under surveillance, and subsequently arrested Tadic on 12 February 1994. He was later charged by the Germans with having committed genocide and crimes against humanity.

The German prosecutors were prepared to prosecute Tadic under German law which picked up and applied international criminal law pursuant to

¹²⁹⁰ Patricia M. Wald *Tyrants on Trial: Keeping Order in the Court Room* 2009 Open Society Institute p 16.

¹²⁹¹ *Ibid* 16.

¹²⁹² William Schabas *The UN International Criminal Tribunals: The former Yugoslavia Rwanda and Sierra Leone* (2006) (Cambridge UP) 126.

¹²⁹³ M. Cherif Bassiouni *Introduction to International Criminal Law* (2003) Transnational p 579

¹²⁹⁴ *Prosecutor v Tadic* IT-94-I-T Decision of the Trial Chamber 7 May 1997.

¹²⁹⁵ *Ibid* par 181.

¹²⁹⁶ *Ibid* par 192.

the principle of ‘universal jurisdiction’. However the Statute of the ICTY incorporated the right of ‘primacy’¹²⁹⁷ when it came to the exercise of jurisdiction by the Tribunal over matters falling within its jurisdiction. Accordingly the German government, as a matter of international courtesy asked the Deputy Prosecutor if he had any interest in prosecuting the case. The first formal German delegation came to The Hague in June 1994. The author was present at this meeting. After the meeting there was much discussion within the Office of the Prosecutor (OTP) as to whether or not the ICTY should take the case. The USA lawyers (seconded from the Department of Justice) were totally opposed to the ICTY prosecuting the case. In the end the author succeeded in persuading the Deputy Prosecutor to take the case on the basis that the prospect of ‘working up’ another case in the then foreseeable future was remote, and as this would be the first case to test the jurisdiction since Nuremburg, it would be better to do this on a less significant case than to potentially founder on some high profile case of ‘major significance’. Ultimately the Deputy Prosecutor decided that it would be in the interests of the tribunal to prosecute the *Tadic* case.¹²⁹⁸

The next step was to physically remove Tadic from Germany into the custody of the Tribunal. As extradition does not operate between a state and an international Tribunal, the transfer had to be by way of ‘deferral’¹²⁹⁹ The then Constitution of the Federal Republic of Germany did not allow for ‘deferral’ so there was no legal mechanism available to the German government to facilitate deferral. However it is a well-established principle of international law that the state cannot avoid compliance with its international obligations by invoking the provisions

¹²⁹⁷ *Statute of the International Criminal Tribunal for the former Yugoslavia* (ICTY Statute) Art. 9 (2)

¹²⁹⁸ The author was recruited to the ICTY in March 1994 and took up duty in early June 1994. This information was acquired by the author when working at the ICTY. The author was the lead prosecutor in the *Tadic Case* see *Tadic* above n 35, par 28.

¹²⁹⁹ *Application of the Prosecutor Dated 12 October 1994* (as amended on 8 November 1994) (1994-1995) see referred to in Vol. 1 Judicial Reports of ICTY 5 . States exchange accused persons between their jurisdictions by way of extradition treaties. In most cases if an extradition treaty has not been executed between particular states then removal from one state jurisdiction to another cannot occur. With International tribunals they rely on the effect of the UN Charter Chapter VII Resolution. Accordingly transfer of accused persons can only occur either by the statute establishing the tribunal itself or pursuant to state obligation created by the use of Chapter VII authority under the UN Charter. In the case of the ICTY this was referred to as deferral to the Tribunal which the Security Council gave overriding authority which it referred to as primacy in Art. 9 (2) of the Statute. (See Secretary Generals Report par 125 page 36 Further under Rule 58 the duty of a state to cooperate with the tribunal under Article 29 in handing over accused persons prevail over any legal impediment to the surrender or transfer of an accused to the Tribunal which may exist under the national law or extradition treaty of the state concerned.

of its municipal laws.¹³⁰⁰ Accordingly the German government were left with little option but to amend the Constitution.

On 12 October 1994 the prosecutor filed a formal request for deferral and transfer to the Tribunal.¹³⁰¹ The public sitting of the Tribunal was held on 8 November 1994 and representatives of the government of the Republic of Germany appeared. Counsel appointed for Tadic also appeared on his behalf.¹³⁰² The specific request made by the prosecutor in the application was for the ‘Government of the Federal Republic of Germany to defer to the competence of international Tribunal’ with respect to the investigation of Tadic. In the application the prosecutor had to address why the Tribunal should assert ‘primacy’ in view of the fact that national courts were also vested with concurrent jurisdiction under article 9 (1) of the Statute. In order to deal with this issue, the prosecutor indicated that the Tadic case was important to the OTP because it touched upon certain other serious investigations that were already ongoing by the prosecutor.¹³⁰³ In determining the matter the Tribunal said that in order for the prosecutor to be successful in obtaining deferral it would be necessary to demonstrate that (a) an investigation was ongoing by the prosecutor in relation to the matter (b) the investigation had been instigated by a state and (c) that the investigation by the state was closely related to investigation undertaken by the prosecutor.¹³⁰⁴ It was incumbent upon the Prosecutor to demonstrate the importance of the matter to other investigations being undertaken by the prosecutor. After hearing from Counsel the Tribunal then proceeded to assert primacy.¹³⁰⁵

Following the acceptance of primacy, the OTP stepped up the investigation. In the early stages of the investigation the prosecutor was assisted by the Report of United Nations Commission of Experts.¹³⁰⁶ The Commission of Experts had been established pursuant to Security Council resolutions 780 of 1992.¹³⁰⁷ Included in the Commission of Experts Report were certain eyewitness accounts which demonstrated that Tadic had been involved in forcing Muslims to leave their villages in the

¹³⁰⁰ *Decision of the Trial Chamber on the Application by the Prosecutor for Deferral* (1994-1995) Vol 1 Judicial Reports of ICTY 3 at p 21 relying on *Advisory Opinion, Exchange of Greek and Turkish Population*, P.C.C.I.J. series B, No. 10 ,p 20.

¹³⁰¹ *Application of the Prosecutor* Dated 12 October 1994 (Tadic) Case number IT 94 I D.

¹³⁰² *Decision on Deferral* above n 41.

¹³⁰³ *Application of the Prosecutor* above n 42 par 4 of the Application.

¹³⁰⁴ *Decision on Deferral* above n 41, 11 – 13.

¹³⁰⁵ *Ibid* 23 – 25.

¹³⁰⁶ *Ibid* 13.

¹³⁰⁷ See referred to in *Report of the Secretary-General Pursuant to Par 2 of Security Council Resolution 808* (1993) UN Doc S/25704 par 7.

Prijedor Opstina and then destroying their houses. It was in the course of this 'ethnic cleansing' that Tadic had committed several murders.

The Tadic investigation was made considerably easier by virtue of the fact that the German police had conducted a very thorough and extensive investigation. Most of the witnesses were located in Western Germany and could be easily located with the assistance of the German Federal Police. In practically all cases a statement was available (in German) in relation to each of these witnesses.

On 10 February 1995 the prosecutor presented an indictment against Tadic.¹³⁰⁸ In the indictment it was alleged that from '...about May 1992 Serb forces attacked Bosnian Muslim and civilian population centres in the Opstina Prijedor forcing them from their homes and confining some 3000 men in the Omaska camp complex. It was alleged that Tadic had participated in the collection and mistreatment of many of these individuals.¹³⁰⁹ The indictment set out the history of the armed conflict in the Prijedor Opstina which started in May 1992. The prosecutor alleged that the Serbs forcibly took control of Prijedor Opstina. The Serbs rounded up the Muslims and Croats and forced them to march in columns bound for the concentration camps. Many of the prisoners were pulled out of the column and beaten or shot on the spot. Following the initial attack Muslims and Croats were rounded up for several weeks and forced into detention camps.¹³¹⁰ Many of the Prijedor Opstina's Muslim and Croat intellectuals, professionals and political leaders were sent to Omaska.¹³¹¹ There were approximately 40 women in the Omaska camp. The 'living conditions at Omaska were brutal'; little or no facilities for personal hygiene were provided. Prisoners received no changes of clothing or bedding and they received no medical attention. Severe beatings were commonplace.¹³¹² Camp guards and others would come into the camp where they would beat the prisoners using all manner of weapons including wooden batons metal rods and lengths of thick industrial cable with metal balls affixed to the end. Both female and male prisoners were beaten, tortured, raped, sexually assaulted and humiliated on almost a continual basis.¹³¹³

¹³⁰⁸ Indictment: *Prosecutor v Tadic and Borovnica* (1994-1995) Vol 1 Judicial Reports ICTY 27.

¹³⁰⁹ Ibid 27.

¹³¹⁰ Ibid 29.

¹³¹¹ Ibid 29 par 2.3

¹³¹² Ibid 29 par 2.5.

¹³¹³ Ibid 29.

The prosecutor charged on the basis that the crimes were committed in the course of armed conflict and or partial occupation.¹³¹⁴ The grave breach provisions of the *Geneva Conventions* of 1949 were alleged because the prosecutor asserted that the armed conflict was international in character.¹³¹⁵ The prosecutor argued that victims of the crimes were protected by the *Geneva Convention* of 1949; the accused Tadic, was bound by the Laws and Customs of War; and that the acts or omissions were part of a widespread, large-scale, and/or systematic attack directed against a civilian population (mainly the Muslim and Croat population) of the Prijedor Opstina.

Tadic was also charged with forcible sexual intercourse with a Muslim woman referred to by the pseudonym 'F';¹³¹⁶ with forcing one of the Muslim prisoners to bite off the testicles of a fellow muslim prisoner in the Omaska Camp;¹³¹⁷ with beating and killing of a muslim Sefik Sivac; and the killing of numerous villagers at Jaskici and Sivci in Opstina Prijedor.¹³¹⁸

The ICTY fully funded the Tadic defence which included lawyers and investigators. The defence were given time to investigate the defence and the resources to carry out research and investigation both in The Hague and Europe generally. The defence team also went into the former Yugoslavia when access became possible.¹³¹⁹

On the 23 June 1995 Tadic filed an interlocutory motion challenging the jurisdiction of the Tribunal. The main points of the challenge were (a) the Tribunal was not established in accordance with law insofar as the Security Council of the United Nations had no competence in this regard, (b) the primacy of the Tribunal over domestic courts had no basis in international law and constituted an infringement upon the sovereignty of states,¹³²⁰ (c) the Tribunal had no jurisdiction *ratione materiae* to try any of the crimes under the statute because there was no nexus with international armed conflict. The argument being that the conflict in the former Yugoslavia, was a civil war.¹³²¹

¹³¹⁴ Ibid 231 para 3.1.

¹³¹⁵ Ibid 31 para 3.2.

¹³¹⁶ Ibid 31 para 4.1.

¹³¹⁷ Ibid 33 para 5.1.

¹³¹⁸ Ibid 39 para 6.1.

¹³¹⁹ *Tadic* above n 35, para 531.

¹³²⁰ J.N. Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) Transnational p 54.

¹³²¹ *Tadic* above n 35 para 14-15.

In relation to the argument that the Security Council lacked the authority to create the Tribunal, the prosecutor argued that the Tribunal could not review the decisions of the Security Council.¹³²² This argument was supported by ICJ authority.¹³²³ The prosecutor further argued, that the decision to establish the Tribunal, was based upon a determination by the Security Council that the conflict in the former Yugoslavia constituted a threat to international peace and security within the meaning of Chapter VII of United Nations Charter.¹³²⁴ The prosecutor pointed out that the determination of whether or not the conflict constituted a threat to international peace and security was a political decision and one which is not competent to be ruled upon by the Appeals Chamber of the Tribunal. In deciding what action the Security Council might take in relation to international disputes, the powers of the Security Council are broad, giving rise to a presumption of legality.¹³²⁵ The prosecutor referred to the *travaux préparatoires* of the United Nations Charter where, in relation to the enforcement arrangements, it stated that ‘wide freedom of judgment has been left (to the Security Council) as regards the moment it may choose to intervene and measures to be applied, with the sole reserve that it should act in accordance with the purposes of principles of the UN Charter’¹³²⁶ The prosecutor argued that the obligation of states to accept and carry out the decisions of the Security Council in accordance with Article 25 of the UN Charter prevailed over the ‘obligations under the any other international agreement’.¹³²⁷

The defence argued that the Tribunal should have been established by treaty. They said that it was the General Assembly and not the Security Council which was the only organ that would be able to guarantee the representation of the international community.¹³²⁸ The prosecution

¹³²² Ibid (*Tadic*) IT-94-I-T; *Written submissions of the Prosecutor on the Defence Motion on Jurisdiction*. Note: these unpublished written submissions were drafted by the prosecution team and settled by the author and then filed in the proceedings.

¹³²³ Decision of international Court of Justice in the *Namibia Advisory Opinion* I C. J. R. 1971 page 45 paragraph 89 whether Court decided that even if they resolution of the Security Council was presumed to be ultra vires the UN Charter does not contemplate a right of judicial review over the political organs of United Nations the Court held that “undoubtedly, the Court does not presents powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned “ Unlike the ICTY this has been accepted as the preferred position by the ICTR.

¹³²⁴ *Tadic* above n 35, *Written submissions of the Prosecutor on the Defence Motion on Jurisdiction*

¹³²⁵ Ibid para 15

¹³²⁶ United Nations conference on international organisation, commissioned 3, document 134,III/3/3, 9 May 1945, at page 785). The *UN Charter* needed to be interpreted broadly “constitutions always have to be interpreted and applied and the process overlaid with precedents and conventions which change them after a time into something very different from what anyone concerned with the with the original text could possibly have foreseen” (J Briery ‘The UN Covenant and Charter’ 23 *British Yearbook of international law* 1946 at page 83.

¹³²⁷ *Tadic* above n 35, *Written submissions of the Prosecutor on the Defence Motion on Jurisdiction*

¹³²⁸ Maogoto above n 61, 147.

responded that the Charter of the UN does not place the Security Council in a subordinate position to the General Assembly and furthermore there was considerable doubt as to whether the General Assembly would have the authority to establish a criminal tribunal.

The prosecution pointed out that with respect to peace building and ethnic reconciliation in the former Yugoslavia it was 'important to try individuals responsible for crimes if there is to be any real hope of defusing ethnic tensions in this region. Blame should not rest on an entire nation but should be assigned to the individual perpetrators of crimes and responsible leaders.'¹³²⁹ Serious violations of international humanitarian law and human rights generally constituted a threat to international peace and security.

The defence countered that the Security Council had no authority to make individuals responsible for breaches of international humanitarian law relying on the often quoted phrase that 'states and not individuals are responsible for breaches of international humanitarian law'. The Prosecutor pointed out that individual responsibility for breaches of international humanitarian law was well-established even prior to the Nuremberg trials.¹³³⁰

In relation to the question of 'primacy' the prosecution argued that the accused did not have standing to contest the issue of 'primacy' because this concerned the sovereignty of states and was not open to individuals to contest, - 'the right to plead violation of the sovereignty of the state is the exclusive right of the state only a sovereign state may raise the plea'.¹³³¹ In any event both the state in which the accused resided, namely Bosnia and where he was arrested Germany, had both accepted the jurisdiction of the Tribunal so it could not be asserted by *Tadic* that the sovereignty of either of the states have been violated. Nor does an accused have the right to be tried by a forum of choice, the only right the accused has is the right of fair trial.¹³³²

The prosecutor also pointed out that the serious violations of international humanitarian law, (the subject matter jurisdiction of the Tribunal) attracted 'universal jurisdiction' which permitted it to be invested in an international tribunal. States have always had the power to defer their

¹³²⁹ T Meron 'The Case for war crimes trials in Yugoslavia' *Foreign affairs Journal* 1993, 122, at page 134.

¹³³⁰ *Tadic* above n 35; Written submissions of the Prosecutor on the Defence Motion on Jurisdiction

¹³³¹ *Eichmann Case* 36 International Law Reports V at page 62.

¹³³² *German High Command trial*, Law Reports of Trials of War Criminals vol xii at page is 62 to 63.

sovereign jurisdiction to the jurisdiction of an international tribunal.¹³³³ Where there are violations of universally held principles, as in the *Tadic* case, states may choose to invest their combined jurisdiction in an international tribunal. The crimes being prosecuted were not purely domestic crimes within the province of any one particular state. The Tribunal's jurisdiction transcend the interests of any one state and the crimes were of international concern. In such circumstances the individual sovereign rights of states cannot take precedence over the rights of the international community. Crimes which struck at the whole of mankind and shocked the conscious of mankind attract 'universal jurisdiction'.¹³³⁴

Another issue raised by the defence was that the Tribunal could not prosecute grave breaches of the *Geneva Conventions of 1949* because there was no international armed conflict in Bosnia at the relevant time. The prosecution argued that the grave breach provisions did apply because (1) an international armed conflict did exist between Bosnia and Serbia and (2) the parties to the conflict had reached an agreement which recognised the application of the *Geneva Conventions of 1949*.¹³³⁵ The prosecutor pointed out that the Security Council and other organs of United Nations had regarded the conflict as an international armed conflict and referred to numerous resolutions of the Security Council which highlighted the fact that the conflict was international in nature. The prosecutor went on to argue that the characterisation of the conflict by the United Nations as an international armed conflict should be given great weight. The prosecutor also referred to the fact that other states had regarded the conflict as international.¹³³⁶

At least at the outset of the conflict the *Geneva Conventions of 1949* certainly applied because the Yugoslav People's Army (JNA), which was essentially a Serbian Army, had military forces operating on behalf of the Serbs in Bosnia. However by May 1992 Milosevic had withdrawn the Serbian members of the JNA leaving only Bosnia Serb members in Bosnia. But once the Geneva Conventions apply there is a presumption that they continue to apply until determined otherwise by a competent tribunal.

There was an argument advanced by the defence that Article 3 of the Statute of the Tribunal did not incorporate all the Laws and Customs of

¹³³³ Ibid.

¹³³⁴ *Eichmann* above n 72,,26.

¹³³⁵ *Tadic* above n 35; Written submissions of the Prosecutor on the Defence Motion on Jurisdiction.

¹³³⁶ Ibid.

War. However the prosecutor made reference to the contemporaneous interpretation of the statute by members of the Security Council, especially the permanent members when this Article of the Statute was debated. Several members of the Security Council interpreted the Laws and Customs of War as including Common Article 3 of the *Geneva Conventions of 1949* and the *Additional Protocols* of 1977 thereto. Ambassador Albright, of United States had said:

[W]e commend the Secretary for his outstanding report which has laid the foundation of today's action by the Council. While the Council has adopted the Statute for the Tribunal as proposed in that Report, the members of the Council recognise that the statute raises several technical issues that can be addressed through the interpretive statements of the Members. In particular we understand that other members of the Council share our view regarding the following clarifications related to the Statute, firstly it's understood the laws or customs of war referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory the former Yugoslavia at the time the acts were committed including common Article 3 of 1949 Geneva Conventions and the 1977 additional Protocols to the Conventions.¹³³⁷

The prosecutor argued that the minimum standards contained in *common Article 3* and the *Geneva Conventions of 1949* are 'applicable to both international and internal armed conflict and therefore it should not be necessary for the Tribunal to inquire into the characterisation of the armed conflict in the former Yugoslavia in order for the Article to apply'.¹³³⁸ *Common Article 3* constitutes a 'minimum yardstick' applicable to both international and non international conflicts.¹³³⁹ The minimum standards contained in *common Article 3* of the *Geneva Conventions of 1949* do not violate the principal *nullem crimen sine lege* as they form part of international customary law and are binding on all states. All states are bound to 'take measures necessary for the suppression of breaches of the *Conventions*'. Violations of the *Geneva Conventions* can be prosecuted by any state of the basis of the universality principle'.¹³⁴⁰

In relation to crimes against humanity the prosecutor argued that 'it was not necessary to establish beyond reasonable doubt that there was a nexus to the armed conflict whether international or internal in character',¹³⁴¹ notwithstanding Article 5 of the Statute because 'under customary

¹³³⁷ UN Docs. S/PV 3217 at page 15 May 25 1993.

¹³³⁸ *Tadic* above n 35; Written submissions of the Prosecutor on the Defence Motion on Jurisdiction. This argument was subsequently accepted in *The Prosecutor v Tadic Interlocutory Appeal Decision on Jurisdiction* IT-94-1-AR72 of 2 October 1995 and in 2006 by the US Supreme Court in *Hamdan v Rumsfeld* 2006 US.

¹³³⁹ *Corfu Channel Case Merits* 1949 ICJ R 22 and *Nicaragua ICJ R* 1986 paragraphs 218-220.

¹³⁴⁰ T Meron, 'International Criminalization of Internal Atrocities' 89 *American Journal of International Law* 1995 at pages 554-557.

¹³⁴¹ This argument was later accepted by the ICTY Appeal Chamber in *Prosecutor v Tadic* IT-94-1-A 15 July 1999.

international law crimes against humanity did not... require any nexus with armed conflict'.¹³⁴²

These fundamentally important issues were argued in first instance before the Trial Chamber made up of Judges McDonald, Stephen, and Vorah. They delivered their judgments on the 10th August 1995.¹³⁴³ The trial chamber decided that it had no power to determine whether the Tribunal was legally created by the Security Council as this was not a jurisdictional question. The Trial Chamber said 'there are, clearly enough, matters of jurisdiction which are open to determination by the international Tribunal, questions of time, place, the nature of the offence charged. These are properly described as jurisdictional, whereas the actual creation of international Tribunal is not truly a matter of jurisdiction. The lawfulness of its creation, involving scrutiny of the powers of the Security Council and of the manner of the exercise of those powers, including the appropriateness of the response to the situation in the former Yugoslavia are not matters that can be reviewed by the Tribunal.'¹³⁴⁴

In relation to the question of the grave breaches of the *Geneva Conventions of 1949* and in particular the resolution of the question of whether the conflict in Bosnia was an international armed conflict, the Trial Chamber looked at Article 2 of the Statute of the Tribunal and determined that it had been so 'drafted as to be self-contained rather than referential.' In other words, the 'determination of the elements of the offence was a matter that could be derived from the Statute itself rather than going beyond Article 2 of the Tribunal Statute to the actual Geneva Conventions themselves'. The Trial Chamber then concluded that, 'as there was no requirement to establish an international armed conflict under Article 2 of the Statute, the categorisation of the conflict was not a matter which needed to be resolved by the Tribunal when determining the guilt or innocence and accused.'

In relation to whether *common* Article 3 of the *Geneva Conventions of 1949* was incorporated by virtue of Article 3 of the Statute Tribunal, as part of that body of law referred to as the 'Laws and Customs of War', the Trial Chamber held that it had subject matter jurisdiction under Article 3 of the Statute, and that violations of the 'laws and customs war' are part of customary international law over which it has competence regardless of whether the conflict was international or internal. The Trial

¹³⁴² 1954 Yearbook of ILC 150 UN dock 80/C. N. 4/S. E. R.. A/1954/add1.

¹³⁴³ *Tadic* above n 35 para 15.

¹³⁴⁴ *Ibid* para 15.

Chamber found that violations of Article 3 can be enforced against individuals and that this did not violate the principal *nullum crimen sine lege*. Finally, the Trial Chamber concluded that there was no requirement of international armed conflict when it came to criminal liability for crimes against humanity.

The matter then went on appeal to the Appeals Chamber made up of Judges Cassese, Li, Deschenes, Abi-Saab, and Sidhwa. The Appeals Chamber delivered judgment on the 2nd of October 1995.¹³⁴⁵ The Appeals Chamber did not agree with the Trial Chamber on the ambit of jurisdiction namely it being limited to time persons and subject matter.¹³⁴⁶ The Appeals Chamber decided that the Tribunal had a much broader basis of jurisdictional review, which included whether the Tribunal had been validly created by the Security Council. The Appeals Chamber relied upon European jurisdictional principles which would give a tribunal such as the ICTY the ability to fully determine its own jurisdiction. With respect to the question it then held that the Security Council did have the authority to create the Tribunal as Article 41 *United Nations Charter* was broad enough for this purpose.¹³⁴⁷

The defence had argued that because there was no specific law which permitted the Security Council to create the Tribunal, it had not been created by law. This they said offended the *International Covenant on Civil and Political Rights*, the *European Convention on Human Rights* and the *American Convention on Human Rights* all of which had a provision similar to article 14 paragraph 1 of the *International Covenant on Civil and Political Rights* ‘in the determination of any criminal charge...everyone shall be entitled to a fair and public hearing by competent, independent and impartial Tribunal established by law’¹³⁴⁸. The Appeals Chamber held that the creation of international tribunals must still be rooted in the rule of law and offer all guarantees embodied in the relevant international covenants or instruments.¹³⁴⁹ The Appeals Chamber held however, (a) that the international Tribunal was established according to the rule of law; (b) it was established according to the proper international standards; (c) it did provide all guarantees offered by these

¹³⁴⁵ *Tadic Interlocutory Appeal* above n 79.

¹³⁴⁶ *Ibid* paras 10-12.

¹³⁴⁷ *Ibid* paras 13-22.

¹³⁴⁸ Article 14 paragraph 1 Article 6 (1) of *European Convention on Human Rights* provides “in the determination of the civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law”. Article 8 (1) of the *American Convention on Human Rights* provides “every person has the right to hearing, with due guarantees and within reasonable time, by a competent, independent and impartial Tribunal, previously established by law”.

¹³⁴⁹ *Tadic Interlocutory Appeal* above n 79, paras 42-43.

Conventions; and (d) had been established in accordance with appropriate procedures of *United Nations Charter*, thus it was established by law.¹³⁵⁰

In relation to the decision by the Trial Chamber that the ‘right to plead a violation of the sovereignty of a state is the exclusive right of the state’, the Appeals Chamber rejected this line of argument on the basis that ‘sovereignty was no longer as sacrosanct and unassailable as it had been in the past due to more liberal forces at work in democratic societies particularly in the field human rights.’¹³⁵¹ The Appeals Chamber said that to deny an accused an opportunity to raise this plea is ‘tantamount to deciding that in a criminal matter, where the liberty of the accused is at stake, the Tribunal could not examine the issue of the violation of sovereignty of a state.’¹³⁵² The Appeals Chamber held that the Tribunal had legitimate primacy over national courts because the crimes concerned were international crimes and relying upon the principal of ‘universal jurisdiction’ it dismissed the defence argument concerning state sovereignty.¹³⁵³

In relation to the need to prove the character of the conflict under Article 2 ‘grave breaches’, the Appeals Chamber decided that:

[T]he Trial Chamber’s reasoning is based on a misconception of the ‘grave breaches’ provisions and the extent of their incorporation in the Statute of the international Tribunal. The ‘grave breaches’ system of the *Geneva Conventions* of 1949 establishes a twofold system; there is on the one hand an enumeration of the offences that are regarded so serious as to constitute ‘grave breaches’, closely bound up with this enumeration a mandatory enforcement mechanisms is set up, based on the concept of a duty and a right of all contracting states to search for and try or extradite persons allegedly responsible for ‘grave breaches’. The international armed conflict element generally attributed to the ‘grave breach’ provisions of the *Geneva Conventions of 1949* is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the ‘grave breaches’ system in light of the intrusion on state sovereignty that such mandatory universal jurisdiction represents. State parties to the *Geneva Conventions of 1949* did not want to give other states jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts, at least not the mandatory universal jurisdiction involved in the ‘grave breaches’ system’.¹³⁵⁴

The Appeals Chamber decided that the ‘grave breach’ offences contained in Article 2 of the Statute of Tribunal can only be prosecuted when perpetrated against persons or property regarded as protected by the

¹³⁵⁰ Ibid paras 41-48.

¹³⁵¹ Ibid para 55.

¹³⁵² Ibid.

¹³⁵³ *Tadic Interlocutory Appeal* above n 79, para59.

¹³⁵⁴ Ibid para 80.

Geneva Conventions and that these protections only apply to offences committed in the context of international armed conflict.¹³⁵⁵

While the decisions of both the Trial Chamber and Appeals Chambers on all of these issues was of fundamental importance to the development of international criminal law, it is unfortunate, (as argued in Chapter 2), that such an unnecessarily restrictive interpretation of the ‘grave breach’ was given. The Appeals Chamber appears to have completely overlooked the fact that the ICTY was an international tribunal where sovereignty based concerns of one state interfering in the internal affairs of another state has no application.¹³⁵⁶

Fortunately the Appeals Chamber did not maintain so narrow an interpretative philosophy, when dealing with the Laws and Customs of War. In relation to Article 3 of the Statute the Appeals Chamber concluded that the violation of the laws and customs war included common Article 3 of the *Geneva Conventions of 1949* as well as the *Hague Regulations of 1907* and violations of all humanitarian law which formed part of customary international law. In other words the Appeals Chamber held that Article 3 of the *Statute of the Tribunal* did not limit itself to violations of the Hague law. Indeed Article 3 applied to all violations of international humanitarian law other than those specifically dealt with by other Articles of the Statute.¹³⁵⁷

When dealing with the distinction in international law between international and internal armed conflict, the Appeals Chamber noted that while there were a considerable number of international rules governing both the conduct of hostilities and the protection of persons in relation to international armed conflict there was much less regulation of internal armed conflict. The Appeals Chamber attributed this to the fact that, ‘...state’s preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and by the same token, to exclude any possible intrusion by other states into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community based on the coexistence of sovereign states more inclined to

¹³⁵⁵ Ibid para 81.

¹³⁵⁶ In the separate opinion written by Judge Abi-Saab in *Tadic Interlocutory Appeal* above n 79 his Honour differed from the majority of the Appeals Chamber by concluding that the grave breach provisions of the Geneva Conventions should no longer be regarded as being restricted to international armed conflict. He came to this conclusion having regard to the opinio juris of States and international organisations which would apply the grave breaches to internal armed conflict.

¹³⁵⁷ Ibid para 88.

look after their own interests than community concerns or humanitarian demands'.¹³⁵⁸

In the context of this thesis, the Appeals Chamber then went on to make a very important statement on state sovereignty, it noted that:

Since the 1930s... [A] state sovereignty-oriented approach has been gradually supplanted by human-being-oriented approach. Gradually the maxim of Roman Law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of property... when two sovereign states are engaged in a war, and yet refrain from enacting the same bans or providing the same protection when violence has erupted 'only' within the Territory of the sovereign state?¹³⁵⁹

After the Appeals Chamber had cleared the way for the trial to proceed, the trial commenced on 7 May 1996. The prosecution case in chief continued for 47 sitting days and concluded on 15 August 1996. The prosecution called 76 witness and tended 346 exhibits. The defence case opened on 10 September 1996 and continued for eight weeks until 30 October 1996 the defence called numerous witnesses and tended 75 exhibits. On the 6-7 November 1996 the prosecution presented 10 witnesses in rebuttal.¹³⁶⁰

The trial chamber delivered its judgment on 7 May 1997. Of the 34 counts the Trial Chamber convicted the accused of 11 counts and found him not guilty on the balance.¹³⁶¹

On 14 July 1997 the Trial Chamber sentenced Tadic to 20 years imprisonment in relation to the 11 counts in the indictment for which he had been found guilty. Tadic filed a notice appeal on 3 June 1997, the prosecution filed a cross appeal on 6 June 1997. In his appeal Tadic complained that he did not receive a fair trial as there were no 'equality of arms' between the prosecution and the defence; that on the evidence before the Trial Chamber he should not have been convicted of two of the murders in the indictment; and that one of his defence counsel had behaved so improperly as to deprive him of a fair trial. The defence also appealed against the severity of the sentence of 20 years imprisonment.¹³⁶² In its cross appeal the prosecution argued that the Trial Chamber erred when:

¹³⁵⁸ Ibid para 96.

¹³⁵⁹ Ibid para 97.

¹³⁶⁰ *Tadic* above n 35.

¹³⁶¹ Ibid par 546-547.

¹³⁶² *Prosecutor v Tadic Decision of the Appeals Chamber* (15 July 1999) IT-94-1-A; pars 20-21

it decided that the ‘grave breach’ provisions of the *Geneva Convention of 1949* had no application;
it dismissed a number of the murder counts;
it decided that in order to be found guilty of crime against humanity the prosecution must prove beyond reasonable doubt that the accused not only formed the intent to commit the underlying offence but also knew of the context of his act in the widespread or systematic attack on the civilian population;
it decided that an act was not taken for purely personal reasons unrelated to the armed conflict;
that discriminatory intent is an element of all the acts which constitute crimes against humanity under Article 5 of the *Statute of the Tribunal*;
and
when it denied the prosecution motion for production of defence witness statements.¹³⁶³

The Appeals Chamber did not accept the defence argument that they were not afforded ‘equality of arms’. The Appeals Chamber was of the view that the Trial Chamber had done all within its power to assist the defence in securing evidence. Accordingly this ground of the appeals dismissed.¹³⁶⁴

With respect to the important question of whether or not there existed after May 1992 a state of ‘international armed conflict’ in Bosnia-Herzegovina, such that it would attract the ‘grave breaches’ provisions of the *Geneva Convention*, the Appeals Chamber held that ‘there existed at all relevant times an international armed conflict’.¹³⁶⁵

In relation to crimes against humanity the Appeals Chamber agreed with the Trial Chamber when it determined that to convict the accused of crimes against humanity it must prove that the crimes were related to the attack on the civilian population occurring during armed conflict and that the accused knew that his crimes were so related. However the Appeals Chamber said that was not necessary that as a substantive element of *mens rea*, that a nexus between the specific act committed by the accused and the armed conflict be proved. Accordingly, provided these requirements were met, the accused could commit a crime against humanity for purely personal motives.¹³⁶⁶ Similarly the Appeals Chamber found that the Trial Chamber had erred when it found that all crimes

¹³⁶³ *Tadic Decision of the Appeals Chamber* above n 103 pars 22.

¹³⁶⁴ *Ibid* pars 43-56

¹³⁶⁵ *Ibid* pars 80-171.

¹³⁶⁶ *Ibid* pars 271-272.

against humanity require proof of discriminatory intent. Discriminatory intent was only an indispensable legal ingredient of persecution as articulated by Article 5 (h) of the Statute of the Tribunal.¹³⁶⁷

The issues ventilated in the Tadic case were so extensive and so important that it has now become a seminal case in the study of modern international criminal law. It also established the great worth of international tribunals in enforcing international criminal law especially in civil war, such as the 1990 Balkan wars. At the time, (and even now) it would have been inconceivable for a court of one of the Balkan states to render justice in the balanced and even handed manner as that provided by the ICTY. If one of the Balkan states had conducted the trial, it would in all probability have been 'sham trial' the outcome depending on whether the enforcing state was politically motivated in favour of or against Tadic. As it turned out the ICTY gave him ample opportunity to not only fully test the jurisdiction of the tribunal but also the investigation by the prosecutor, the evidence against him and the sentence imposed. If anything the case may have been too lavish.¹³⁶⁸ However as it was the first trial before the ICTY and the first trial before an international tribunal since Nuremberg and Tokyo so many of the legal principles were in urgent need of ventilation. The case proceeded without interference from any state or the Security Council. In the circumstances Tadic received a fair trial and the victims of the crimes received a fair measure of justice. Judged on these standards this first trial before an international tribunal in 50 years was a success.¹³⁶⁹

The trial was also important from the point of view of cooperation between a state (Germany) and an international court (ICTY). The ICTY simply could not have prosecuted the case had it not been for the assistance of Germany. Germany used its coercive powers to arrest Tadic, the German police conducted a thorough and extensive investigation. From beginning to end Germany acted as a model international state. At no stage did Germany impede the work of the ICTY and even went to the extraordinary lengths of amending its constitution in order that it might comply with the Tribunal's request for deferral. The Tadic case is an excellent example of where international criminal law can work effectively if the states involved have the will to see it succeed.

¹³⁶⁷ Ibid para 305.

¹³⁶⁸ Robertson above n30, 266.

¹³⁶⁹ As the senior prosecutor in the trial it is necessary for me to draw attention to the fact that my view of the outcome may be biased but I believe that compared to the history of state trials I can fairly make this assessment.

8.4 *A Role for Civil Society an Example of a People's Court - The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery*

Since the 'high water mark' of the *Tadic Case* the willingness of states to create a fair and balanced system of international criminal justice has significantly declined. True it is that the international community of states came together at the end of the 20th century and created the ICC, but unfortunately that Court has been so 'shackled' by sovereignty limitations that it cannot be compared to the bold experiment of the ad hoc tribunals - ICTY and ICTR. Accordingly there is little room for optimism if the responsibility for creating a fair system of international criminal justice is to be left exclusively to states. Without more, the excesses of the past will simply be points of comparison for excesses of the future. Sham trials, impunity and vindictive justice will continue to be a feature of the enforcement of international criminal law. It is against this background that it is necessary to analyse what global civil society can achieve in the absence of states. In terms of addressing international criminal law issues *The Prosecutors of the Peoples of the Asia Pacific Region of v Hirohito Emperor Showa et al* provides a good basis for comparison. This trial by civil society arose in circumstances where the victims of the crimes had been denied justice not only by national courts but by the international tribunal as well. The commission of the crimes arose under the following circumstances.

During the 1930s and 1940s the Japanese Imperial Military forces compelled many thousands of young women into sexual slavery in order to satisfy the needs of Japanese soldiers operating in the Asia-Pacific prior to and during World War II. It is estimated that some 200,000 women were brutally enslaved for this purpose.¹³⁷⁰ Apart from a few minor trials conducted by The Netherlands in Batavia,¹³⁷¹ the 'comfort woman' crimes have never been addressed by a state court or international criminal tribunal.¹³⁷² These crimes fell within the jurisdiction of the International Military Tribunal for the Far East (the Tokyo Tribunal) and it would seem that the existence of these crimes were known to the Tokyo prosecutors but they failed to bring any prosecutions.¹³⁷³ As a consequence these crimes were ignored until the 1990s when the women victims first spoke of their suffering. After the

¹³⁷⁰ *The Prosecutors of the Peoples of the Asia Pacific Region of v Hirohito Emperor Showa et al Case* PT-2000-I-T 31 January 2002 par 784; see also <<http://www.1.jca.apc.org/vavww-net-japan/english/womenstribunal2000/judgement.pdf>> accessed December 2009.

¹³⁷¹ Batavia now Java. Indonesia was at the time a Netherlands colony.

¹³⁷² *Peoples Trial* above n 111 para 3.

¹³⁷³ *Ibid* pars 78 – 80.

first few women spoke out, many hundreds then came forward revealing for the first time the true magnitude of the offending.¹³⁷⁴ This failure by the Tokyo Tribunal was compounded by the fact that the Japanese government has consistently refused to acknowledge or accept responsibility for the crimes.¹³⁷⁵

This failure to provide justice to the victims of these crimes, prompted global civil society to empower an international NGO, 'The Organisation for the International Violence Against Women in War'¹³⁷⁶ to propose the establishment of a People's Tribunal to draw attention to the unsatisfactory situation. The objective of the proposed people's tribunal was to receive from each country affected by the 'comfort women' system evidence of the crimes that had been committed against these women by or on behalf of the Japanese government. The task of the Tribunal was to analyse the nature of the crimes, in a gender sensitive manner and determine whether or not crimes against humanity and genocide had been committed.¹³⁷⁷

Following a series of earlier meetings,¹³⁷⁸ on 2 October 2000 the organising committee met in The Hague, Netherlands, where they settled the charter of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (the Woman's Tribunal). In the preamble to the charter it states that with the passing of the 20th century justice had not been rendered to the victim survivors and that sexual violence against women is still a feature of armed conflict.¹³⁷⁹

The jurisdiction of the people's tribunal was expressed to cover crimes committed against women before and during the course of the World War II. It included sexual slavery, rape other forms of sexual violence, torture, deportation, persecution, murder, and extermination as war crimes, crimes against humanity and genocide.¹³⁸⁰ The Tribunal had jurisdiction over individuals and well as states.¹³⁸¹ The Tribunal followed the model of the ICTY having three separate functional organs, the judges, the prosecutor, and the registry. Evidence could be admitted as documents,

¹³⁷⁴ Ibid para 1.

¹³⁷⁵ Ibid pars 1 – 5.

¹³⁷⁶ Ibid pars 10 – OIVAWW met in Geneva Switzerland in 1998.

¹³⁷⁷ Ibid par 13; see also at Violence against women in war -- network Japan HTTP://www 1. JCA. APC. Org/vaWW – net- Japan/English/women's tribunal 2000\charter.HTML HTTP://home.Att ne. Ifjp/ star/ tribunal/background_ htm).

¹³⁷⁸ Ustinia Dolgopol 'Redressing Partial Justice – A possible Role for Civil Society' in Ustinia Dolgopol and Judith Gardam (eds) *The Challenge of Conflict: International Law Responds* (2005) 488

¹³⁷⁹ *Peoples Trial* above n 111 para 3.

¹³⁸⁰ Ibid para 12.

¹³⁸¹ Ibid Parts IV & VI.

affidavits, depositions, signed statements and oral testimony. The statute provided that judgment should be pronounced in public. The judges were empowered to make recommendations to any person or state requesting redress for the injury caused to the victims.¹³⁸²

The Women's Tribunal was described as 'a People's tribunal, a tribunal conceived and established by the voices of global civil society'.¹³⁸³ The authority for the tribunal was expressed to come from 'the peoples of the Asia-Pacific region and the peoples of the world to whom Japan has a duty under international law to render account'.¹³⁸⁴ The tribunal was to step '...into the lacunae left by states and (did) not purport to replace their role in the legal process'.¹³⁸⁵ The power of the Tribunal was expressed to lie '...in its capacity to examine the evidence, develop an accurate historical record and apply principles of international law to the facts as found'.¹³⁸⁶ The tribunal charter then called '...upon the Government of Japan to realise that the great shame lies not in this recording of the truth about these crimes but in its failure to accept full legal and moral responsibility for them.'¹³⁸⁷

The Women's Tribunal was founded '...on the conviction that individuals and states must be held accountable for their gross violations of international humanitarian law, otherwise those individuals and states are permitted to act illegally, with impunity'.¹³⁸⁸

The Women's Tribunal had the obligation to find the accused guilty beyond reasonable doubt in accordance with the accepted international standard generally applicable under international criminal law.¹³⁸⁹

The accused named in the indictment brought before the Women's Tribunal were as follows: Hirohito Emperor Showa, Head of State of Japan and Supreme Commander of the armed forces prior to and during the course of the World War II; Ando Rikichi, Commander of the 21st Army and Governor General of Taiwan; Hata Shunroka Commander of the Japanese Expeditionary Army in China until November 1944; Itagaki Seishiro War Minister and military commander; Kabayashi Seizo also

¹³⁸² Violence against women in war -- network Japan HTTP://www 1. JCA. APC. Org/vaWW – net-Japan/English/women's tribunal 2000\charter.HTML.

¹³⁸³ *Peoples Trial* above n 111 par 5.

¹³⁸⁴ *Ibid* para 5.

¹³⁸⁵ *Ibid*.

¹³⁸⁶ *Ibid*.

¹³⁸⁷ *Ibid*.

¹³⁸⁸ *Ibid* para 6.

¹³⁸⁹ *Ibid* para 23.

one-time Governor of Taiwan prior to the war and Cabinet Minister from December 1944 until March 1945, during the course of the war he reported directly to the Emperor; Matsui Iwane Commander of the Japanese Expeditionary Army in Shanghai and central China from 1937 to 1938; Terauchi Hisaichi Commander of the Southern Expeditionary Army in Philippines, Indonesia, Malaysia, Timor and Burma. Minister of War from March 1936 and October 1937; Tojo Hideki, Prime Minister, who reported directly to the Emperor and Chief of the General Staff of the Army; Umezumi Yoshijiro vice War Minister from March 1936 to May 1938, Commander of the First Army and served as Chief of the General Staff of the Army in July 1944; Yamashita Tomoyuki Commander of the 14th area army and from September 1944 to September 1945 responsible for Japanese troops operating in Philippines.¹³⁹⁰

The Tribunal sat in Tokyo over a five-day period in December 2000 and heard testimony from over 60 witnesses, some witnesses testified in person while others gave evidence by videotape and affidavits. In addition to the testimony of the victim survivors, evidence was also taken from historians, psychologists and Japanese soldiers. Documentary material was also offered into evidence.

The judges found that there was compelling evidence that the Japanese Ministry of War were well aware of the 'comfort' women system and the coercive means by which women were forced into the system. They cited documentary evidence of military instructions to officers in the field on how they should go about the process of 'recruiting' women for the purposes of the 'comfort' women system.¹³⁹¹ Allied military documents also indicated that the Allies were aware of the fact that the Japanese were operating 'comfort' women's stations throughout the Asia-Pacific region during the course of the Second World War.¹³⁹² The Tribunal also pointed to the fact that that in 1992 the Japanese government itself acknowledged the existence of the 'comfort' women system.¹³⁹³

In their judgement the judges recite the history of the 'comfort women' system, they note that it was established in 1932 in order to repress the number of rapes committed by Japanese military personnel on local women during the course of their military operations.¹³⁹⁴ This behaviour by the Japanese military came to a head during the course of the attack on

¹³⁹⁰ Ibid para 26 - 36.

¹³⁹¹ Ibid para 95.

¹³⁹² Ibid pars 99-108.

¹³⁹³ Ibid para 108.

¹³⁹⁴ Ibid para 145.

Nanking in 1937, infamously referred to as the ‘Rape of Nanking’.¹³⁹⁵ Because of the international outcry following the Japanese invasion of China and in particular the wholesale rape of Chinese women by the Japanese invaders, the idea of establishing a comfort women system was considered appealing.¹³⁹⁶ The advantages of the ‘comfort’ women system was that it would allow soldiers to gratify their sexual urges on women who were not locals and who were not in a position to attract international sympathy as were the victims of an invasion, they could also be maintained physically and free of venereal disease. They were less likely to constitute a security threat - soldiers having sex with local women might pass on military secrets - but this was not a problem if the enslaved ‘comfort’ women came from a different country or region.¹³⁹⁷

Women were forced into the ‘comfort’ women system from all over the Asia Pacific Region but generally ‘comfort’ women from a particular local area under invasion were not used in that area. Enslaved women were transported to all parts of the Asia-Pacific region so that they may be utilised in the ‘comfort’ women's system.¹³⁹⁸ As the Second World War progressed and when the Japanese lost control of the shipping lanes, they were forced to abandon the practice of importing foreign ‘comfort’ women and began to use the local women for this purpose.

The tribunal heard evidence from victim witnesses coming from various regions of the Asia-Pacific. One witness Jan Ruff O’Hern was a 19 year old Dutch girl living in the then Dutch territories of Indonesia on the island of Java. Following the Japanese invasion in 1942 Indonesian citizens of Dutch dissent where interned in camps. In 1944 the Japanese army began to register women between the ages of 17 and 28 years. Subsequently these women were inspected to assess their suitability for enslavement as ‘comfort’ women. They were then selected and taken by force to an old Dutch colonial home where they were forced to provide sexual services for the Japanese military.¹³⁹⁹ In her testimony Jan Ruff O’Hern said:

We were all virgins... I wanted to be a nun... We were given Japanese names ... they were all the names of flowers... he dragged me from under the table and immediately I kicked him but he was so strong. He dragged me into the bedroom and in the bedroom again I started to fight with him... he threw me on the bed and tore off all my clothes... he ran the sword over my body, starting at my neck, right down my body...

¹³⁹⁵ Ibid para 152.

¹³⁹⁶ Ibid pars 156-159.

¹³⁹⁷ Ibid para 109.

¹³⁹⁸ Ibid.

¹³⁹⁹ Ibid para 237.

he was just playing with me like a cat would do a mouse... he eventually brutally raped me.¹⁴⁰⁰

In relation to the suffering of the ‘comfort’ women, the Tribunal observed that:

The suffering injured by the comfort women began with their illicit procurement, often by deception or abduction, after seeing their family raped or killed it continued daily during the time they were enslaved they were repeatedly raped or otherwise tortured, abused and mistreated over period of months or years. The women and girls could not exercise control over their own lives... they were denied the ability to make even the most basic decisions about their bodies, their movement, their identities and their future, with every facet of their life in the ‘comfort’ stations controlled and or manipulated by the Japanese or their agents.¹⁴⁰¹

Although the Japanese government (by its choice) was not formally a party to the proceedings, they were represented by ‘non official counsel’.¹⁴⁰² These ‘non official’ counsel argued, on behalf of the Japanese government, that all claims by the ‘comfort women’, against the Japanese government, in terms of compensation, had been fully satisfied by the Peace Treaties and international agreements entered into between Japan and other states following the end of the Second World War.¹⁴⁰³

In relation to the peace treaty between the government of Japan and the government of the Netherlands, it specifically provided that the government of the Japan pay an amount of US\$10m as solatium on behalf of nationals of the Netherlands. It was argued on behalf of Japan that because of this agreement, nationals of the Netherlands could not make a claim against the Japanese government. The judges decided that in the context of this case, the idea of compensating the state under the peace treaty, rather than individuals of the state, was a legal fiction developed to permit states to assert state responsibility for the commission of internationally criminal acts against individuals and to control the making of claims. The court resolved that this reasoning is not relevant to crimes against humanity, where the harm is to the individual members of the targeted civilian population. This approach they observed was consistent with the modern interpretation of international humanitarian law following the *Pinochet case* where these crimes could never be legitimated so as to create immunity pursuant to international agreement between states, especially if this was to prevent individual victims from

¹⁴⁰⁰ Ibid; - the author was the prosecuting counsel who led this witness through her evidence at the Tokyo People’s Tribunal hearing in 2000.

¹⁴⁰¹ Ibid para 371.

¹⁴⁰² Ibid pars 37-39.

¹⁴⁰³ Ibid pars 1001-1020.

bringing claims against the state itself.¹⁴⁰⁴ The court observed that ‘the people of the world (not only states) have a compelling interest in establishing accountability for crimes against humanity.’¹⁴⁰⁵

Although the decision of the Tribunal was primarily for the benefit of the victims of the crimes, it had another purpose of encouraging states to discharge their responsibilities as part of the community of nations, to accelerate their efforts to achieve a just resolution and to ensure the accountability of the Japanese state.¹⁴⁰⁶

The tribunal concluded by making a number of recommendations to the Japanese government, namely to (a) accept full responsibility and apologise for the creation of the ‘comfort’ women system; (b) to compensate the victim survivors who were forced into the ‘comfort’ women system; (c) to establish a truth and reconciliation commission in order to create a historical record of the gender-based crimes committed during the war and prior to World War II; (d) to recognise the honour of the victim survivors by creating appropriate memorials and monuments on their behalf; (e) to disclose all documentary evidence of the existence of the ‘comfort’ women system; and (f) to identify and punish the perpetrators of these crimes.¹⁴⁰⁷

The tribunal went on to say that the Allied nations should release classified documents that they held relating to the ‘comfort’ women system operated by the Japanese and acknowledge their own failure to investigate and prosecute these crimes. The United Nations should take action to require Japan to pay compensation and to seek an advisory opinion of International Court of Justice as to the legality and continuing liability of the Japanese government in relation to the ‘comfort’ women.¹⁴⁰⁸

This trial by civil society did not purport to be a substitute for a national or international trial. It was a trial in circumstances where both states and the international community had failed to render justice to the victims. The victims themselves could not have been more innocent. They had not participated in the Asia-Pacific war, apart from anything else many of them would have been too young at the time to participate. Many of them bravely held their silence for most of their tormented lives. Although the

¹⁴⁰⁴ Ibid pars 1001-1020.

¹⁴⁰⁵ Ibid para 1015.

¹⁴⁰⁶ Ibid.

¹⁴⁰⁷ Ibid para 1053.

¹⁴⁰⁸ Ibid pars 1054 - 1055.

liberty of the accused was never in question, the proceedings were nevertheless very fair in so far as the accused were concerned. The evidence was suitably weighed and the judges considered themselves bound by the principles of international humanitarian law as it relates to a 'fair trial'. Had representatives of an accused sought representation, there is no question that the judges would have allowed them or related interested parties to be heard.

It is difficult to determine the success or otherwise of a trial of this kind. In terms of process it was very fair. The proceedings had not been manipulated in order to achieve the desired result. The evidence was compelling especially when the witnesses gave their oral testimony. If the success of a criminal trial is determined on whether or not a suitable sentence is imposed then it was a failure! However this is not the beginning and the end of the criminal trial process. In this case the victims received some measure of justice but not as a consequence of state action either national or international. In terms of the objectives of the 'people's trial', namely to draw international attention to the plight of the victims and to provide some closure for them, then the trial was a success. It is unfortunate that the imperfections of the national and international enforcement mechanisms available for the proper administration of international criminal law are so widespread, such that civil society must from time to time step in and take direct action. However curing the defects in the national and international systems may not be readily achieved. The victims of these crimes should not be forced to endure these imperfections and hence, suffer in the way that the victims of these crimes suffered. A more permanent structure should be available to allow civil society to take appropriate action when circumstances so require. The victims should not be left to rely on an ad hoc opportunity as occurred in this case.

While it is not always possible to precisely point to a particular segment of civil society acting at a specific moment in time and say 'here is proof of civil society' influencing states to act in accord with international humanitarian law, it is sometimes possible to identify dissatisfaction by civil society in the particular conduct of states.¹⁴⁰⁹ Civil society is limited in what it can do when states stand in breach of international law. One thing it can do is punish governments for breaching their obligations to it by encouraging their members to express their disapproval through the

¹⁴⁰⁹ In this regard it is significant the role now played by 'civil society' organisations at international conventions. Civil society played a major role when the the Anti Land Mine Conventions was being negotiated in Toronto; the Rome Treaty for the ICC; the Dublin Convention on Cluster Munitions; and most recently the Copenhagen Conventions on Climate Change.

ballot box¹⁴¹⁰ but this is an imprecise and often blunt instrument. However for the moment there is little else available.

What the *Comfort Women Case* did demonstrate is that it is not only states that can organise and hold credible criminal trials. Civil society can organise itself to perform this function if the need arises. While the lack of a police force or army may prevent civil society from using coercive force (not that this would be a good idea in any event) most of the attributes of the traditional criminal trial can nevertheless still be achieved demonstrating that it is not only states that can be effective enforcers of international criminal law.

8.5 Conclusion

This analysis of the 3 alternative means of enforcement of international criminal law demonstrates that states do not have or need to have exclusive dominion over the enforcement of international criminal law. Nor can states point to an impressive record such that they should have this control. While no single system is perfect a better system could be achieved if the three systems operated together in a (genuinely) complimentary fashion. The provision of a fair trial to both the accused and the victim of the crimes can be achieved at a state level, especially if the prosecution occurs as part of the states ordinary civil justice system. However there are times when states have a conflict of interest and in these circumstances the alternate international criminal law system should be utilised.

The civil society model of a people trial suffers from not being able to provide a traditional sanction usually associated with the enforcement of the criminal law. While there is a place for the civil society model, it perhaps functions best as a 'check and balance' mechanism when the national and international models fail to function effectively.

¹⁴¹⁰ The subsequent decline in popularity of Prime Mister Blair in the UK, President George W. Bush in the USA, and Prime Minister John W. Howard in Australia may be related to this dissatisfaction.

CHAPTER 9

A Role for Global Civil Society in the Enforcement of International Criminal Law

9.1 Introduction

In this chapter the central argument of the thesis is concluded by drawing upon the other chapters of the thesis as evidence in support of the argument. The historical record demonstrates that in terms of dispensing fair and unbiased justice states are not well placed to claim *exclusive* jurisdiction over the enforcement of international criminal law. The assertion by states that they are entitled to this exclusive claim to jurisdiction based on the sovereignty principle is not supportable.¹⁴¹¹ Further the rhetorical question might be asked ‘If society within a sovereign state would not tolerate a situation where the perpetrators of serious crimes committed on a regular basis were allowed to escape prosecution - why then is the situation different for breaches of international criminal laws?’¹⁴¹² Part of the answer is to be found in the conflict of interest that states often find themselves in especially when it comes to the enforcement of international criminal law for offences committed on their own territory or by their representatives. But that is not the only reason because sometimes the responsibility for the enforcement of international criminal law falls between that of the nation state and that of the international community.¹⁴¹³ Individual nation states are sometimes reluctant to exercise ‘universal jurisdiction’ (if indeed it is open for them to do so) especially when this requires intervention in the internal affairs of another state.¹⁴¹⁴ In these cases states often prefer the international community to take on the enforcement role, if at all.¹⁴¹⁵

In this chapter, while acknowledging that we must make the ‘most of what we have’, a mechanism is proposed whereby the International

¹⁴¹¹ Anthony J. Colangelo, ‘Universal Jurisdiction as an International “False Conflict” of Laws’, SMU Dedman School of Law Legal Studies Research Paper No. 00-35 <http://ssrn.com/abstract=1337777> p 2, accessed May 2009.

¹⁴¹² M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003) Transnational p 691.

¹⁴¹³ *Ibid* 17.

¹⁴¹⁴ C.L. Sriram *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (2005) Routledge p 33.

¹⁴¹⁵ *Ibid* 35 - There is certainly less ambiguity on whether the international community can exercise ‘universal jurisdiction’ – international tribunals have really no other basis of jurisdiction see generally *Democratic Republic of Congo v Belgium - Arrest Warrant of 11 April 2000* Judgement, 14 February 2002 ICJ

Criminal Court can be reinforced by ‘global civil society’¹⁴¹⁶ so as to protect the Court from being undermined or sidelined by those states opposed to its existence.

As mentioned in Chapter 1, the sovereign right of states versus the rights of humanity can also be examined on another plane, namely the interests of civil society at a national level and the interests of global civil society at an international level. Arguably there can be divergence between these civil societies. Possibly there are at times two civil societies - national and international – and their interests may be different. The civil society of a state may express itself in terms of preservation of the majority of that state. In these circumstances any minority group may not be represented by the majority of civil society. It may even go further than this in that the majority civil society may urge the government to eliminate the minority if they perceive that this minority threaten the existence of the state and as a consequence, the majority.

Conversely global civil society would be more aligned with the overall interests of humanity. What constitutes a threat to humanity threatens ‘global civil society’. For example the destruction of a racial group would be perceived by ‘global civil society’ as a threat to humanity, yet the destruction of the same group may be justified by a ‘national civil society’ because it constitutes a subversive element which threatens the survival of the state. A parallel analogy could be drawn for the ‘global warming debate’. The preservation of the planet would be the focal point of ‘global civil society’, yet preserving the economy of a state may be the focal point of the ‘civil society’ of a particular state. In future, it is conceivable that global civil society may have to compel a delinquent state to reduce carbon emissions notwithstanding the fact that civil society within that state may oppose this edict in the interests of preserving their economy. In these circumstances it would be argued that the interests of global civil society are greater and should as a consequence, prevail over the interests of the particular civil society of a state.

9.2 *The Role of the Modern Sovereign State*

As noted in Chapter 3, it would be naive and not necessarily a good thing¹⁴¹⁷ to argue for the total exclusion of the sovereign state from the

¹⁴¹⁶ B.N. Schiff, *Building the International Criminal Court* (2008) Cambridge U.P. p 160.

¹⁴¹⁷ S. Macedo (ed.) *Universal Jurisdiction: National courts and the Prosecution of Serious crimes under International Law* (2004) Penn Mary Robinson ‘Preface’ p 16.

enforcement process of international criminal law,¹⁴¹⁸ however the once powerful sovereign state is now only one of the players on the international landscape,¹⁴¹⁹ it is no longer the only player, if it ever were. The exclusive power of the sovereign state is on the decline.¹⁴²⁰ Individual sovereign states are simply not able to dominate all things in the way that they once could.¹⁴²¹ World economies and multi national organisations now have a life outside the sovereign state.¹⁴²² The sovereign state,¹⁴²³ is now only a participant in the global community, a great deal of activity occurs outside the borders of the typical sovereign state over which it has no control, this not only includes commercial activities but event arising upon the high seas.¹⁴²⁴ The affairs of one state may be significantly influenced by what happens in another state but the government of the former state is powerless to do anything about it.¹⁴²⁵

Similarly in many instances the sovereign state can no longer exclusively decide the fate of individual citizens.¹⁴²⁶ With rapid communications and travel, international intercourse is becoming common place.¹⁴²⁷ Many individuals see themselves less and less as a citizen of a particular sovereign state. They are citizens of the world.¹⁴²⁸ Dual nationality is becoming far more prevalent. Members of global organisations work throughout the world, with the sovereign state having very little to do with their conditions of work or life.¹⁴²⁹ The internet has allowed

¹⁴¹⁸ J. Shen 'National Sovereignty and Human Rights in a Positive Law Context' (2000) 26 *Brooklyn J. Int'l L.* 417.437; O. Schachter, 'The Decline of the Nation-State and its Implications for International Law' 1997) 36 *Colum. J Transnat'l L* 7.22.

¹⁴¹⁹ E.K Leonard *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (2005) Ashgate p176.

¹⁴²⁰ J. N. Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) Transnational p 71.

¹⁴²¹ Leonard above n 9, 182.

¹⁴²² F.F. Martin, S.J. Schnably, R.J. Wilson, J. S. Simon & M. V. Tushnet, *International Human Rights & Humanitarian Law: Treaties, Cases, & Analysis* (2006) Cambridge U.P. p 940.

¹⁴²³ Shen above n 8, 429 – the author argues in a similar vein that until 'recent decades' the most effective way for states to protect their citizens was through its 'domestic legal system'.

¹⁴²⁴ D.L.VanderZwaag and D. Rothwell, Chapter 16 'Principled oceans governance agenda : lessons learned and future challenges' in Donald R Rothwell and David L. VanderZwaag (eds) *Towards principled Oceans Governance: Australian and Canadian approaches and challenges* (2006) Routledge 405; see also K. Ohmae *The End of the Nation State* (1995) p 41.

¹⁴²⁵ Ibid 42.

¹⁴²⁶ Maogoto n 10 109 citing Bassiouni.; Ivan Shearer 'Australia, The United States and The Rule of Law in International Affairs: Comparisons and Contrasts' (2005) 26 (2) *Adelaide Law Review* 191.203.

¹⁴²⁷ O. Schachter, 'The Decline of the Nation-State and its Implications for International Law' 1997) 36 *Colum. J Transnat'l L.* 7. 23.

¹⁴²⁸ D B Goldman, *Globalisation and the Western Legal Tradition:Recurring Patterns of Law and Authority* (2007) Cambridge U.P. p 40.

¹⁴²⁹ Leonard above n 9 3; see also Ibid (Goldman) 41.

students as individuals to go beyond the traditional fields of learning,¹⁴³⁰ whatever may be offered in terms of education by the sovereign state, the focus is now vastly broader than it ever was.¹⁴³¹ The individual is finding ways in which he/she can protect and enforce their rights on the international stage without having to rely on the sovereign state to act on their behalf.¹⁴³² Nowhere is the challenge to sovereignty more pronounced than in today's Europe. The very sources of all powerful sovereignty, France and Britain, have now conceded large slabs of their sovereign authority to the European Union and in particular to the European Court of Justice. The European Union and the European Court of human rights have brought about a 'fundamental shift in the relationship between the individual and the state'.¹⁴³³

Furthermore 'global civil society' has found a way to operate outside the structure of the sovereign state.¹⁴³⁴ Even the international creations of sovereign states such as the United Nations, The World Trade Organisation and The World Bank have to some extent learnt to operate independently of the sovereign state. The mono political structure of the international community is slowly being replaced¹⁴³⁵ by a dual structure,¹⁴³⁶ not necessarily in competition with a state dominated structure, but complementary.¹⁴³⁷ Multi national corporations have discovered the need for duopoly and hence, have moved outside the traditional monopolistic sovereign state structure, similarly civil society needs to have an effective means whereby it can do the same thing. This does not mean that the sovereign state or international organisations should be abandoned, it really means introducing a structure that sits side by side with the sovereign state, so that the sovereign state is not the only 'player on the field', at least so far as civil society is concerned.¹⁴³⁸ It is a question of 'checks and balances' on the international stage. The sovereign state can form an important part of the whole process of international criminal justice and should not be discouraged from participating in a legitimate way.¹⁴³⁹

¹⁴³⁰ David Barnhizer and Daniel Barnhizer 'Myth Magic and Mystery: Defending the Hidden Order of the Rule of Law' *Research Paper 07 – 149* October 2007 Working Paper Cleveland State University p 50; Goldman above n 18 47.

¹⁴³¹ Schachter above n 17, 14.

¹⁴³² F.F. Martin, S.J. Schnably, R.J. Wilson, J. S. Simon & M. V. Tushnet, *International Human Rights & Humanitarian Law: Treaties, Cases, & Analysis* (2006) Cambridge U.P. p 941.

¹⁴³³ D. Jacobson & G. B. Ruffer *Courts Across Borders: The implications of Judicial Agency for Human Rights and Democracy* *Human Rights Quarterly* 25 (2003) 74 at 88.

¹⁴³⁴ Leonard above n 9, 183.

¹⁴³⁵ *Ibid* 184.

¹⁴³⁶ *Ibid* 184.

¹⁴³⁷ Shen above n 8 435.

¹⁴³⁸ D B Goldman above n 18 37.

¹⁴³⁹ Shen above n 8.436.

A procedural protocol needs to be agreed with respect to the enforcement of international criminal law by states. As observed by Bassiouni: ‘Notwithstanding the interest of international civil society in the establishment of international criminal tribunals, national criminal jurisdictions remain the cornerstone of the prosecution of international crimes.’¹⁴⁴⁰

9.3 Global Civil Society

In the context of this thesis the global civil society is ‘international’, ‘transnational’ ‘world wide’ or global. This global civil society is a means by which pressure can be applied to the governments of states requiring them to enforce international criminal law.¹⁴⁴¹ Global civil society is less rigidly affixed to the nation state.¹⁴⁴² It is more linked to humanity than nationality.¹⁴⁴³ The authority of global civil society can be asserted through organisations which can in turn, influence the governments of sovereign states.¹⁴⁴⁴ In particular international non-governmental organisations (INGOs) are growing in sophistication and influence.¹⁴⁴⁵ INGOs are playing an increasingly significant role¹⁴⁴⁶ in the formulation of the policy of international organisations.¹⁴⁴⁷ It is still ‘early days’ but the pressure asserted by global civil society through the conduit of the INGOs may well successfully bring about more favourable results when it comes to the enforcement of international criminal law because the political and economic interests of the state may well come to be viewed

¹⁴⁴⁰ Bassiouni, above n 2, 712.

¹⁴⁴¹ Ibid (Bassiouni) 48; see also United Nations, Report of the Secretary-General, ‘Implementing the responsibility to protect’ Sixty Third session of the General Assembly Agenda Item 44 and 107; 12 January 2009 UN Docs. A/63/677 p12 & 31; see also M. Kumm; Chapter 10 ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in J.L. Dunoff and J.P. Trachtman (Editors) *Ruling the World? Constitutionalism, International Law and Global Governance* (2009) Cambridge U.P. the concept of “we the people as the foundation of many state constitutions derives its force from national ‘civil society’, similarly international civil society can give legitimacy to international laws in like manner.

¹⁴⁴² Martin above n 22 943 where extracted is part of an article by Louis Henkin *The Age of Rights* (1990) where he discusses this concept in the context of ‘human Rights’ in a national setting as opposed to international human rights. See also Schachter above n 17 13; Leonard above n 9 175.

¹⁴⁴³ P. Mendies ‘The NGO Wars: Why Neo-Liberals are Thrashing Non-Government Advocacy groups’ (2005) 40 *Social Alternatives* Third Quarter 40 at p 41; D B Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (2007) Cambridge U.P. p 41.

¹⁴⁴⁴ Leonard above n 9, 134.

¹⁴⁴⁵ H.J. Steiner & P Alston *International Human Rights in Context: Law, Politics, Morals* (2000) Oxford U.P. p 938; D B Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (2007) Cambridge U.P. p 40.

¹⁴⁴⁶ Kenneth Anderson ‘Global Governance: The Problematic legitimacy Relationship Between Global Civil Society and the United Nations’ *American University Washington College of Law Research Paper* NO. 2008-7 <http://ssrn.com/abstract=1265839>, accessed February 2009, p 3.

¹⁴⁴⁷ Mendies above n 33 42; Leonard above n 9 135; Ibid (Anderson) 16.

through the prism of humanity rather than through the lenses of those who purport to govern humanity.¹⁴⁴⁸

While a precise definition of civil society has not emerged.¹⁴⁴⁹ Alessandrini maintains that there appears to be general agreement that it is ‘the site of interactions between organisations and individuals’ and as this it is not the state and it is not the market.¹⁴⁵⁰ Kaldor, Anheier and Glasius do not favour constructing a precise definition of civil society but describe it as a ‘sphere of ideas, values, institutions, organisations, networks and individuals located beyond the family, the state and the market’.¹⁴⁵¹ They would add the words ‘operating beyond the confines of national societies politics and economies’.¹⁴⁵² On the other hand Anderson and Rieff doubt that global civil society actually exists or if it does exist they argue that it is not represented by transnational or international NGOs.¹⁴⁵³ They argue that international NGOs are nothing more than ‘nineteenth-century foreign missionaries in modern dress’.¹⁴⁵⁴ The problem with this argument is that it ignores the history and existence of old NGOs such as the *International Committee of the Red Cross* (ICRC) established in 1863,¹⁴⁵⁵ which is so fundamental to any discussion of international humanitarian law. While it may not fall to the ICRC to represent global civil society in its quest to encourage the legitimate enforcement of international criminal law, an organisation similar to the ICRC may well perform this function. Alternatively it may not be the role of an NGO at all, reference is made to NGOs because they would appear to be the best ‘global civil society’ organisations presently

¹⁴⁴⁸ M.Glasius *The International Criminal Court : A Global Civil Society Achievement* (2006) Routledge p 26; Schiff, above n 6, 160.

¹⁴⁴⁹ M. Alessandrini ‘Is Civil Society an Adequate Theory?’ (2002) 2 *Third Sector Review* 105; D. J. Porter & P. Kilby ‘Strengthening the Role of Civil Society in Development? A Precariously Balanced Answer’ (1996) *Australian Institute of International Affairs* 31 at p 32; D. Castiglione ‘History and Theories of Civil Society: Outline of a Contested Paradigm’ (1994) 40 *Australian Journal of Politics and History* 83.

¹⁴⁵⁰ Ibid (Alessandrini) 106 see also H.J. Steiner & P Alston *International Human Rights in Context: Law, Politics, ,Morals* (2000) Oxford U.P. p 938.

¹⁴⁵¹ Mary Kaldor, Helmut Anheier and Marlies Glasius *Global Civil Society Yearbook 2004/5* (2005) Sage p 2.

¹⁴⁵² Ibid.

¹⁴⁵³ Ibid (Kaldor) see also Kenneth Anderson and David Rieff Chapter 1 ‘Global Civil Society: A sceptical View’ (2005) Sage p26; Leonard above n 9 161.

¹⁴⁵⁴ Ibid (Kaldor) see also Kenneth Anderson and David Rieff Chapter 1 ‘Global Civil Society: A sceptical View’ (2005) Sage p32; ¹⁴⁵⁴ Kenneth Anderson ‘Global Governance: The Problematic legitimacy Relationship Between Global Civil Society and the United Nations’ *American University Washington College of Law Research Paper No. 2008-7* <http://ssrn.com/abstract=1265839> , accessed February 2009 p 4.

¹⁴⁵⁵ Steiner above n 35, 949; see also C. Baker & L. Vierucci; Chapter 1 ‘Introduction: a normative or pragmatic definition of NGOs?’ in P. Dupuy & L Vierucci (Eds) *NGOs in International Law* (2008) Edward Elgar p 3.

available who might be suitably equipped to perform this role.¹⁴⁵⁶ What the thesis does assert with greater certainty however is that ‘humanity’ must have a seat at the table separate from states,¹⁴⁵⁷ it needs to be heard by states on the question of the enforcement of international criminal law and states should be persuaded to acknowledge that exclusive dominion over the enforcement of international criminal law by individual states is untenable.¹⁴⁵⁸

It is beyond the scope of this thesis to trace the historical development of civil society and in any event as the thesis is concerned with ‘global’ civil society, an analysis of the emergence of national civil society would only be of limited relevance. Save that as Kaldor, Anheier and Glasius argue, the ‘social contract’ function of national civil societies has a parallel with the role played by global civil society.¹⁴⁵⁹ Bassiouni argues that it is an essential element of international criminal justice for there to be accountability for those who commit transgressions of certain norms of international criminal law’.¹⁴⁶⁰ However what Anderson and Rieff have to say about the legitimacy of NGOs representing the view of global civil society does bear consideration.¹⁴⁶¹ They argue that international NGOs have no democratic mandate to speak for anyone (other than themselves) because the international system ‘lacks democratic legitimacy’.¹⁴⁶² Johns is critical of national NGOs because they too lack ‘democratic legitimacy’.¹⁴⁶³ While this is true, if the argument is extended to its logical conclusion and in the absence of a global democratic government, none of the international players, including states have this legitimacy either.¹⁴⁶⁴ While individual states may have democratic legitimacy within their own borders, no state has a democratic mandate to speak on behalf of the peoples of another state.¹⁴⁶⁵ Chapter VII Resolutions of the Security Council can be binding on all member states of the United Nations but the Security Council does not hold a plebiscite of member states before resolving to act. Helfer argues that with increasingly critical issues facing the planet, such as ‘global warming’, non-consensual international lawmaking is likely to be the norm in the future rather than

¹⁴⁵⁶ Glasius above n 38, 113.

¹⁴⁵⁷ Schiff above n 6, 160-161.

¹⁴⁵⁸ Leonard above n 9, 184.

¹⁴⁵⁹ Kaldor, above n 41, 2; see also Bassiouni above n 2, 690.

¹⁴⁶⁰ Ibid (Bassiouni) 699.

¹⁴⁶¹ Steiner above n 35, 942.

¹⁴⁶² Kaldor, above n 41; Anderson above n 44, 33; See discussed in - Shearer above n16, 198.

¹⁴⁶³ Johns. G (2001) ‘Protocols with NGO’s: The Need to Know’ *IPA Backgrounder*, 3 (1)

¹⁴⁶⁴ Steiner above n 35, 951; M.Glasius above n 38, 113-114.

¹⁴⁶⁵ Diane Ring, ‘What’s at Stake in the Sovereignty Debate? International Tax and the Nation State’ *Boston College of Law Legal Research paper 153, April 2006* <http://ssrn.com/abstract=1120463>; accessed August 2008, p 12.

the exception.¹⁴⁶⁶ It is not within the scope of this thesis to resolve this issue with respect to national NGOs however as Onyx and Dalton point out, NGOs seldom claim to represent the whole of national civil society and in any event, within a democratic society where freedom of speech is a valued right, elected governments are not the only advocates authorised to speak on behalf of a particular interest group.¹⁴⁶⁷ On the contrary, the right of people in civil society to pursue their aspirations and to live in a healthy creative environment free from government oppression is a basic human right protected by the ‘rule of law’.¹⁴⁶⁸

Porter and Kilby warn against ‘romanticising the concept of civil society and loading it with the virtues of freedom, equality and liberty independently of the state’,¹⁴⁶⁹ because as they assert civil society can generate ‘unequal power relationships which only state power can challenge’.¹⁴⁷⁰ However this thesis is not about the contest between civil society and the state rather it deals specifically with the struggle between the so called ‘sovereign rights of states’ and international humanitarian law. Bassiouni maintains that state sovereignty is an ‘obstacle to international criminal justice’.¹⁴⁷¹ These sovereign rights can trace their origins to the sovereign rights of kings. In most cases the kings have now gone but the governments of states from time to time still call on such rights to justify their behaviour. Sovereignty is often asserted by states as the basis upon which they are entitled to override international criminal law.¹⁴⁷² In the thesis it is contended that the sovereignty should be subordinated to international criminal law because international criminal law has the superior authority of all of humanity.¹⁴⁷³

¹⁴⁶⁶ Laurance R. Helfer ‘Nonconsensual international Law Making’ (2007) WP 26 *Univeristy of St Gallen* p 51 <http://ssrn.com/abstract=1019412>.

¹⁴⁶⁷ Jenny Onyx and Bronwen Dalton ‘Accountability and Advocacy’ (2005) *Third Sector Review* 7 at p 18.

¹⁴⁶⁸ Stephan Klingelhofer and David Robinson, ‘The Rule of Law, Custom and Civil Society in the South Pacific: An Overview’ (2002) 8 *The Third Sector Review Law in the Pacific Rim* 211. 212.

¹⁴⁶⁹ Porter above n 39, 38.

¹⁴⁷⁰ Ibid (Porter). See also Schachter above n 17, 14.

¹⁴⁷¹ M Cherif Bassiouni Preface to J. N. Maogoto *State Sovereignty and International Criminal Law: Versailles to Rome* 2003 Transnational p x.

¹⁴⁷² Ibid (Bassiouni & Maogoto) - this is a claim made by states, it is not justified as a matter of law. Examples of where the claim has been made include: – The United States of America under the G.W. Bush Administration in opposition to the International Criminal Court; The Government of Indonesia in opposition to an International War Crimes Tribunal for East Timor; Cambodia in opposition to an international War crimes Tribunal for Cambodia concerning the Khmer Rouge genocide; and Germany in opposition to an international War crimes tribunal following World War I all of these examples will be expanded on during the course of the thesis.

¹⁴⁷³ H Roggemann and P Sarcevic (Eds) *National security and International Criminal Justice* Chapter 10, I Josipovic ‘The Legal Road to the Resolution of the Conflict of Interest Between the ICTY and States: The Example of Croatia’ in Part 1 New Approach to State Sovereignty and the International Criminal tribunals 2002 Kluwer p 147 Bassiouni expresses it this way: -“...When it come to international justice, states re-discover sovereignty, and jealously defend it, not on the grounds that

In other words international criminal law derives its authority from all civil society or international civil society. It is argued that ultimately all law, (including sovereignty) derives its authority from civil society. If all society refused to obey the law, a state would be powerless to do anything about it. It is because society accepts being bound by the laws made by states that the system works. International criminal law is directed at the preservation of humanity. The preservation of humanity as a whole must logically be preferred over the preservation of an individual state, even if the civil society of that state supports its government in perpetrating crimes against humanity. While civil society may operate within the borders of a state it is not limited to the borders of any one state because humanity is not so limited. So in determining what law has the greater legitimacy the resolution of the questions must be determined according to what is in the best interest of the whole of humanity.

9.4 *Global Community's Expectations*

It is axiomatic that the regulation of control of society by means of the criminal law is more effectively achieved by ensuring that it is administered fairly and enforced evenly across the community. Respect for the criminal law diminishes in circumstances where the law is rigorously applied to one part of the community but not to another. In democratic societies, there would be a public outcry if a privileged class were given immunity from prosecution but the rest of the community were punished.

It is difficult to imagine a situation where very serious crimes such as murder, rape and torture committed on a regular basis would be tolerated within a functioning nation state.¹⁴⁷⁴ This is especially so if the government allowed the perpetrators of these crimes to go unpunished.¹⁴⁷⁵ This often happens with people who commit international crimes.¹⁴⁷⁶ To be sure, civil society tends to be critical of government if it breaches the social contract by allowing law and order to get out of hand within the nation state. Also civil society within the state sometimes has a very different agenda to global civil society.¹⁴⁷⁷ Accordingly global civil

they have priority in the exercise of criminal jurisdiction, but as a bar to justice. Whether it be exercised by national or international institution.” Bassiouni & Maogoto above n 61, px ; Sriram above n 4, 48.

¹⁴⁷⁴ Bassiouni above n 2, 689.

¹⁴⁷⁵ Ibid 729.

¹⁴⁷⁶ Leonard above n 9, 61.

¹⁴⁷⁷ For example civil society within Australia at the conclusion of World War II would appear to have supported the Government action in prosecuting Japanese war criminals (see Chapter 5) also the majority of US civil society appears to have supported President Bush (at the time) in establishing

society needs to devise a means whereby it can apply pressure upon states in order to influence them so as to ensure that they properly enforce international criminal law.

It is not sufficient to simply add some aspirational clause to an international treaty in order to cover the enforcement of international criminal law. Nor is it sufficient to simply allow existing international criminal laws to evolve into a separate compartment of state criminal laws, at least as the only form of international criminal law enforcement. As discussed throughout the thesis, ‘states have been poor performers when it came to the enforcement of international criminal law’. As noted in Chapter 2, the Laws and Customs of War were originally only concerned with illegal acts committed by two or more sovereign states, during the course of an international armed conflict. The law applied to the state and not the individuals who actually committed the illegal acts. Neither the individuals who committed the illegal acts or the state itself were held criminally liable.¹⁴⁷⁸

Linked to this is the historical reluctance of states not to interfere in the internal affairs of another state. The reasons for this are fundamentally based on the sovereignty principle but there are also common sense reasons such as the fear of threatening their own national security should one state take it upon itself the responsibility of enforcing international criminal law in relation to crimes committed on the territory of another state.¹⁴⁷⁹

International criminal law (in part) poses a threat to the sovereign authority of the state. Unless some mechanism is devised, states will continue to resist other individual states attempting to enforce international criminal law on their territory or against their officials. While acknowledging that, in most instances, non-interference in how a state conducts its internal affairs is an important principle for the preservation of international peace and security, the interference in the internal affairs of a state is essential if breaches of international criminal law (especially if committed by its representatives) are to be addressed. Since at least the 1960’s the international community has sought to intervene in the internal affairs of states especially if serious breaches of international criminal law, international human rights law or international

Guantanamo Bay (see Chapter 5) but Guantanamo Bay was not supported by many international NGO’s appearing to speak on behalf of global civil society.

¹⁴⁷⁸ Bassiouni above n 2, 61.

¹⁴⁷⁹ This occurred with the reluctance of the international community to initially arrest alleged war criminal indicted by the ICTY including defendants such as Karadic and Mladic.

humanitarian law have been committed. However the solution does not lie in simply creating a doctrine of universal jurisdiction which permits any state to interfere in the internal affairs of another state when breaches of international criminal law occur on the territory of that state. States are reluctant to interfere in the internal affairs of another state. This is appropriate; if one state interferes with another state then, the interfering state exposes itself to attack. To the extent that historically ‘universal jurisdiction’ may have worked in order to criminalise the activities of ancient pirates upon the high seas, a direct equation with regulating the conduct of state officials is misconceived because (for the most part) the pirate was an outlaw, despised and disowned by all states, which is not the case with state officials.

The history of nations is replete with examples of the reluctance of states to interfere in the internal affairs of another state in order to enforce international criminal law. The infamous¹⁴⁸⁰ ‘*Bloody Sunday Massacre*’ of unarmed civilians at Derry in Northern Ireland in 1972 by the British Army was viewed by the international community as an ‘internal matter’ not requiring an international response.¹⁴⁸¹ Nor (apparently) was it viewed by the majority of the British civil society as a criminal offence. However, if this massacre was carried out without the sanction of the sovereign state¹⁴⁸² the criminal law would have been enforced. Similarly, if the massacre had occurred during an international armed conflict, it would have been labelled a ‘war crime’; contrary to the Laws and Customs of War.

As discussed in Chapter 8, the *Tadic* interlocutory appeal decision¹⁴⁸³ importantly described these different standards in the application and enforcement of national and international criminal law as being ‘sovereignty oriented’.¹⁴⁸⁴ The Tribunal said this was ‘based on the coexistence of sovereign states more inclined to look after their own interests than community concerns or humanitarian demands’.¹⁴⁸⁵ Fortunately since the 1930s there has been a gradual change in attitude where states have now become more inclined to get involved in offering redress for human rights abuses in other countries.¹⁴⁸⁶

¹⁴⁸⁰ W.A. Schabas & S Darcy (Ed.s) *Truth Commissions and Courts* (2004) A. Hegarty ‘Truth Law and Official Denial’ p 204.

¹⁴⁸¹ *Ibid* 201.

¹⁴⁸² *Ibid* 201.

¹⁴⁸³ *Prosecutor v Tadic* - Interlocutory Appeal. Appeals Chamber IT-94-1- A72. 2 October 1999.

¹⁴⁸⁴ *Ibid* par 96.

¹⁴⁸⁵ *Ibid*.

¹⁴⁸⁶ *Ibid* par 97- 98.

However apart from some notable moments in history such as at the Nuremberg and Tokyo trials and more recently the ad hoc tribunals, the enforcement of international criminal law has for the most part been left to states using their domestic courts and or tribunals and the history of this enforcement action has been less than satisfactory. International criminal law is not the creation of any one particular state. It is the product of the international community of states. International crimes are those crimes which are so serious that the international community has set aside the traditional respect for the sovereign rights of individual states in favour of the broader interests of preserving humanity itself.¹⁴⁸⁷ In view of this, it is perhaps not surprising that individual states have not been very active in enforcing international criminal law and enforcement has worked better when handled by the international community.¹⁴⁸⁸

Further, states tend to be reluctant to take an aggressive stand in relation to the prosecution of international crimes committed on the territory of another state, especially when the state involved has no political, social or historical connection with the offending state. A single state gains little by holding itself out as the world's international police force. Because of trade and other considerations it is often preferable for a state to turn a 'blind eye' to human rights abuses occurring on the territory of another country, taking the view that this is the other country's business.¹⁴⁸⁹

The enforcement of international criminal law for a crime committed on the territory of one state by another state, or where the accused is located in another state, generally only occurs where the enforcing state is fundamentally and politically committed to this course.¹⁴⁹⁰ Alternatively it only happens where the enforcing state has military and or economic ascendancy over the offending state.¹⁴⁹¹ Further, the enforcement of the law in relation to crimes, such as crimes against humanity, can be very expensive.¹⁴⁹² The investigation of such crimes becomes even more expensive if the prosecuting state has to gather evidence on the territory of the offending state. The investigation process can be difficult and

¹⁴⁸⁷ Ibid par 58.

¹⁴⁸⁸ Ilias Bantekas and Susan Nash *International Criminal Law* 2nd Ed. 2003 p 9.

¹⁴⁸⁹ Successive Australian Governments did nothing about Indonesia's human rights abuses in East Timor because of a desire to reach agreement with Indonesia over natural gas supplies in the Timor Sea, similarly Australia is reluctant to be too outspoken about China's human rights record for fear that it might have adverse repercussions with respect to trade between the two countries.

¹⁴⁹⁰ For example Israel in relation to the Eichmann Case – *Eichmann v A.G of Israel* (1962) 36 ILR 277.

¹⁴⁹¹ For example NATO and Kosovo (1999) and possibly USA and Iraq (2002 – 2004). See also discussion in Steiner above n 35, 940.

¹⁴⁹² Mark Aarons *War Criminals Welcome – Australia, a Sanctuary for Fugitive War Criminals Since 1945* (2001) at p 506.

dangerous where the offending state is hostile to prosecution action being taken by the other state.¹⁴⁹³ Thus the occasions when one state is prepared to undertake a prosecution for offences committed in another state even if the accused turns up in the prosecuting state, are rare.¹⁴⁹⁴

This lack of enforcement activity is not entirely the result of jurisdictional constraints because had states been willing, the universal jurisdiction conferred by both international conventions and customary law, could have lent itself to a uniform interpretation which permitted individual states to prosecute these international crimes on the territory of other state.¹⁴⁹⁵ Some states have accepted this interpretation.¹⁴⁹⁶ The problem is that, for the most part, states have failed to take individual enforcement action. In other words the concept of universal jurisdiction as applied to individual states enforcing international criminal law on the territory of another state has failed. Meanwhile the international community has maintained that individual states have an obligation to share the burden of enforcing international criminal law, while individual states have taken the view that the responsibility for enforcement lies with the international community.¹⁴⁹⁷

Unfortunately on the few occasions when states have taken on the role of enforcing international criminal law they have not done a very good job. As discussed in Chapter 6, after World War I the international community shrugged off its responsibility to deal with war crimes committed by Germany during the war. Germany was permitted to conduct its own prosecutions and the Leipzig trials that followed were regarded as a complete failure.¹⁴⁹⁸ The prosecution of Lieutenant Calley in the United

¹⁴⁹³ The arrest in Bosnia-Herzegovina of Karadzic and Mladic did not take place initially because of the opposition by the Serbian Bosnian Republic. Subsequently both men surrounded themselves with a loyal guard of followers and no arrest took place due to the danger of conducting such an arrest.

¹⁴⁹⁴ For example Pinochet was arrested in Britain but at no stage was the British Government enthusiastic about prosecuting him for crimes against humanity. *R v Bow Street Stipendiary Magistrate ex p Pinochet Ugarte (no.3)* [2000] 1 AC 147.

¹⁴⁹⁵ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 1949 75 UNTS (1950) 287-417 Article 146.

¹⁴⁹⁶ For example the national trials of *Eichmann* in Israel, *Tadic* in Germany, *Polyukhovic* in Australia, Spanish indictment of *Pinochet* and the Belgium cases.

¹⁴⁹⁷ Bassiouni above n 2,380 see also *Democratic Republic of Congo v Belgium - Arrest Warrant of 11 April 2000* Judgement, 14 February 2002 ICJ..

¹⁴⁹⁸ After World War I the victorious allies inserted in the Versailles Treaty a provision which allowed for the Kaiser of Germany to be prosecuted for war crimes. In addition, a commission of inquiry identified over 900 potential offenders who allegedly committed war crimes. These were mostly German soldiers. The United States opposed the international prosecution of the Kaiser, who had secured sanctuary in the Netherlands. The British and French were more interested in extracting war reparations from Germany than having potential war criminals prosecuted. As a consequence the defeated Germany secured the right to conduct these prosecutions themselves. The whole process was a farce because of the 888 potential defendants a mere 13 were convicted, a number of these escaped

States for the My Lai massacre during the Vietnam war¹⁴⁹⁹ was not a success especially when President Nixon gave him a Presidential pardon resulting in him spending only a few days in custody under house arrest.¹⁵⁰⁰ The failure of the French perpetrators of the ‘Rainbow Warrior’ bombing in Auckland Harbour to serve their minimum sentence,¹⁵⁰¹ and General Pinochet’s ‘on again, off again’ prosecution by the Chilean government are examples of failed justice.¹⁵⁰² In these cases the failure of the particular states may be attributed to the fact that their respective governments were reluctant to prosecute those who were ‘serving the interests of their country’, in other words they had a conflict of interest and (at least in some of the cases) the government of the state was supported by that states’ civil society.

At the other end of the spectrum and as discussed in Chapter 5, states can abuse the prosecution process by being overzealous in prosecuting persons who are suspected of committing international crimes, thereby giving the appearance of ‘state sponsored revenge’. As noted this was particularly prevalent in the immediate post World War II era, but was not limited to this as Guantanamo Bay is a modern manifestation of the same problem. Fortunately ‘civil society’ played a significant role in ensuring that the United States of America eventually complied with the provisions of the *Geneva Conventions of 1949* Common Article 3 relating to the provision of fair trial rights for detainees held at the US Naval prison at Guantanamo Bay.¹⁵⁰³

On the other hand, as noted in Chapter 8, when it came to the prosecution of alleged Nazi war criminals who had entered Australia as part of the displaced persons program the government turned a ‘blind eye’ to their presence.¹⁵⁰⁴ In many respects this failure to take action occurred because of the government’s preference for having Nazi war criminals in the Australian community than communists.¹⁵⁰⁵ At least in one case, the trial or extradition of an alleged Nazi war criminal meant dealing with the Soviet Union, which at that time, was politically unacceptable.¹⁵⁰⁶

and most failed to serve their sentence, (see Geoffrey Robinson *Crimes Against Humanity – The Struggle for Global Justice* (1999) p 197.); Ibid (Bassiouni) 402.

¹⁴⁹⁹ Ibid (Bassiouni) 307.

¹⁵⁰⁰ Robinson above n 88, 167.

¹⁵⁰¹ *Rainbow Warrior Arbitration (NZ v France)* (1990) 82 ILR 499; see also Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008) Oxford U.P. 126.

¹⁵⁰² *Pinochet Ugarte (no.3)* above n 84, 147.

¹⁵⁰³ David Sissons ‘Sources on Australian Investigations into Japanese War Crimes in the Pacific’ (1997) 30 *Journal of the Australian War Memorial* 1; For Chapter 5 see pp139 – 144 of this Thesis.

¹⁵⁰⁴ Aarons above n 82, 244.

¹⁵⁰⁵ Ibid 259.

¹⁵⁰⁶ Ibid 442 (Ervin Viks case).

These few examples demonstrate how vulnerable the enforcement of international criminal law is to political pressure when prosecutions are exclusively conducted internally within a sovereign state.¹⁵⁰⁷ While not all prosecutions are unsuccessful or unsatisfactory,¹⁵⁰⁸ there is every reason to be concerned about the lack of willingness of sovereign states to allow the effective prosecution of international crimes to proceed on their territory untroubled by political interference.

There are of course, many other examples that one could draw upon in order to further illustrate the unsatisfactory track record of sovereign states in enforcing international criminal law at the domestic level. There is no question that the domestic enforcement of international criminal law is largely dependent upon the political will of the government of the day. Sovereign states manage to get away with this misbehaviour because it is 'international criminal law' and not 'national criminal law' and there is no supervision and scrutiny of their conduct by an 'interested' civil society. This issue is complex because the civil society of the state may well support the government of the state in its abuse of just enforcement of international criminal law in order to satisfy some domestic political agenda. In other words the civil society of that particular state may be in conflict with global civil society which has a humanitarian interest in ensuring the just enforcement of international criminal law.

Notwithstanding this dilemma, the enforcement of international criminal law at the domestic level has to be maintained because it is simply not possible to prosecute all of the cases before international tribunals. However it is undesirable for states to have exclusive control over enforcement of international criminal law. When states do enforce international criminal law there needs to be some 'check and balance' in place to oversee their performance.

9.5 An Expanded Role for Global Civil Society

An increasing number of states are now more willing to allow 'global civil society' to play a greater role in international affairs¹⁵⁰⁹. Kaldor argues that humanitarian law, the ICC and peacekeeping operations

¹⁵⁰⁷ B.R.Roth 'Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and The Limits of International criminal Justice' 2009 *Wayne State University Law School Legal Research paper* N0.09-17 <http://ssrn.com/abstract=1441962> p 68. Accessed November 2009.

¹⁵⁰⁸ Persons accused of committing war crimes during the 1990 Yugoslav conflict were successfully brought to trial in Germany and Denmark.

¹⁵⁰⁹ Mary Kaldor "*Global Civil Society – An Answer to War*" 2003. Steiner above n 35, 940.

constitute the structure of ‘global governance’.¹⁵¹⁰ Kaldor suggests that much of the work of ‘global civil society’ is carried out by (international) non-government organisations (NGOs).¹⁵¹¹ These NGOs undertake a wide variety of work from the provision of services (e.g. OXFAM), to advocacy, public mobilisation and campaigning (e.g. Amnesty International), some become involved in a little of both (e.g. International Committee of the Red Cross).¹⁵¹² Kaldor argues that ‘global civil society’ is a new form of ‘global politics’ which provides a means whereby individuals (as opposed to states) can have their views represented at the international level.¹⁵¹³ She defines civil society as the ‘medium through which social contracts or bargains are negotiated between the individual and the centres of political and economic authority’.¹⁵¹⁴

The governments of states should have nothing to fear from ‘global civil society’ committed to the maintenance of international peace and security, they should seek to work with it.¹⁵¹⁵ Sovereign states and their international creations such as the United Nations, International Court of Justice and the International Criminal Court should continue to function and operate to the maximum of their capability thus ensuring some measure of protection for the individual. It does not mean that the sovereign state or international organisations should be abandoned, it really means formalising a structure of ‘checks and balances’ in so far as international criminal law is concerned.¹⁵¹⁶

The machinery of ‘global civil society’ is what is required to strengthen the International Criminal Court.¹⁵¹⁷ The creation of a suitable vehicle to carry out this supporting role is required. What is needed is an alternative means by which the grievances of the victims of international crimes can be heard. Although there already exists global civil society mechanisms available to fulfil this functions such as the ICRC, Amnesty International and Human Rights Watch (to mention but a few), no individual INGO is tasked with this precise function. In this thesis it is argued that a ‘custom designed’ INGO would be preferable to an ad hoc basis which elects to become involved in a particular global crisis. The mechanism advanced by the thesis is a ‘world people’s court’? This would be a world people’s

¹⁵¹⁰ Ibid (Kaldor), Ibid (Steiner) 7.

¹⁵¹¹ Ibid (Kaldor). Ibid (Steiner) 87.

¹⁵¹² Ibid (Kaldor). Ibid (Steiner) pp 90-91; & 940 & 947.

¹⁵¹³ Ibid (Kaldor). Ibid (Steiner) 107. & 950.

¹⁵¹⁴ Ibid (Kaldor). Ibid (Steiner) 142.

¹⁵¹⁵ Neera Chandhoke, *The Limits of Global Civil Society* Chapter 2, Yearbook of Global civil Society p 43 www.lse.ac.uk/Dept/global/yearbook/outline/2002.htm.

¹⁵¹⁶ Steiner above n35, 952.

¹⁵¹⁷ Glasius above n 38, 3.

court, separate from the sovereign state or the international creations of sovereign states such as the United Nations or the International Criminal Court. A world people's court might initially be dismissed as being without authority because without the support of the sovereign state, it has no sanction. However it would arguably have the authority of 'global civil society' which in a sense is a higher authority than that of the sovereign state. A world people's court as an INGO would promote 'the rule of law' and encourage states to apply humanitarian law.¹⁵¹⁸ A world people's court would have as much strength as any organisation supported by people. In any event it is arguable that the sanction following the judgement is less important than the judgement itself. Besides, a court does not have to be an organ of a state or international organisation, sporting clubs throughout the world have tribunals which hear cases concerning the infringement of the rules of a game of sport. Their decisions are respected and authoritative.¹⁵¹⁹

The idea of a world people's court is not new. In 1966 Bertrand Russell¹⁵²⁰ established a people's tribunal in Paris in order to hear war crimes and crimes against humanity allegations, against the governments of United States of America, Australia, New Zealand and South Korea committed during the course of the Vietnam War. The Russell Vietnam War crimes tribunal had no clear precedent at that time. The tribunal did not represent any state power nor did it have the power to compel accused persons to appear before the tribunal for trial.¹⁵²¹

The tribunal was composed of 'eminent men and women who had authority, not by virtue of the power of their position but through their intellectual and moral contribution to humanity'.¹⁵²² Bertrand Russell described the tribunal as preventing the 'crime of silence'. The tribunal was to determine whether the 'respective governments of the United States, Australia, New Zealand and South Korea had committed acts of

¹⁵¹⁸ Steiner above n 35,938; see also C. Baker & L. Vierucci; Chapter 1 'Introduction: a normative or pragmatic definition of NGOs?' in P. Dupuy & L. Vierucci (Eds) *NGOs in International Law* (2008) Edward Elgar 5.

¹⁵¹⁹ Contact sports, such as football have tribunals which regularly deliberate on player misconduct or breaches of the rules of the game and hand down sentences, which could include suspension from play or imposition of a fine, in much the same way as an ordinary criminal court would operate.

¹⁵²⁰ British anti-war campaigner.

¹⁵²¹ The terms 'court' or 'tribunal' are used interchangeably. A 'court' is a term that is more closely linked to the 'sovereign state' because it is the place from where the sovereign historically dispensed justice but little turns on this distinction these days. For example the International Criminal Court is the term used for the permanent court whereas the International Criminal Tribunals for the former Yugoslavia and Rwanda, are very similar to the ICC in appearance and function.

¹⁵²² Bertrand Russell, *Speech at the first meeting of members of the War Crimes Tribunal*, (1969) Vol 3 p 216 also referred to at http://www.infotrad.clara.co.uk/warcrimes/Vietnam_intro_russ.htm.

aggression; whether the United States had used weapons forbidden by the Laws of War; the bombing of civilian targets; the mistreatment of prisoners of war; and the creation of concentration camps for the deportation of the population'.¹⁵²³

The tribunal considered both oral and documentary evidence. The Russell tribunal heard the evidence from the victims of the Vietnam War who had 'no other forum in which to voice their grievance'. It heard a great deal of evidence concerning atrocities committed by the United States and its allies against individuals and upon civilian targets which targets had no reasonable connection to military activities. The governments of United States, Australia, New Zealand and South Korea were invited to participate in the hearings but they refused to take part. The Russell tribunal was followed in 1976 by the Algiers Declaration on the Rights of People. This Declaration identified the sovereignty of the 'people'. It also called for the establishment of a permanent people's tribunal. Like the Russell Tribunal the legitimacy of the permanent people's tribunal was neither sanctioned by international law or by the domestic law of states. While the permanent people's tribunal was created in the context of post colonial struggle,¹⁵²⁴ the concept of a permanent people's tribunal is not limited to the struggle of minority groups against 'imperialist violence'. The work of the permanent people's tribunal included investigations and deliberations on a wide range of international issues including the persecution of minority groups in the Philippines under Marcos regime (1980); the Soviet invasion of Afghanistan (1981/82); Indonesian persecution in East Timor (1981); genocide committed by Turkey against the Armenian people (1984) and the US intervention in Nicaragua (1984) and Iraq (2005).¹⁵²⁵

Nayar¹⁵²⁶ describes the role of the people's tribunal as a forum for 'the voicing and discovery of the truths of violations, for providing a means of judging the commission of wrongs; to challenge the silence of dominant imperialist legality and to create instead a public memory of peoples struggle against violence; to extend the scope of truth and judgment in order that exploitation in all its forms is denied the status of normalcy in human relations'.

¹⁵²³ Ibid.

¹⁵²⁴ Jayan Nayar 'A People's Tribunal Against the Crime of Silence?-The People's Judgments and an Agenda for People's Law' (2001) *Law of Social Justice and Global Development* also at <http://elj.warwick.ac.uk/global/issue/2001-2/nayar.html>.

¹⁵²⁵ Christine Chinkin 'Peoples' Tribunals: Legitimate or Rough Justice', (2006) 24(2) *Windsor Yearbook of Access to Justice* 201 at p 211.

¹⁵²⁶ Ibid.

Resort to a people's tribunal generally occurs in circumstances where serious crimes against people have been committed but no action is taken to deal with those crimes by individual sovereign states or the international community.¹⁵²⁷ In many cases it is the very states which have the responsibility to render justice that are the perpetrator of these crimes against their own people.

People's tribunals have been used to address past injustices which have not been given judicial recognition. In 1984 a permanent people's tribunal examined the genocide committed against the Armenian people by the government of Turkey during the course of the World War I. Following the war and particularly at the Treaty of Versailles Conference, calls were made for the Armenian genocide to be investigated. At that time it was pointed out that over '600,000 Armenian people had been slaughtered by the Turkish government during the course of the war'. Although an investigation was launched into this genocide no prosecutions ever followed. The government of Turkey was called upon, on numerous occasions to prosecute these crimes but it persistently refused to recognise that it had committed genocide against the Armenian people. Accordingly the permanent people's tribunal heard the case and found that genocide had been perpetrated against the Armenian people by the government of Turkey.¹⁵²⁸

As discussed in Chapter 8 one of the most credible and successful people's tribunals was the 'Women's International War Crimes Tribunal on Japan's Military Sexual Slavery' (Women's Tribunal) which sat in Tokyo, Japan in December 2000. Dolgopol described the Women's Tribunal as 'an alternative vision of justice',¹⁵²⁹ which was a 'form of justice' that was achieved by civil society.¹⁵³⁰ Dolgopol considers that the significance of the Women's Tribunal was not so much the legal process employed but the attempt by civil society to render justice to the victims of the crimes. She speaks of 'civil society' in terms of it being 'the conscience of humanity',¹⁵³¹ 'making governments more accountable and in putting pressure on governments...'.¹⁵³² The permanent people's tribunal that this thesis proposes would be like the Tokyo Woman's

¹⁵²⁷ Ibid.

¹⁵²⁸ Gerard Libaridian (ed) *A Crime of Silence-The Armenian Genocide: Permanent People's Tribunal* (1985) see also referred to at http://www.zoryaninstitute.org/Table_of_Contents/genocide_-_docs_ppt_verdict.htm.

¹⁵²⁹ Ustinia Dolgopol, 'Redressing Partial Justice – A possible Role for Civil Society' in U. Dolgopol and J Gardam (eds) *The Challenge of Conflict: International Law Responds* (2006) p 476.

¹⁵³⁰ Ibid.

¹⁵³¹ Ibid 479.

¹⁵³² Ibid 476.

tribunal,¹⁵³³ except that in order for it to be complementary to the International Criminal Court it would only find a *prima facie case* and generally not proceed to a final determination of the matter before it. However, it would be the same in that it would be supported and funded by non state organisations committed to the protection of individual human rights. The findings of a ‘prima facie case’ would be a powerful force in demonstrating to a particular sovereign state that they are out of step with internationally recognised standards of human conduct.

A legitimate question that might be asked is: *Well what has been the effect of these People’s Tribunals? Has anyone been punished for the Turkish genocide of the Armenians? Has any of the Japanese perpetrators of the ‘comfort woman’ atrocity been put behind bars?* The answer of course is ‘No’, but that is not the end of the argument. Chinkin argues that ‘where a state fails to assert the law – and thereby weakens or erodes its authority - civil society can and should step in to reaffirm that authority’.¹⁵³⁴ With respect to these old crimes, identifying the perpetrators is only part of the purpose of the trials. The Turkish and Japanese governments have persistently refused to either recognise or accept responsibility for these crimes. Once these trials have occurred, they at least, have to explain why a seemingly legitimate process has produced this finding. Even if these states continue to refuse to accept responsibility, other states are slower to side with the offending states on this issue because the victims have spoken in a coherent, organised and compelling way.¹⁵³⁵ The people of the offending states often find out for the first time the crimes that are alleged against their government or former governments of their state. This may in turn, bring about a demand for an explanation. The legitimacy of the people’s court process is the exposure of that which has been denied or that which has been suppressed. If the responsible governments or perpetrators are called upon for an explanation that may in itself be sufficient justification for the process.

The process of hearing evidence, making findings and then passing these findings on to the authorities is a common feature of people’s tribunals. This process is not all that different to the role of the ancient jury of England which heard the evidence, made the allegations and then passed

¹⁵³³ *The Prosecutors of the Peoples of the Asia- Pacific Region v Hirohito Emperor Showa et al* Judgement (2001) PT-2000-I-T.

¹⁵³⁴ Chinkin above n 115, 217.

¹⁵³⁵ On 30 July 2007 the United States House of Representatives passed a resolution calling for Japanese action and an official apology. Similar resolutions were passed in the parliaments of Canada and The Netherlands, see James Ladino, ‘Ianfu: No Comfort for the Korean Comfort Woman and the impact of House Resolution 121’ (2008-2009) *15 Cardoso J.L. & Gender* 333 at 346 and 350.

these findings onto the court of assizes. International criminal law is still in its infancy. As we have seen above the application and or enforcement of this law is *ad hoc*, uneven and politically motivated. The ancient jury was, at least initially an instrument of civil society. It was not an official instrument of the state. Even now, as it is the representative of the people in the criminal justice system, it is arguably still not an instrument of the state. What has happened is that it has been officially recognised and accepted as a *de jure* arm of the justice system by the state.¹⁵³⁶

In a similar way a people's tribunal is not a *de jure* organ of the international community, although in time it may again by convention achieve *de jure* status. A people's tribunal, like the ancient jury, is a mechanism for drawing to the attention of those who possess power and the need for them to use that power in the interest of humanity. It is the world people's court acting as an international grand jury that will provide the mechanism by which pressure can be applied to states by global civil society. Just as the criminal justice system was in its infancy when the ancient English jury was in its infancy, now international criminal law is in its infancy when the international grand jury through the world people's court can similarly assert such influence.

9.6 ICC Has a Critical Role to Play

In Chapter 7 it was pointed out that the Rome Statute of the International Criminal Court (ICC) (as it is now written), is only a 'complementary'¹⁵³⁷ organ of enforcement because the main administration of international criminal law has been primarily¹⁵³⁸ left to individual states. Further the Statute of the ICC is so heavily weighted in favour of state parties, the ICC could only ever be a secondary instrument when it comes to the enforcement of international criminal law. Already we see in cases such as the *Darfur Reference* the government of Sudan is not only ignoring the ICC but the UN Security Council as well.¹⁵³⁹ In these circumstances international prosecutions will be the exception rather than the rule. The point is that the ICC as it presently stands cannot be seen as a means by which it can assert much influence over individual states in order to achieve a more balanced and less politicised environment for the

¹⁵³⁶ *Kingswell v The Queen* 91985) 159 CLR 264 per Deane J in par 49 of his judgement.

¹⁵³⁷ *Rome Statute of the International Criminal Court* 1998- Preamble

<http://www.un.org/law/icc/statute>.

¹⁵³⁸ Compare *Statute of the International Criminal Tribunal for the former Yugoslavia* Article 9(2) (1993) (S125704).

¹⁵³⁹ All Africa.com 'Pluses and minuses of War crimes Charges' Vol 3 Issue 37 *War crimes Prosecution Watch* Jan. 19 2009.

domestic enforcement of international crimes.¹⁵⁴⁰ While it is acknowledged that the ICC has taken a proactive approach to its complementary role,¹⁵⁴¹ the fact remains, that the legal underpinnings of its function, as set out in the ICC Statute, place it in a weakened legal position *vis a vie* the position of states.

The Rome Treaty, incorporating as it does the complementarity principle, assumes that somehow states will now change their behaviour and accept responsibility for enforcing international criminal law, by utilising universal jurisdiction.¹⁵⁴² However this view that states will conduct prosecutions for offences which occur on the territory of another state is misplaced.¹⁵⁴³ The strategic political and economic considerations discussed above are not going to change. In most instances states will not get involved in the internal affairs of another state.¹⁵⁴⁴

It might then be said that if state prosecutions do not occur in these circumstances, then it is these very conditions that will trigger the Rome statute to activate the jurisdiction of the ICC. Unfortunately this view is too simplistic. While states may not want to conduct prosecutions themselves they may not want the international community to prosecute the crimes either.¹⁵⁴⁵ The Rome statute is heavily weighted in favour of preserving state sovereignty, individual states which do not want prosecutions to occur in the international court will have little difficulty in preventing this from happening.¹⁵⁴⁶

In all probability the only effective prosecutions that will occur in the International Criminal Court in the near future will be those referred to the court either by poor states which lack the resources to prosecute¹⁵⁴⁷ or by the Security Council. This is consistent with the history of the ICC so far.¹⁵⁴⁸ Those referred by the Security Council will be authorised by

¹⁵⁴⁰ Vol 3 Issue 37 *War crimes Prosecution Watch* Jan. 19 2009.

¹⁵⁴¹ William W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' Vol 19, No 1, 2008 *Criminal Law Journal* 59; William H. Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' Vol 19, No1, 2008, *Criminal Law Forum* 5.

¹⁵⁴² Macedo above n 7 16.

¹⁵⁴³ Cedric Ryngaert, 'Applying The Rome Statutes Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting Under the Universality Principle' Vol 19, No.1, 2008 *Criminal Law Forum* 153; VOA News.com 'Uganda Plans for War crimes Trials' Vol 3 Issue 37 *War crimes Prosecution Watch* Jan. 19 2009.

¹⁵⁴⁴ *Ibid* 155.

¹⁵⁴⁵ All Africa.com 'Pluses and minuses of War crimes Charges' Vol 3 Issue 37 *War crimes Prosecution Watch* Jan. 19 2009.

¹⁵⁴⁶ *Ibid*.

¹⁵⁴⁷ *War crimes Prosecution* above n 133.

¹⁵⁴⁸ *Ibid*.

Chapter VII of the UN Charter which carries enforcement authority. Whether enforcement authority is backed up by the means of enforcement will depend on the circumstances of each case. However it is unlikely that any such prosecution referral will occur where the permanent members of the Security Council are unwilling to allow this to happen. The permanent members willingness to agree to a referral will only arise in circumstances where it is in the combined political or economic interest of all the permanent members to allow this to occur. The fact that it only takes one permanent member to veto a referral means that the chances of a high number of successful referrals are not good.

These fundamental weaknesses in the Rome Statute did not occur because of some oversight. The Statute is the product of nation states. All states were jealous of their sovereign authority and had no intention of allowing the Rome treaty to rob them of this power. The participating states may have said that they wanted a permanent international criminal court, but they were not going to allow this to happen at the expense of their sovereign power. The court has very little independent power. Whatever power it does have is given to it by sovereign states. Equally in relation to particular cases, sovereign states can take away that power whenever they choose. The permanent Court only assumes the appearance of a 'real' criminal court when states allow it to do so. The court has a very narrow function, whether or not it will succeed within these constraints remains to be seen, but it is not going to be an easy road for it to follow. While Cassese tentatively argues that complementarity is a 'positive' thing, he nevertheless expresses a preference for the Nuremberg model where the international criminal tribunal is at least, primarily responsible for the principal offenders, leaving the lesser offenders to be dealt with by individual states.¹⁵⁴⁹ A better model would be one where the Court delegates cases to states to prosecute but maintains a supervisory role, so that it can call back the case if the state fails to deal with the matter in an appropriate way. As presently constituted it is difficult to see how the Court could manoeuvre itself into this supervisory role. It is in this context that global civil society needs to apply sufficient pressure on states so this can happen.

One thinks of enforcement of the criminal law including international criminal law as the lawful imposition of a sanction for its breach. Traditionally states have had both the authority and means of imposing this lawful sanction. But as noted above law enforcement is not only a

¹⁵⁴⁹ Antonio Cassese, *International Criminal Law*, (2003) p 353-354.

matter for the government of a state.¹⁵⁵⁰ Mediation, conciliation and arbitration are occurring all the time without the need for the parties to go to a state court. There is no reason why international criminal law could not at least, in part be enforced in a similar way.

The statement of the will of the people through the democratic process operates as a brake on the power of the state. The people of the state can inform the state that they expect the state to comply with international criminal law.¹⁵⁵¹ *The Magna carta* is an early example of civil society negotiating a break on the power of the sovereign head of state.¹⁵⁵² Bills of rights and constitutional guarantees fall into a similar category. Instruments of this kind often serve society well when it comes to the internal relationship between the sovereign state and civil society but these instruments generally have little relevance to the enforcement of international criminal law.¹⁵⁵³ This is especially so when the international crime in question has been committed for and on behalf of the state, or the government of the state. When this occurs the victim is often left with little chance of securing justice – hence the need for a ‘victims’ voice.

9.7 How Can Global Civil Society Assert this Influence over States

As noted above, in the case of international criminal law, a conversation needs to take place between global civil society and the international community of states.¹⁵⁵⁴ Global civil society could be represented in this discussion by an international NGO.¹⁵⁵⁵ Similarly the international community of states might benefit from having a body that can collectively represent their interests during these discussions. Without ruling in or out other possibilities the model postulated by this thesis is a conversation between a world people’s court and the international criminal court.

The world people’s court proposed here would be similar to the modern ad hoc international tribunals or the ICC in that it would have an independent prosecutor, judicial chambers and registry. What is new and

¹⁵⁵⁰ Leonard above n 9, 187.

¹⁵⁵¹ T. M Franck *Democracy* (1994) p 367 D’Amato (ed) *International Law Anthology*. John Rawls, *Political Liberalism* Columbia University Press 1996.

¹⁵⁵² Although it has to be said that this was a very ‘select’ group in society, namely the Barons of England, probably more interested in protecting their power and wealth, than championing the cause of the ‘common’ men and women.

¹⁵⁵³ Eleanor Roosevelt compared the *Universal Declaration of Human Rights 1948* to an ‘international *Magna Carta* for all men everywhere’ Speech to the United Nations General Assembly (1948) <http://www.udhr.org/history/Biographies/bioer.htm>> at 2 Dec 2009.

¹⁵⁵⁴ Leonard above n9,189.

¹⁵⁵⁵ Ibid 192.

not contained in the existing international tribunals would be an international grand jury. It is considered desirable to have a grand jury because although a grand jury will not in itself overcome the 'democratic deficit', it does introduce an element of 'we the people' which is absent from a judge alone case.

The world people's court would have a statute similar to the statutes of existing international tribunals but with some important differences that will be discussed below. The prosecutor would be charged with the responsibility of investigating serious breaches of international humanitarian law that have occurred or are occurring at any place in the world. The prosecutor would act *proprio motu* or on the advice of states or NGOs. The authority of the prosecutor would be restricted to those cases where a judicial panel of the world people's court on the motion of the prosecutor and after a public hearing involving all interested parties decides that (a) there is a sufficient basis to form a reasonable suspicion that serious breaches of international humanitarian law has occurred on the territory of a state, and (b) the relevant state or the international community of states are not actively investigating the matter with a view of bringing those responsible to justice.

If the judicial panel of the world peoples' court finds in favour of the prosecutor, the prosecutor would proceed to investigate the matter relying on the assistance of INGOs and concerned states. If the prosecutor obtains sufficient evidence to make out a *prima facie* case against one or more offenders he/she would present an indictment for confirmation before a confirming judge of the world peoples' court. If the indictment is confirmed the matter would be set down for hearing before a full panel of the court sitting with an international grand jury. The prosecutor would present evidence and make submissions in the usual manner at the hearing. The accused would be invited to be present and make relevant submissions at the hearing but the hearing could proceed in the absence of the accused, should the accused fail to appear.

The grand jury would then deliberate on the matter and decide whether or not on the balance of probabilities the prosecutor has made out a *prima facie* case. The grand jury could return a verdict that a *prima facie* case has been made out against the accused (or not), or if not satisfied that a *prima facie* case has been made out against the accused but that there is *prima facie* evidence that a serious breach of international humanitarian law has been committed by persons unknown, it could return such a verdict.

In the event of the grand jury returning a verdict in favour of the prosecutor the grand jury would then be stood down but the world people's court would then go on to conduct an investigation as to why the relevant state or the ICC had failed to act on the matter. The relevant state and/or the ICC would be invited to attend and participate at the hearing. At this stage the relevant state or the ICC could agree to 'take over' the matter. In the event of such an undertaking being given by the state or ICC the proceedings would be stayed pending the impartial disposition of the matter.

If the state fails to diligently prosecute the matter in an impartial or independent fashion the prosecutor could call on the case again before the world peoples' court. Further in the event of the case being taken over by the ICC, if the ICC is frustrated by the state or states in its efforts to investigate and prosecute the matter then after consultation between the prosecutors of the ICC and the world peoples court the matter could likewise be called on again before the world peoples' court. At this subsequent hearing the world peoples' court would investigate the matter with a view to uncovering why the case has not proceeded in a satisfactory manner. The court would then actively explore with the parties ways to try and restore the investigation/prosecution by the state or the ICC. If the world peoples' court failed to resolve the matter at the adjourned hearing it would set down the matter for trial.

The trial would be a jury trial and could proceed in *absentia*. Should the world jury return a guilty verdict no sentence against the accused would be made but the court could make such orders against the recalcitrant state as it deemed fit. The role of the world peoples' court is to expose criminal activity pursuant to a reliable and transparent process. This is the only 'sanction' that it would impose. It could not or would not have the authority to pursue other forms of sanctions including restorative justice or victims' compensation.

The process outlined above is how it is proposed that the conversation between global civil society and the international community of states could take place.¹⁵⁵⁶ It is possible that initially both states and/or the international community of states might spurn the world peoples' court and/or its decisions¹⁵⁵⁷ but in time provided it acts in a careful and just way, its activities will eventually gain acceptance. One of the most important issues for the court would be to ensure that it truly represents

¹⁵⁵⁶ L. Vierucci; Chapter 5 'NGOs before international courts and tribunals' in P. Dupuy & L. Vierucci (Eds) *NGOs in International Law* (2008) Edward Elgar 155.

¹⁵⁵⁷ *Ibid* 197.

the interests of global civil society. In this regard the court should be looking to ensure that it properly aligns itself with that part of global civil society that is committed to the preservation of humanity.¹⁵⁵⁸ As long as its core business is directly related to the suppression of crimes against humanity and provided it maintains this commitment then it should ultimately be respected as an integral part of the international criminal justice system.

9.8 How Can This All Come About?

To bring into effect a proposal as set out above requires the coming together of a sufficient number of interested parties, particularly INGOs, but not limited to INGOs because individuals and states should also be included in the process, albeit that states should not be permitted to ‘steal the agenda’.

The starting point with initiatives such as these is generally an international conference. In customary fashion an international conference of government, non-government and civil society organisations could meet to determine the fundamental issues associated with establishing the Permanent World Peoples Court (PWPC).

Included in some of the important questions that would need to be addressed are:-

Funding

It is proposed that the Permanent World Peoples Court would be a ‘not for profit’ organisation made up of a coalition of interested states, NGO’s, and civil society. Each member would contribute to the cost of running the PWPC. To a large extent the funding of the PWPC would be similar to how NGO and civil society mechanisms are funded now, except that the interested states would also be significant contributors. In due course, if the PWPC develops in a similar way to how the jury system developed in Common Law countries, then like juries, they could be supported and paid for by the international community, as an integral part of the international criminal justice system. However there is no doubt that funding the court would not be easy and trying to anticipate the many potential funding issues that could arise, is beyond the scope of this thesis.

¹⁵⁵⁸ Glasius above n 38, 130.

Members of the PWPC

As noted above the broad coalition of interested states, NGO's, and civil society groups would be members of the PWPC. The coalition would not only fund the court but also oversee its activities. However it is important to ensure that membership does not become a 'closed club'. Accordingly private individual membership should be allowed provided the individual member had the financial capacity to contribute to the cost of the court. This structure would not be dissimilar to the Assembly of States parties as applies to the International Criminal Court, save that it would not be made up exclusively of states. The statute of the PWPC would have to contain provisions which would ensure that the civil society mechanisms would not be 'out voted' by states wanting to pursue a particular national interest, especially if such an interest was contrary to the spirit and intent of the PWPC. Further if a member of the PWPC encountered a conflict of interest with any particular matter under consideration by the Assembly of Members of the PWPC then that member would be required to 'step down' while that particular matter was under consideration.

Method of appointment to the court and grand jury

The members of the grand jury would be selected on a 'case by case' basis. They could not be drawn for the Assembly of Members of the PWPC. They would be vetted to ensure that they do not represent the interest of a particular state, NGO or civil society group. They would be disqualified if found to have a 'conflict of interest'. They would be individuals appointed from a variety of national backgrounds. They could be 6 or 12 in number. A panel of twice the size of the final jury (12 or 24) would be arranged by the Registrar of the court. The jury selection would occur in a manner similar to how jury selection occurs in criminal trials in common law countries at the moment.

Role of the court and role of the grand jury

The court would be a panel of legally qualified judges. The panel would be 3 in number. Judges must be of high reputation and good moral character and be qualified for appointment to the bench in their own national jurisdictions. Judges would be disqualified from sitting on a case if found to have a 'conflict of interest'. Judges would decide questions of law and rule on the admissibility of evidence. The grand jury would decide questions of fact and in particular decide if a *prima facie* case exists. Judges would be appointed on a case by case basis but would not

be permanently appointed. Both the judges and members of the grand jury would be compensated for their 'out of pocket' expense and paid on a *per diem* basis.

Addressing the *democratic deficit*

As the PWPC has a grand jury which represents the *people* in this proposed civil society mechanism, the jury would incorporate 'ordinary people' into the process without having to possess special qualification entitling them to the right to participate. Further membership of the PWPC is not exclusively made up of any one particular category of participant, (state, NGO of other civil society mechanism) and can also include individuals in its membership. Accordingly the PWPC would enjoy greater democratic legitimacy than existing single players in the international community namely states and/or NGO's. The democratic legitimacy of the PWPC would even be greater than organisations like the United Nations, because the United Nations, is exclusively made up of member states. In similar fashion the ICC is also exclusively made up of states. The broad membership base of the PWPC would make it one of the most democratic world governance institutions operating at the international level. The design of the statute of the court should specifically acknowledge and foster the achievement of this objective. However just as the institution of the jury in common law countries is a formal process of allowing the citizens of a state to participate in the criminal justice system, the use of the PWPC Grand Jury would fulfil a similar objective.

Seat of the court

The seat of the court should be in The Hague, The Netherlands.

Statute of the court

The Statute of the Court would be modelled on the Statutes of the International Tribunals, ICC; ICTY; and ICTR. However the PWPC would not be able to impose a sentence. Accused persons would have the right to attend trials and be represented by legal counsel, but if they chose not to attend the court for the hearing of the trials, the trials could be held in *absentia*. The focus of the hearings would be on determining if a *prima facie* case exists against a named accused.

Means by which cases are referred to the world peoples' court

The PWPC would be a court of ‘last resort’. The jurisdiction of the court could not be exercised if for example the Security Council of the United Nations was actively pursuing the case, or if a state was genuinely investigating and prosecuting the matter. Also if the ICC was effectively investigating and prosecuting the case the PWPC could not become involved in the matter. However if the Security Council were deadlocked or failed to take appropriate action or the ICC prosecutor was being frustrated in investigating or prosecuting the case the PWPC could exercise jurisdiction. The decision to exercise jurisdiction would be for the PWPC after conducting a hearing of the matter. The hearing would be initiated upon an application of the Prosecutor but an interested party such as a suspect, the United Nations Security Council, a state or the ICC Prosecutor would be permitted to appear before the court and make appropriate submission on the question of whether or not the court should exercise jurisdiction. A case could be referred to the court by anyone including the victims of crimes. However the prosecutor of the court would investigate an alleged international crime as specified by the Statute of the Court *proprio motu*. The crimes that fall within the jurisdiction of the PWPC would be the same as those crimes that fall within the jurisdiction of the ICC.

Investigation and methods of the gathering evidence

The prosecutor would only be collecting evidence in order to establish a *prima facie* case. In other words the sufficiency of evidence and the standard of proof would be only that needed to reach a level capable of determining if a *prima facie* case exists. However, without state assistance, the Prosecutor could not go upon the territory of a state in order to collect evidence. This limitation may affect the quality of the evidence that the prosecutor could collect. However the failure to gain access to a state in order to gather evidence should not be a basis upon which the Prosecutor is prevented from acting. In order to overcome this problem, the Statute of the PWPC would provide that in first instance the Prosecutor must apply to the relevant state for ‘safe passage’ in order to conduct his/her investigations. If the state refuses or fails to grant the Prosecutor ‘safe passage’ the Statute would allow the Prosecutor to rely on secondary sources such as NGO, United Nation and media reports. This would not of course preclude the Prosecutor relying on more substantial sources of evidence, if such evidence could be secured.

Rules of evidence and procedure

Subject to the proviso above concerning the use of secondary sources, the rules of evidence and procedure would be similar to that provided in the statutes of the existing international tribunals.

Findings of the grand jury

The grand jury would decide whether or not a *prima facie* case exists or not on the 'balance of probabilities'. The decision would be by majority verdict made in camera.

Review of findings by the court

An appeal chamber could be assembled on a needs basis. However an appeal could only be brought after the (*prima facie*) Trial Chamber had finally decided the matter. Interlocutory appeals would not be permitted.

Relations between the world peoples' court and the International Criminal Court

The whole concept of the PWPC is to provide international pressure on states who might seek to frustrate the ICC prosecutor in conducting an investigation and prosecution of a matter. Accordingly it is hoped that a very close relationship between the PWPC Prosecutor and the ICC Prosecutor would develop. However as the ICC Prosecutor is subject to pressure by states, both the PWPC Prosecutor and the ICC Prosecutor should be fully independent of each other and any reluctance on the part of the ICC prosecutor to investigate and prosecute a case should not prevent the PWPC Prosecutor from acting.

Relations between the world peoples' court and other state based international organisations such as the United Nations

In a similar manner the role of the PWPC should compliment (not hinder) the work of the United Nations. Accordingly it is to be hoped that a close relationship could also developed between the PWPC and relevant organs of the United Nations. However the United Nations represents states and in large measure must comply with their direction. Accordingly it is highly probable that a conflict could arise between (especially) the United Nations Security Council and the PWPC. As a result the United Nations should not be able to frustrate the work of the PWPC especially the PWPC Prosecutor.

Relations between the world peoples court and individual nation states

There are many states seriously committed to the pursuit of international criminal justice. These states would advocate that impunity for international crimes should be eliminated. It is also these states that are often frustrated in their attempts to move the international community of states to take appropriate action. It is with these states that it is hoped that the PWPC will develop close relations. The only states that logically should shun the PWPC are states that are involved indirectly in the commission of international crimes. Accordingly it is hope that the PWPC will develop close relations with ‘like minded’ states.

Formal recognition of the process of forging a new social contract on behalf of global civil society with the international community of states in relation to the enforcement of international criminal law

The preamble of the statute of the PWPC statute should make specific reference to the above stated objective.

9.9 Conclusion

By formally incorporating a role for global civil society in the administration of international criminal justice, the PWPC would stand on an equal footing with sovereign states and operate in tandem with international organisations created by states for the protection of humanity. If this were to occur, then one day international organisations, may be able to successfully complete their humanitarian mission without being frustrated by the manipulation of some powerful states committed to preventing this from happening.

The seeds of this possibility already exist. *The UN Charter* recognised the concept that respect for humanity is an essential ingredient of maintaining international peace and security. *The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic and Cultural Rights, as well as the Covenant Against Torture and other Cruel, Inhuman or Degrading Treatment* all represent the development and growth of human rights, which in turn, reduce the absolute power of the sovereign state.¹⁵⁵⁹ The growth of democracy and the ability of individual human beings to express themselves outside formal state structures is an important modern

¹⁵⁵⁹ M. Kirby J. ‘The Impact of International Human Rights Norms: A Law Undergoing Evolution’ (1996) 25(1) *University of Western Australia Law Review* 30.31.

development.¹⁵⁶⁰ There has now developed the concept of ‘individual sovereignty’ as articulated by the then Secretary General in his 1999 speech to the UN General Assembly, this is the ‘right of every individual to control his or her own destiny’.¹⁵⁶¹

The sovereign state has failed to adequately protect the interest of humanity by properly enforcing international criminal law. The sovereign state, pressed by the democratic process has paid lip service to humanitarian law in the international forum but has not seriously been able to put aside the demands of state security in order to cater for full human protection. Perhaps the nature of the sovereign state is such that it simply cannot do this in any event. There is of course, a clash between the rights of the majority and the rights of the minority or more particularly the individual, and this paradox cannot be avoided.

On the other hand with the expansion of democracy there is now emerging the concept of ‘people power’. People power is not structured, its responses are sporadic and inconsistent. What is required is a mechanism to capture the force of ‘people power’ and to channel this force into a machine which is capable of effecting change. With this proposal the sovereign state would continue to exist with all its trappings such as parliaments and the courts on a domestic and international level.

A people’s court can only ever be a mechanism directed at drawing attention to the commission of international crimes by states or individuals which have been conveniently overlooked by the responsible state because of political or economic considerations. A people’s court of necessity cannot make or impose sentences or have such sentences carried out against individuals. The sovereignty of the state and its relationship to the citizens over which it purports to exercise authority must of necessity remain intact. At this stage there is no alternative mechanism available under international law to effectively replace the state when it comes to its obligations towards its citizens. An uncontrolled people’s court with the power to carry out sentences could in fact, be worse. Accordingly a people’s court would have the limited role of applying pressure which hopefully would have the effect, in appropriate circumstances, of ensuring that a prosecution followed. The

¹⁵⁶⁰ Lauterpacht argued that international law should modify the sovereignty of states so that the sovereignty of the person could be re-established in situations of abuse, see H Lauterpacht, *International Law and Human Rights* (1950) (London: Stevens and Sons); see also C W. Jenks, *The Common Law of Mankind* (1958) (London: Stevens and Sons); Julius Stone, *Of Law and Nations: Between Power Politics and Human Hopes* (1974) (Buffalo: W S Hein).

¹⁵⁶¹ J. McConville & D. Smith ‘Of War Crimes and Humanitarian Intervention (2000) 25 (4) *Alternative Law Journal* 177, 178 quoting UN Secretary General (1999) Speech to the General Assembly.

prosecution could be by the state according to its domestic laws or by an international criminal tribunal.

A people's court would achieve justice by hearing the evidence and conducting itself in a judicial manner. If the people's court is to achieve credibility it must be properly funded and have quality staff. It must dispense justice in a fair and open manner. It must apply internationally recognised standards of justice but the state or an international criminal tribunal would have to be the ultimate deciders of fact and law and be responsible for imposing the appropriate sanction.

Having regard to the constraints imposed upon the prosecutor of the ICC there needs to be an international non government body operating outside of the ICC which can draw the world's attention to the commission of international crimes such as genocide and crimes against humanity. The ICC being the product of states will undoubtedly be constrained in just how far it can go in criticising the conduct of states. Because of these constraints it is imperative that there be an independent and unconstrained organisation such as a permanent people's court that can hear allegations and make findings so as to encourage nation states to justly try the offenders or if appropriate refer persons for prosecution to the ICC.

The means are available to improve the protection of human beings from human rights abuses; it is really just a matter of having the will to do something about it. There is perhaps no better time to do this than now.

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CITATIONS AND PUBLICATIONS NOTE

Citations: To the best of my knowledge and belief the citations used in this thesis conform to the Flinders University School of Law policy on style.

Publications and Presentations: Some of the material appearing in this thesis has been used by me in my previously published works and as the basis of presentations that I have made at conferences and other public venues.