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ON THE TOPIC

The Development of International Criminal Law- Comparison of ICC with ICTY and the way Forward

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CERTIFICATE

This is to certify that dissertation titled, "***The Development of International Criminal Law-Comparison of ICC with ICTY and the way Forward***" submitted by Mudbir Nazir (Id No.627) in partial fulfilment of the requirements for the Master in Law (***Human Rights***) is a product of the candidate's own work carried out by him under my guidance and supervision. The matter embodied in the dissertation is original and has not been submitted for award of any other degree in any other University.

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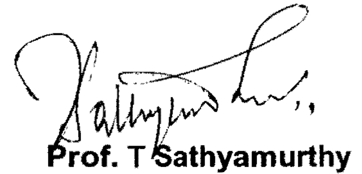

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DECLARATION

I Mudbir Nazir, hereby declare that this dissertation titled, "***The Development of International Criminal Law-Comparison of ICC with ICTY and the way Forward***" is the outcome of doctrinal research conducted by me as a part to accomplish my academic requirements for LLM programme at National Law School of India University, Bangalore under the guidance of Prof T Sathyamurthy.

This work is my original work except the help taken from such authorities as have been referred to at the respective places for which necessary acknowledgment has been tendered.

I further declare that this work has not been submitted either in part or in whole, for any degree or diploma at any other University or institution.

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

- ICC - International Criminal Court.
- ICCPR- International Covenant on Civil and political Rights.
- ICESCR- International Covenant on Economic Social and Cultural Rights.
- ICL- International Criminal Law.
- ICTY- International Criminal Tribunal for Yugoslavia.
- ICTR- International Criminal Tribunal for Rwanda.
- IDP's- Internally Displaced Persons.
- ILC- International Law Commission.
- IMT- International Military Tribunal.
- IMTFE- International Military Tribunal for far-east.
- SC- Security Council.
- UN- United Nations.
- ASP- Assembly of State Parties.
- UDHR- Universal Declaration of Human Rights.
- ICT's - International Criminal Tribunals.
- SCSL- Special Court for Sierra Leone.
- EU- European Union.
- UCC- Universal Criminal Jurisdiction.
- PTC- Pre-Trial Chambers.

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RESEARCH METHODOLOGY

STATEMENT OF PROBLEM

International Criminal law, as a branch of international law has made significant progress since the end of the Second World War by providing the necessary legal basis for the punishment of the perpetrators of international crimes. Its progress further hastened through the ad-hoc international criminal Tribunals established during the nineties. It took a decisive stage with the adoption of the Rome statute in 1998. In spite of these developments the general impression has been that ICL needs to be strengthened in order to make administration of international criminal justice system more effective in terms of the scope and enforcement mechanism.

AIM AND OBJECTIVES

The aim of the research paper is to trace the development of International Criminal law throughout the twentieth century and the beginning of the present century and also aims to evaluate the triumphs and setbacks during this development of the ICL along with the evolution of the jurisprudence of its own. It also aims to look at the present status of ICL facing some uneasy questions regarding jurisdiction and enforcement, in the possible course of future development.

SCOPE AND LIMITATION

This dissertation intends to look into the various developments in the field of International Criminal law and the effect of these developments on the present administration of criminal justice and the repercussions of the same. The present investigation intends to limit itself to the development, the

achievements and the future prospects of International Criminal Law by referring to some significant developments that have taken place since the establishment of the International Military Tribunal at Nuremberg by the Allied powers at the end of the second World War.

RESEARCH QUESTIONS

- What is the significance of International Criminal law which is relatively a new branch of international law?
- What is the legacy of the International Military Tribunal at Nuremberg and how has it contributed to the development of ICL?
- Whether the domestic criminal justice systems are capable of administrating international criminal justice?
- What has been the significance of Criminal tribunals with particular jurisdiction especially the ICTY on the development of ICL?
- Whether the establishment of an international court of general Jurisdiction i.e. the International Criminal Court has helped further the development of ICL?
- Whether the courts of particular jurisdiction have been more effective than the present International Criminal Court in the justice delivery of general jurisdiction system?
- Whether the present ICL is adequate to instil confidence among community of states to effectively meet the threats of international crimes?
- Whether the ICC and ICL need a whole new direction to make the international criminal justice system more effective and comprehensible?

HYPOTHESIS

The researcher believes that the significance of International Criminal law is immense in punishing the perpetrators of international crimes and providing relief to a large number of victims if not to all of them. The system has evolved itself considerably since the establishment of International Military Tribunal at Nuremberg. The system needs to be further strengthened in terms of jurisdiction and enforcement mechanisms, and also needs to be insulated from the possible political and other prejudices.

RESEARCH METHODOLOGY

The Researcher has relied upon the Doctrinal and Analytical method of Research Methodology.

SOURCES

The researcher has consulted various primary and secondary sources. The primary source in such as International instruments, judicial reports and some relevant domestic legislations with regard to International Criminal jurisprudence. The secondary sources consulted are various articles published in reputed journals and books reputed authors.

MODE OF CITATION

The Uniform System of Citation has been adopted throughout the project.

INTRODUCTION

The subject of International criminal law (ICL) has emerged as one of the most significant jurisprudential achievements as far as the twentieth century is concerned. It has developed on the concepts and ideas of international human rights law, international humanitarian law the also has the influence of domestic criminal legal systems. Though their is no doubt that ICL has developed immensely throughout, more so during the last decade of the twentieth century, there remain certain trivial questions like the issues of sovereignty of states and the jurisdiction of the judicial bodies, that need to be answered so that the development of ICL continues to make the international criminal justice system move effectively. The future of ICL, it seems is beseeched with many questions and most of which are theoretically and politically influenced. The development of international criminal law in the last thirty years has been unprecedented to say the least but if one wishes to judge the present status of ICL based on this small period only, it would be anything but fair. These three decades have resulted in the establishment of various significant International Criminal Tribunals like those in former Yugoslavia, Rwanda, Sierra Leone and Lebanon to name a few which have developed the international criminal Jurisprudence especially the first two of them. All these tribunals were established for specific purposes and thus had particular jurisdiction while the International Criminal Court which was a result of the Rome statute of 1998 had a general jurisdiction over certain International crimes and is thus different from the ad-hoc tribunals. Over the period of time their have been questions that have been raised against the ICC while arguing that such an International Court was encroaching upon the sovereignty of the states including powerful countries like the United States of America running a sustained campaign against the ICC. Although the current research assignment will be focussed on the

development of International Criminal Law after the establishment of the International Military Tribunal at Nuremberg (IMT), which is required to have a proper perspective of the recent developments which include the establishment of above mentioned International Criminal Tribunals with varied scope and jurisdiction. This research will thus look at the three main such International Tribunals and their impact on the development of International Criminal Law through the parameters of the fundamental objectives of ICL:

- To help end the Conflicts,
- To End Impunity to the perpetrators of international crimes,
- To punish the perpetrators, and
- To secure Justice to the victims.

While evaluating the influence of the said institutions viz-a-viz, the objects of establishing this branch of study, the dissertation will look forward to the future of International Criminal Law. The dissertation comprises of the following chapters:

- ***Chapter 1***

International Criminal Law before the establishment of IMT

- ***Chapter 2***

International Military Tribunal at Nuremberg- Its Legacy and pitfalls.

- ***Chapter 3***

International Criminal Tribunal (ad-hoc) for Yugoslavia- Dawn of a New Era.

- ***Chapter 4***

The International Criminal Court and the General Jurisdiction Conundrum.

- ***Chapter 5***

The future of International Criminal Law- A need to plug the loopholes.

- **Chapter 6**

Conclusion.

CHAPTER I. INTERNATIONAL CRIMINAL LAW BEFORE THE ESTABLISHMENT OF IMT

1.1. THE RELIGIOUS PHASE

The development of ICL is rooted in the history since the times of ancient warfare although such warfare was primarily based on chivalry with some exceptions which were primarily religious in nature. There were restraints on the waging of war contained in the *Koran* , which have been interpreted to mean that there are obligations on commanders to mete out punishments, but the evidence related to the same is very scant. The religious connection to punishment for violation of the limits on war making was also present in the Christian world. By the 9th century A.D. the use of penitential books and decrees was fairly widespread in Northern Europe.[1]

1.2. THE NEXT PHASE

Later in the 15th century one of the most important trials in the history of International Criminal Law took place in which Peter Von Hagenbach a Bourguignon knight from Alsace and Germanic military and civil commander was executed. Hagenbach was put on trial for the atrocities committed during the occupation of Breisach, found guilty of war crimes, and beheaded in public.[2] The start of the 16th century was the era of great writers on the law of war, in particular Vitoria, Ayala, Belli, Gentili and of course Grotius. These writers exercised a considerable influence on the doctrines of international

[1] ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES SELECTIVITY AND INTERNATIONAL CRIMINAL LAW REGIME, 13, (2005).

[2] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 1-2, (2004).

law, although it is less certain how much they effected practice. It can also be said their views on what was permitted belligerent, and generally by the laws of war, was very broad, providing little actual restraint.[3] Later scholars began to suggest an International Criminal Court and the first such proposal came from Gustav Moynier in 1872.[4]

1.3. THE ERA BEFORE THE WORLD WAR I

The efforts to bring to justice war criminals continued afterwards as well in the form of instruments like the *Lieber* code promulgated during the regime of President Abraham Lincoln during the American Civil war. The 1864 Geneva Convention[5] made no express provisions for criminal punishment nor did the 1899 Hague Declaration or the 1907 Hague Conventions. However in the year 1906, the 1864 Geneva Convention was updated to include a precursor to the grave breaches regime of later Geneva Conventions. Article 28(1) required the state parties to ensure that their Criminal Laws covered various violations of the 1864 Convention. Hague Convention X of 1907[6] also contained a similar provision thus in a sense establishing the customary underpinnings of criminality with regard to certain conducts.

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[3] *Supra*, note 1 at 22.

[4] Christopher Keith Hall, *The first proposal for a permanent international criminal court*, INTERNATIONAL REVIEW OF THE RED CROSS, 322, (1998)

[5] Convention for the Amelioration of the Conditions of Wounded in Armies in the Field 1864.

[6] Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention 6 July 1906.

1.4. THE WORLD WAR I

Later during and after the World War I the Allied forces made several attempts to establish liability for Criminal Conduct although their efforts were made to favour their own only. The end of the war led to high expectations of the establishment of a platform for International Criminal Liability and the allied countries established a fifteen member Commission[7] which put the entire blame on the Central Powers. The findings of the Commission were not entire acceptable to the states especially the U.S.A and the Japanese representatives. Cryer[8] feels that if the Commissions proposal had been implemented the history of International Criminal Law might have taken a different route but they were not.

1.5. THE TIME BETWEEN THE TWO WORLD WARS

The league of Nations Advisory Committee in 1921, came up with an idea of an International Tribunal and the President of the Committee, Baron Deschamps, was particularly supportive of the proposal; however the Committee was not unanimous and left the issue for the League to decide, which found the issue too premature to deal with.[9] Later in the year 1926 the International Law Association drafted(ILA) drafted a statute for an International Criminal Court with other bodies like the Inter-Parliamentary Union, International Congress on Penal Law and the Pan-American

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[7] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities,1919.

[8] *Supra,* note 1 at 33.

[9] TIMOTHY L. H. MCCORMACK, GERRY J. SIMPSON, THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 32 (1997).

Conference also recommended the creation of a court.[10] The assassination of King Alexander of Yugoslavia in the year 1934 led to the most advanced proposal wherein the League drafted, adopted and opened for signature statute for an International Criminal Court. The Court was to enforce a separate Convention for the prevention of terrorism, but unfortunately from the development aspect of International Criminal Law it remained without state support.[11]

All these attempts were thus not either successful or consistent over a long period of time due to one reason or the other, although since then there has been a change in the scenario regarding the same. Ever since the International community has time and again felt a need to deal with serious crimes, especially those which take place during war-like situations and due to certain reasons cannot be tried by the courts of domestic jurisdiction and thus came the idea of having international Tribunals, but at the same time the motive behind the establishment of these tribunals has been consistently criticised for being either theoretically or politically influenced. However as we will find out throughout the later chapters that ICL has also brought to book various perpetrators of these serious crimes. The debate among the supporters of ICL and those who criticise it for being either influenced or encroaching upon the state sovereignty has been never ending and the debate has changed with varied arguments both for and against the concept of having International Criminal Tribunals.

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[10] *Supra*, note 1 at 36.

[11] Manley O. Hudson, *The Proposed International Criminal Court,* 32 (3) THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 549-554 (1938).

CHAPTER II. INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG- ITS LEGACY AND PITFALLS

In the aftermath of the World War II, the international community came to terms with the reality of such a large scale war and the atrocities committed during the same primarily the war crimes which were a glaring reminder of the nature and extent of barbarities that were committed during the subsistence of the war. After their victory the allied forces called for a need to prosecute the war criminals, in fact it was something which they had reiterated time and again during the subsistence of the war as well and had thus put in efforts regarding the same beforehand through several important events.

2.1. THE 1943 UNITED NATIONS WAR CRIMES COMMISSION

In the year 1942, the allied powers signed an agreement at the Palace of St. James, establishing the United Nations War Crimes Commission(UNWCC).[12] The United Nations War Crimes Commission was finally set up in October, 1943, at a meeting of the representatives of seventeen nations at the Foreign Office in London, a year and a half after its intended formation had been announced a year previously by a simultaneous declaration of the British and United States Governments. Unfortunately the U.S.S.R. did not take part in the inaugural meeting and never joined the commission. The commission recommended in 1944 that the retributive action of the United Nations should not be restricted to technical war crimes, that is, violations of the laws and customs of war, particularly embodied in The Hague and Geneva

[12] The Inter-Allied Declaration, 13th Jan 1942.

Conventions, but should extend to the unprecedented crimes committed by the Nazi and other Axis Powers against both combatants and civilians in the occupied and Axis countries. Recommendations were also made by the commission on the defence of ' Act of State ' and on that of ' superior orders', which were eventually approved.[13] Between 1942 and 1945 , political support for the body waned. As the United States began to dominate the IMT proceedings and conduct its subsequent proceedings pursuant to Control Council Law No. 10 in the very same courthouse in Nuremberg, U.S. support for the UNWCC evaporated. The UNWCC's moral influence over governments to compel cooperation in the pursuit of accuse war criminals and to either prosecute or extradite such persons was substantially eroded. This was particularly evident with respect to those accused Italian war criminals who were never prosecuted.[14]

2.2. REASONS FOR ESTABLISHMENT OF IMT

After the defeat of Germany, the British, led by Churchill, stated that it was enough to arrest and hang those primarily responsible for determining and applying Nazi policy, without wasting time on legal procedures, minor criminals they suggested could be tried by specifically created tribunals. However neither President Roosevelt, nor the US Defense secretary, Henry Stimson agreed nor pretty surprisingly did Stalin.[15] In the end they prevailed and the International Military Tribunal was set up in Nuremberg to try both the 'great Nazi Criminals', and the minor criminals which were to be dealt with by allied tribunals in the four occupied zones of Germany. The Americans

[13] *The United Nations War Crimes Commission, 1*(1), THE INTERNATIONAL LAW QUARTERLY, 42-44, (1947).

[14] M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, 40 (2012)

[15] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 320 (2008)

advanced several arguments in favour of holding a trial for both major and minor crimes, and some basic arguments[16] that they proposed were:

2.2.1. Due Process of Law

They argued that a defeated army cannot be without following the due process of law as such a conduct would go against the basic principles of a democratic setup. To consider someone guilty without following the due process of law would be anything but fair and the act of not following the due procedure would put them at par with the Nazis who had put trampled over many principles of justice, civilisation and fair treatment by holding mock trials and punished people allegedly guilty without even the benefit of judicial process.

2.2.1. Justice for the World to see

Americans also argue that, those who set up the Nuremberg Tribunal felt that the dramatic rehearsal of Nazi crimes-and that of racism and totalitarianism would make a deep impression on world opinion. Thus, the trial was designed to render tragic historical phenomena plainly visible.

2.2.1. To leave a legacy

The other reason for the allied forces was to act for posterity. The crimes committed by the Third *Reich* and its Nazi officials were so appalling that some detailed record had to be left behind. A trial held on a grand scale would allow the Tribunal to assemble a massive archive useful not only in court, but also to the historians and the generations to come. The trial would also serve as a lesson in history for future generations.

[16] International Conference on Military Trials: London,1945.

There basic reason behind the American arguments was that it was not one of the countries that was devastated by the war and had to thus come up with something that would authenticate their conduct in their own country.

Another justification for the setting up of a tribunal was that the collective nature of the Nazi crimes which in addition to large scale massacres included the persecution of the Jews, gypsies and the political opponents which was an indicator of the policy pursued at the highest levels of power in the Axis states. Antonio Cassese[17] terms these crimes as those belonging to 'collective or system criminality' which means that there nature was such that it would have been impossible to punish these crimes within these particular states. It was imperative in such a scenario that only states which were neutral would do so. All these arguments would eventually form the basic principles for the development of the International Criminal Law and would be used for the establishment of several such tribunals later.

2.3. STRUCTURE AND SETTING UP OF IMT

In the summer of the year the United Kingdom, France, the United States and the Soviet Union convened the London Conference to decide the means to punish the perpetrators of the large scale crimes. The conference resulted in the Nuremberg Charter[18] which led to the establishment of the International Military Tribunal. The Charter defines offences and sets out the parameters for *Individual Criminal Responsibility* with regard to these offences. This concept of *Individual Criminal Responsibility* has ever since turned out to be one of the basic principles of International Criminal Law. The

[17] *Supra,*note 15 at 321.

[18] Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis.

subject matter jurisdiction of the Tribunal was set out in the Article 6 of the Tribunal's Charter, which provided:

The tribunal established by the agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interest of European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

"The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

Crimes against Peace

Namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

War crimes

Namely violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

Crimes against humanity

Namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or

in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

The Tribunal met from 14 November 1945 to 1 October 1946. Besides in occupied Germany the four major allied powers under Control Council Law No. 10, prosecuted through their own courts sittings in Germany, in their respective zones of occupation, the same crimes committed by the low ranked German officials. The Tribunal had eight judges, four principle Judges, one each from the major Allies(France, the USSR, the United Kingdom and the United States) and four under studies drawn from the same states. The indictment was received by the Tribunal on 10 October 1945, at its official seat in Berlin. It contained four main charges based on Article 6 of the Charter. Count one was the overall conspiracy, which was dealt with at the trial by the United States, count two was Crimes against peace dealt with by the United Kingdom. Count three was war crimes and count four Crimes against humanity. The prosecution of which was split between France and the USSR, France dealing with the Western Zone of conflict and the USSR with the East. Twenty-four defendants were arraigned before the Tribunal. There were also six criminal organisations who were to be prosecuted.[19] Thus having received the indictment the Tribunal moved the city with which it is now associated, Nuremberg. The trial took place over ten months with 403 open sessions. In the end three of the defendants (Shacht, Fritzche and von Papen) were acquitted, three of the six indicted organisations were declared criminal. Of the remaining defendants, twelve were sentenced to death seven

[19] TELFROD TAYLOR, THE ANATOMY OF NUREMBERG TRIALS, (1992)

to periods of imprisonment ranging from ten years to life. The Soviet judge, Major-General Nikitchenko, dissented from all the acquittals and the life sentence of Adolf Hess. He would have declared all the defendants and organisations guilty and sentenced Hess to death.[20] It is pertinent to mention here that the concept of crimes against humanity is very novel. Atrocities committed during World War II by Germans against Germans or against the nationals of Germany's occupied territories like and nationals of Germany's allies like Hungary and Romania, although not in violation of laws of war as those applied only between belligerents, were crimes against humanity. The Nuremberg Charter linked the prosecution of this *genus* of crimes to the "execution of or in connection with any crime within the jurisdiction of the Tribunal". In effect the crimes had to be committed in execution of or in connection with war crimes and crimes against peace.

2.3.1. Whether IMT was an International Tribunal?

There have been arguments both during and after the establishment of the IMT, as to whether the Tribunal was truly international in nature as it was principally run by the *big four* countries. The International Criminal Tribunal for Yugoslavia took the view that IMT was not "truly international" instead it was termed as multinational thus representing only a few of the countries in the world.[21]such observations have time and again raised the question whether IMT had a global nature and is substantiated by the fact that only the Allies sat on the bench during the trials. Cryer[22] however does not agree with these assertions and perhaps rightly points out that the Control Council laws

[20] *Supra*, note 1 at 41.

[21] Prosecutor *v.* Tadic IT-94-1-AR72 1995.

[22] *Supra*, note 1 at 39.

and the London agreement was adhered to by nineteen states other than the *big four*. He further points out that it was the first instance where an international Tribunal was applying international law directly. In essence this tribunal proved that individuals have duty even beyond the national boundaries and if there is any breach of such duties they are certainly answerable without any interference from their domestic courts.

2.4. THE LEGACY OF THE IMT

With the developments regarding the International Military Tribunal at Nuremberg there was effectively a beginning of the attempt the practice of bringing to justice the perpetrators of serious crimes by invoking the concept of international duties. It coordinated the prosecution of offenders at the national and international level as the Control Council law had the provisions that gave primacy to the IMT over the domestic procedures.[23] The impact of the IMT on the domestic trials was variable and but not in any way insignificant. The legacy of the IMT has been a mixed one because it was for the first time an effort was undertaken to punish offenders of international crimes(crimes against peace, war crimes and crimes against humanity were the only international crimes at that point in time).

2.4.1. Merits of the IMT

IMT was very important as regards to the development of International Criminal law for various reasons:

Jurisdiction over war Crimes

[23] Articles 2(3), 3(3), 4(3) of Control Council Law.

The International military Tribunal at Nuremberg along with the Tokyo Tribunal broke the monopoly over the jurisdiction over the war crimes which was firmly held by the states up to that point in time. It was for the first time non-national, or multi-national, institutions were established for the purpose of prosecuting and punishing crimes having an international dimension and scope.[24]

Development of the ICL jurisprudence

The statutes and the case laws of the tribunals set up by the allies in the aftermath of the World War II contributed to the development of new legal norms and standards of responsibility, by providing, for example, for the elimination of the defence of 'obedience of superior orders'.

A moral Legacy

A significance emerged from these experiences in terms of their moral legacy.[25] The fact remains that if the allied forces wished they could have punished the accused people without a trial but they chose not to thus leaving a moral legacy.

Prosecution of Military Officials

Another important fact was that until that time only servicemen and minor officers had been prosecuted, now for the first time military leaders as well as high ranking politicians and other civilians were brought to trial.

New offences

New offences were envisaged in the London Agreement and made punishable; crimes against humanity and crimes against peace. Whether or

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[24] *Supra,* note 15 at 323.

[25] M.Lippman, *Nuremberg: Forty five years later* Connecticut, JOURNAL OF INTERNATIONAL LAW, 1 (1991)

not this was done in breach of the principle of *nullum crimen sine lege,* it is a fact that since 1945 those crimes gradually became the subject of international customary law provisions.[26]

2.4.1. Demerits of the IMT

The fact that IMT was significant jurisprudential achievement as far as application of International law through Criminal Tribunals is concerned cannot hide the fact that it had certain fallacies of its own. There were certain issues due to which the IMT is criticised :

Victor's Justice

The IMT was open to the charge of *victor's justice* i.e. it was an instance of the "winners" putting the "losers" on trial. There is undoubtedly a basis for this criticism. The tribunal was established, administrated and staffed by the victorious Allied powers. There was no prosecution for arguably criminal acts committed by the Allied Powers such as indiscriminate bombings of the civilian populations of Dresden and other German cities. This problem would have to be addressed if international criminal law were to represent anything more than a legal fig leaf to legitimize the unilateral condemnation of the losing party.[27]

Proper Forum

Nuremberg tribunal heard charges against the defendants for crimes violating the rights of their own subjects and citizens. Germany was not a party to the London Charter establishing the IMT and so it was unclear why the tribunal was a legally proper forum in which to bring the charges. It was one thing for

[26] *Supra,* note 15 at 323

[27] Judge & Murphy, *International Criminal Law: Celebrating its Achievements, Fearing for its Future,* SOUTH TEXAS LAW REVIEW, 55 (2013)

Turkey to prosecute its former leaders before a Turkish tribunal for planning and executing the mass murder of its own subjects. It was quite another for an international tribunal to prosecute German leaders for violating the rights of German Jews.[28]

2.5. ROLE OF IMT IN THE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

In spite of the various pitfalls in the system the Tribunal at Nuremberg was a very significant achievement and paved way for a system which would in future give relief to various victims of atrocities mainly those which are backed by powerful state actors. It laid down a precedent for the judicial development of international criminal law. It provide the international community a outline for the procedures that are to be adopted while prosecuting the perpetrators of serious crimes crime against peace. It came up with the concept of crimes against humanity which envisaged within itself grave human rights violations and identification of certain other specific crimes. It proved that a fair trial could be provided even to people who put the entire humanity to shame. Moreover there was one matter where the IMT was unarguably neutral; the tribunal was established when the war was over so it in no way influenced the behaviour during the war or the restoration of peace and security.

[28] Andrew Altman & Christopher Heath Wellman, 115 (1) *A Defense of International Criminal Law ETHICS*, 35-67 (2004).

CHAPTER III. INTERNATIONAL CRIMINAL TRIBUNAL (AD-HOC) FOR YUGOSLAVIA- DAWN OF A NEW ERA

The International Military Tribunal at was indeed a significant achievement as far as the development of International Criminal Law is concerned but for the next five decades after it finished its proceeding there wasn't any momentous development in this area except a few which didn't yield the desired results.

3.1. EFFORTS OF THE ILC IN THE POST-NUREMBERG ERA

In the year 1947, keeping in view the work done by the Nuremberg Tribunal the United Nations General assembly asked the International Law Commission (ILC) to formulate the Nuremberg Tribunal and the Charter provisions into a set of principles. The ILC considered this request during its first session in1949 and concluded that since these principles had already been affirmed by the General Assembly its task should not be to express appreciation on the content but rather to formulate them as substantive principles of international law.[29] The report of the special rapporteur Jean Spiropoulus was adopted by the Commission, which subsequently forwarded its formulation of the famous seven principles, together with their cornmentaries to the General Assembly. [30] The General assembly also asked its member states for their comments and requested the ILC to prepare a draft Code of Offences Against Peace and Security of Mankind.[31] The ILC submitted the Draft Code to the General Assembly by 1951, but

[29] International Law Commission Yearbook [YBILC], 282,(1949)

[30] YBILC Vol II 374 (1950).

[31] General Assembly Resolution 488(V) (12 December 1950).

keeping in view the comments that were received it submitted it final version in the year 1954.[32] The Assembly felt however that the definition of *aggression* raised unsurpassable problems and decide to postpone consideration of the Code until further work was done on this legal matter.[33] A definition of *aggression* with consensus some twenty years later in the year 1974[34] and the Commission once again suggested that it may resume the consideration of the code. This was done in 1981 when the Assembly invited the Commission to examine the code as a matter of priority, taking into account the results achieved by the process of progressive development of international law.[35] the General assembly kept working and the ILC kept working onto the issue which we would deal in the later chapters. From the developments during all these years one gets a feeling that everything was taking too much time and the reason for the same according to many was the cold war, but in the early nineties not only did the cold war end, but their also arose certain exigencies which demanded the immediate attention of the community of the states and thus gave the development of International law a new lease of life. These included the conflicts in the former Yugoslavia and also the Great Lake Emergency of Rwanda; the community of states did react albeit with varied interest, but for purposes of this study the advances made in the International Criminal Law Jurisprudence via the happenings in former Yugoslavia are very significant.

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[32] YBILC Vol II 149 (1954).

[33] General Assembly Resolution 897 (IX) (4 December1954).

[34] General Assembly Resolution 3314(XXIX) (14 December 1974).

[35] General Assembly Resolution 36/106 (10 December 1981).

3.2. BACKGROUND TO THE ESTABLISHMENT OF ICTY

Starting from the year 1991 there came reports of gross human rights violations as a result between armed ethnic groups in the former Yugoslavia. The nation of Yugoslavia was created in the aftermath of World War I, and was composed mostly of South Slavic Christians, but the nation also had a substantial Muslim minority. In the 1980s, relations among the six republics of the SFRY deteriorated. Slovenia and Croatia desired greater autonomy within the Yugoslav confederation, while Serbia sought to strengthen federal authority. As it became clearer that there was no solution agreeable to all parties, Slovenia and Croatia moved toward secession. Although tensions in Yugoslavia had been mounting since the early 1980s, it was 1990 that proved decisive. In the midst of economic hardship, Yugoslavia was facing rising nationalism among its various ethnic groups. By the early 1990s, there was no effective authority at the federal level. The Federal Presidency consisted of the representatives of the six republics, two provinces, and the Yugoslav People's Army (JNA). The communist leadership was divided along national lines. There were a lot of conflicts and the first of these conflicts, known as the Ten-Day War, was initiated by the JNA on 26 June 1991 after the secession of Slovenia from the federation on 25 June 1991.[36] Ethnic tensions rose, fuelled by propaganda in both Croatia and Serbia. As the new Croatian authorities started to modify the Constitution of Croatia, Serbian politicians escalated their boycott into an insurrection called the Log Revolution. The armed incidents of early 1991 escalated into an all-out war over the summer, with fronts formed around the areas of the breakaway SAO Krajina. The JNA had disarmed the Territorial Units of Slovenia and Croatia

[36] *Available at*, http://www.slovenija2001.gov.si/10years/path/ (Last visited on 11th May 2015).

prior to the declaration of independence.[37] By mid-July 1991, the JNA moved an estimated 70,000 troops to Croatia. The fighting rapidly escalated, eventually spanning hundreds of square kilometres from western Slavonia through Banija to Dalmatia.[38] In the meanwhile the United Nations Security Council expressed its deep concern and termed the situation a threat to international peace and security.[39] The UN determination was premised over a large part on a series of interim reports that were submitted to the council by a UN commission of experts established under the Security Council Resolution 780 of 1992.Security council resolution 808 instructed the Secretary General to examine whether the establishment of a criminal tribunal would have basis in law, and if so, to formulate an appropriate statute. The secretary generally replied in the affirmative and duly formulated a statute on the basis that it would apply only to the portions of international law which were beyond any doubt a part of customary international law.[40] Based on the Secretary General's report, to which a statute was annexed the security council adopted and established[41] the International Tribunal for the Prosecution of persons Responsible for Serious Violations of International Humanitarian Law Committed in the territory of Former Yugoslavia(ICTY). In the meeting preceding the passing of the resolution Brazil and china both questioned whether the security council had the authority to set up an international Criminal Tribunal, but neither considered this reservation fundamental enough to vote against the resolution.

[37] M. Cherif Bassiouni, *Final report of the United Nations Commission of Experts established pursuant to security council resolution* 780 (1992).

[38] *Id.*

[39] Security Council Resolution 808 (22 February 1993)

[40] Report of the Secretary General pursuant to Security Council Resolution 808 (1993), UN Doc S/25704(1993) 32 ILM 1159.

[41] Security Council Resolution 827 (25 May 1993).

3.3. STRUCTURE OF ICTY

Since its establishment in 1993, the ICTY has changed the landscape of international humanitarian law and provided victims an opportunity to voice the horrors they witnessed and experienced. In its precedent-setting decisions on genocide, war crimes and crimes against humanity, the Tribunal has shown that an individual's senior position can no longer protect them from prosecution.[42] The ICTY is made up of three main branches: the Chambers, the Registry, and the Office of the Prosecutor.

3.3.1. The Chambers

The Chambers are organised into three Trial Chambers and an Appeals Chamber. They are assisted in their work by the Chambers Legal Support teams. They consist of numerous legal staff, employed by the Registry, who assist the judges in conducting research, helping them in preparing and managing cases, as well as in participating in the actual draft and analysis of legal documents.

Each Trial Chamber is composed of three permanent judges and a maximum of six *ad litem* judges. *Ad litem* judges are appointed by the UN Secretary-General at the request of the President of the Tribunal to sit on one or more specific trials, allowing for efficient use of resources in accordance with the court's changing caseload . Article 12(1) of the Tribunal's Statute allows the appointment of a maximum of twelve *ad litem* judges (for the purposes of the suit).

On 29 June 2010, the Security Council adopted resolution 1931, extending the terms of office of five permanent judges in the Appeals Chamber until 31

[42] *Available at,* http://www.icty.org/sections/AbouttheICTY (Last visited on 12th May 2015).

December 2012. In a subsequent resolution, adopted on 29 June 2011, the Security Council extended the terms of office of eight permanent judges and nine *ad litem* judges serving in the Trial Chambers until 31 December 2012, or until the completion of their assigned cases.[43] The President of the Tribunal is elected by a majority of the votes of the permanent judges for a two-year term and is eligible for re-election once. The President presides over the proceedings of the Appeals Chamber and is also responsible for the assignment of judges to the Appeals Chamber and Trial Chambers. In addition, the President presides over all plenary meetings of the Tribunal, coordinates the work of the Chambers, supervises the activities of the Registry, and issues Practice Directions addressing detailed aspects of the conduct of proceedings before the Tribunal.

3.3.2. The Registry

The unique character of an international criminal judicial institution puts the Registry at the centre of a complex set of responsibilities in running the Tribunal. In addition to the administration of the courtrooms, the Registry assumes duties that are often afforded to ministries in national systems. Finally, the Registry fulfils the tasks just like an administrative body of a United Nations organ.

Court Support Services activities imply the support of the work of the Chambers, the Prosecution and Defence the for the purpose of conducting trials. Hearings take place in the three courtrooms of the Tribunal, all equipped with state-of-the-art technology and accessible to the public. In court, the Registry is represented by court ushers and court officers. They keep official record of events in all hearings, administer exhibits and all filings submitted by the parties on the case. The offices of the Registry are

[43] *Id.*

responsible for bringing witnesses to testify in court, protecting them when necessary and providing them with expert psychological support. The Office of Legal Aid and Defence Matters ensures that all accused are duly represented. Its mission includes assigning defence counsel to represent defendants who cannot afford to pay their own counsel (indigent defendants).[44]

3.3.1. Office of the Prosecutor

The ICTY's Office of the Prosecutor (OTP) has investigated many of the worst atrocities to have taken place in Europe since the Second World War, such as the 1995 Srebrenica genocide and has successfully prosecuted civilians, military and paramilitary leaders for their responsibility over such crimes. The OTP is, along with the Chambers and Registry, one of the Tribunal's three organs. It is mandated to investigate and prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. The OTP is headed by a Prosecutor, who is appointed by the Security Council for a renewable four-year term. The Prosecutor is independent and does not seek or receive instructions from external agencies such as any government or international organisation, or from either of the Tribunal's other two organs. Pursuant to UN Security Council resolutions and the Tribunal's Statute, UN member-states are under an obligation to cooperate with the OTP's investigations and prosecutions. The job of the Prosecutor is twofold: to investigate crimes and to present cases at trial and later, if necessary, on appeal. Over the years, the focus of the OTP's work has shifted from investigations to prosecutions.[45]

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[44] *available at*, http://www.icty.org/sid/10 (Last visited on 12th May 2015).

[45] *Available at*, http://www.icty.org/sid/42 (Last visited on 12th May 2015).

3.4. JURISDICTION AND WORK OF THE ICTY

The creation of the ICTY raised a number of very important jurisdictional issues which concerned both the definition and scope of the crimes within the jurisdiction of the Tribunal and the relationship between the international Tribunal and national courts. The four general categories of crimes within the jurisdiction[46] of the Tribunal are, Grave breaches of Geneva Conventions of 1949-Article 2.;Violations of the laws and customs of war-Article 3.;Genocide-Article 4.;The Crimes against Humanity-Article 5.

The experience of the ICTY has helped over all in clarifying the definition and scope of these crimes. Article 1 of the ICTY Statute sets out three general limitations upon the jurisdiction of the Tribunal which provides:

> *The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.*

The territorial limitation is that the acts concerned must be have been *committed in the territory of the former Yugoslavia* ; the temporal limitation is that those acts must have been committed *since 1991* and lastly those acts must constitute *serious violations* of international humanitarian law. The territorial and the temporal requirements are fairly straightforward and do not require much elaboration. The last of these limitation means, at one level, the violation of international humanitarian law within the jurisdiction must be more than *de minimis* as the Tribunal laid down[47] that, "the violations must be

[46] Statute of International Tribunal for the Prosecution of persons Responsible for Serious Violations of International Humanitarian Law Committed in the territory of Former Yugoslavia(ICTY).

[47] The Prosecutor *v.* Tadic

serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Moreover it raises the question of how to distinguish serious violations of international humanitarian law from common crimes under the domestic law.

3.4.1. The requirement of an armed conflict

All the crimes within the jurisdiction of the Tribunal except for the crime of Genocide must be committed in the context of an armed conflict. The appeals Chamber of the ICTY, when ruling on a pre-trial motion filed in the first case[48] before the Tribunal, held that the allegations in that case did concern crimes committed in the context of an armed conflict. After hearing the evidence at the trial, the Trial Chamber made specific findings that at all relevant times an armed conflict of sufficient scope and intensity was taking place to justify the application of the laws and customs of war under the Statute,[49] the grave breaches provisions of the Geneva Conventions of 1949,[50] and by application of Article 5 on crimes against humanity.[51]

The Tribunals recognition that all crimes within its jurisdiction must have a sufficient nexus to armed conflicts increases the burden of the prosecution in seeking to convict those indicted by the ICTY. This added burden is justified by clear terms of the Tribunals Statute which limits its jurisdiction to "serious violations of international humanitarian law."[52]

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[48] Prosecutor *v.* Dusko Tadic ICTY case no. IT-94-1-T

[49] Article 3 ICTY 1991

[50] *Supra*, note 47.

[51] *Id.*

[52] ICTY Statute, Article 5.

3.5. RELATIONSHIP OF ICTY WITH DOMESTIC COURTS

The Tribunal has encouraged judiciaries in the former Yugoslavia to reform and to continue its work of trying those responsible for war crimes committed there during the 1990s. The Tribunal works in partnership with domestic courts in the region - transferring its evidence, knowledge and jurisprudence - as part of its continuing efforts to bring justice to victims in the former Yugoslavia.[53] In November 1995, on the conclusion of the Dayton peace agreement, the Tribunal's then President, Antonio Cassese, commented, "Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand."[54]

In addition to its primary function of trying individuals for war crimes, the Tribunal has also served as an incentive to authorities in the former Yugoslavia to reform their judiciaries, and has been a catalyst for the creation of specialised war crimes courts. These and other courts across the former Yugoslavia have and will continue to benefit from the Tribunal's invaluable experience in dealing with war crimes and the volume of evidence that the ICTY has made, and continues to make, available to the local prosecutors.

Through its central role in the so-called Rules of the Road[55] system, the ICTY Prosecution has reviewed over 900 investigations files from prosecution

[53] *Available at,* http://www.icty.org/sid/324 (Last visited on 14th May 2015).

[54] ICTY Press Release Number 27, 24 November (1995).

[55] *See also,* In the aftermath of the war in Bosnia and Herzegovina, returning displaced persons and refugees voiced fears about arbitrary arrests on suspicion of war crimes. To protect against this, the OTP agreed to operate a "Rules of the Road" scheme under which local prosecutors were obliged to submit case files to The Hague for review. No person could

offices in Bosnia and Herzegovina to verify that the inquiries were justified and whether any were related to ICTY cases. This was done in order to ensure freedom of movement across Bosnia and Herzegovina by preventing arbitrary arrests of individuals on war crimes charges. To further support the process of strengthening the rule of law, the Tribunal is actively involved in transferring its expertise to legal professionals from the former Yugoslavia so as to assist them in dealing with war crimes cases and enforcing international legal standards in their local systems. In implementing its completion strategy, the Tribunal has transferred several ICTY cases, as well as numerous investigative files, to national authorities and courts in the former Yugoslavia. These transferrals, mainly to courts in Bosnia and Herzegovina, have resulted in many convictions being secured and truly provides a new dimension to the principle that its jurisdiction runs concurrent to national courts. The Tribunal is especially committed to assisting the War Crimes Chamber of the State Court of Bosnia and Herzegovina. The ICTY has also provided substantial assistance to the War Crimes Chamber of the Belgrade District Court as well as the Croatian judiciary dealing with war crimes cases, and will continue to do so.[56]All of these efforts have contributed to promoting respect for the rule of law across the former Yugoslavia which is vital for long-term stability in the region. The ICTY has made a vital contribution to international justice, well beyond the region of the former Yugoslavia. The Tribunal's judges and staff have extensively shared their expertise with those involved in the development of other international courts, such as the International Criminal Court, the Special Court for Sierra Leone and others. With its experience to date, the ICTY has played a crucial role in bringing

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be arrested on suspicion of war crimes in BiH unless the Tribunal's prosecution had beforehand received and assessed a case file to contain credible charges.

[56] *Available at,* http://www.icty.org/sid/324 (Last visited on 14th May 2015)

justice not just to people in the former Yugoslavia but across the globe unlike the IMT which was more or less limited to the Axis countries.

3.6. FAIR TRIAL ISSUES REGARDING ICTY

The fairness of the trials at the International Criminal Tribunal for the former Yugoslavia (ICTY) is an important but contested issue. In a formal sense, the trials must be fair because international human rights law includes a fair trial guarantee, but there are other reasons to want fair trials. Fair trials would be a moral obligation even in the absence of the legal requirement. Moreover, having fair trials is, according to procedural justice theory, one of the most important factors in establishing the legitimacy of a court and promoting compliance with the law, which is a goal of all international criminal justice mechanisms. The ICTY statute lays down[57] that;

The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Nevertheless, the fairness of the ICTY's trials has been a contested issue, particularly within the former Yugoslavia. Surveys of attitudes towards the ICTY conducted during the 2000s consistently showed that ethnic Serbs overwhelmingly thought the ICTY was biased and untrustworthy.[58] The ICTY was vilified in Serbia as a fundamentally political court that ignored crimes committed against Serbs and was only interested in unfairly punishing Serbs. an explanation for why ethnic Serbs have such a low opinion of the fairness

[57] ICTY Statute, Article 20(1).

[58] *Available at,* http://jurist.org/forum/2013/12/stuart-ford-icty-fair.php (Last visited 15th May 2015).

of the court despite most independent observers having concluded that the trials were basically fair. Most ethnic Serbs identified strongly with their own ethnic group and took the Serb "side" in the conflict. Moreover, most ethnic Serbs had a common narrative about the conflict in which their group was the victim of crimes committed against them by the other groups. Ultimately, the data is inconsistent with allegations that the ICTY's trials are political trials. This is good news because fair trials are important. On the other hand, the fairness of the trials appears to have had relatively little impact in Serbia, where attitudes towards the court have been very negative. This is unfortunate because the population of the former Yugoslavia is an important audience for the court.[59] Initially, they may be viewed quite negatively by groups who identify with the individuals they accuse, but if they collect convincing evidence of the guilt of the accused and present that evidence in fair trials they may, over the long haul, be able to reshape narratives that are holding back both perceptions of the court and compliance with international criminal law.

3.7. Political support Issues of ICTY

One of the most contested issues in pursuing justice in conflicts is the question to what extent political calculations play into the decision whether to prosecute or not in a particular case. Unlike on the national level there is no overarching state power that guarantees the prosecution of crimes in the international arena. Whether investigations are initiated and whether they lead to arrests depends to a large part on a couple of powerful states within the international community. There have been attempts to use both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICC

[59] *Id.*

as levers of Western powers to apply political pressure on states like Serbia and Sudan.[60] Frederik Harhoff, a justice at the International Criminal Tribunal for the Former Yugoslavia (ICTY), recently charged that the American presiding judge at the tribunal pressured his colleagues to overturn decisions related to war crimes, cases in Croatia and Serbia. Harhoff's allegations subsequently triggered a number of similar accusations of political interference by tribunal insiders and observers. All of this reinforced what many observers have claimed throughout the ICTY's twenty-year existence, that to unacceptable degrees, the tribunal's work is determined not by impartial standards of justice, but by the great powers' political interests.[61] the most significant and questionable about-face in the ICTY's history has undoubtedly been the recent decisions that have essentially gutted the doctrine of command responsibility. In the cases of Croatian generals Ante Gotovina, Ivan Cermak, and Mladen Markac, Serbian general Momcilo Perisic, and Serbian intelligence officials Jovica Stanisic and Franko Simatovic, the ICTY now finds that these individuals (several of whom have been said to have close ties to US intelligence agencies) were not responsible for war crimes committed by their subordinates during the Yugoslav wars.[62] Thus although the ICTY has not been as politically motivated as the IMT but as we have seen that it still isn't free from political prejudices which are a *sine qua non* for effective and durable justice.

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[60] *Available at* http://justiceinconflict.org/2011/07/28/law-versus-politics-in-international-criminal-justice/ (Last visited on 15th May 015).

[61] *Available at* http://www.worldaffairsjournal.org/article/trials-and-tribulations-politics-justice-icty (Last visited on 15th May 2015).

[62] *Supra*, note 60.

3.8. ACHIEVEMENTS/LEGACY OF THE ICTY

The ICTY came as a fresh lease of life as far as the development of the International Criminal Law. As we have already seen, it overcame various regarding jurisdiction and politicisation which had become synonymous with the International Military Tribunal of Nuremberg. It also laid a blueprint for the various criminal Tribunals that were set up after it, and thus became a model for the others to follow. The Tribunal's legacy[63] may be conceptualised broadly as "that which the Tribunal will hand down to successors and others," including:

Responsibility of the accused

The factual findings on the crimes that occurred and the responsibility of the accused for those crimes.

The efficiency

The legal legacy of the Tribunal, including its rules of procedure and evidence; practices of the Tribunal, the Office of the Prosecutor, and the Registrar; and - perhaps most significantly - its judgements and decisions, which define the legal elements of crimes that must be established beyond reasonable doubt to establish the responsibility of the accused. These judgements, decisions and practices represent a contribution to the development of substantive and procedural international humanitarian law and international criminal law.

The Database

[63] *Available at* http://www.icty.org/sid/10292 (Last visited 12th May 2015).

The records of the Tribunal, including audiovisual recordings of the proceedings, transcripts and the evidence admitted into its cases, and collections of material gathered in the course of investigations. Combined, this material, some of it confidential, will constitute the archive of the Tribunal's work.

Development of local Judiciary

The institutional legacy of the Tribunal, including its contribution to the creation of other international and hybrid criminal courts, particularly the development of the local judiciaries in the former Yugoslavia and their capacity to hold fair and effective war crimes proceedings.

Promotion of rule of law

The Tribunal's regional legacy, promoting the rule of law in the former Yugoslavia and contributing to peace and stability in that region. Coupled with this impact is the Tribunal's contribution to the national prosecution process and generally to providing a sense of justice to victims of the crimes committed during the wars in the former Yugoslavia, as well as to the local communities and the society at large.

Support of the International Community

The international community's normative legacy, expressed through its support for creation and operation of the Tribunal, staking humanity's claim to justice and increasing awareness of the struggle against impunity for serious crimes under international law.

In addition to these various aspects of the Tribunal's legacy, the mechanism by which the work of the Tribunal is to be continued and preserved for posterity has also to be considered.

The Tribunal's strategy for establishing and ensuring utilisation of its legacy by the countries of the former Yugoslavia has been actively pursued over the last few years and has comprised two elements: first, assisting in building the capacity of courts in the region to carry on the work of the Tribunal long after the Tribunal closes: and second, ensuring that courts in the region have access to relevant materials from the Tribunal in a useable form.

3.9. CRITICISM OF THE ICTY

The International Criminal Tribunal for the former Yugoslavia was established in 1993 to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory." But taking into account the thousands of victims of sexualized violence from the conflict is comprehensive prosecution even feasible? It is estimated that the victims of sexualized crimes during the Balkan conflict is at around 35,000, while Margot Wallström, the former UN Special Representative on Sexual Violence in Conflict, has said the totals are between 50,000 to 60,000. Yet the ICTY has only 28 convictions for these crimes under its belt, as well as about 20 ongoing cases.[64] Some of the other areas:

Lack of uniform procedure

The court came under fire for a lack of uniformity in procedures, between trial chambers and in legal definitions of crimes. Another criticism was its failure to secure a conviction against former Yugoslav president Slobodan Milosevic who died of natural causes four years into an overly complex trial. Milosevic

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[64] *Available at* http://www.womenundersiegeproject.org/blog/entry/seeking-justice-through-the-icty-frustration-skepticism-hope (Last visited on 12th May 2015).

trial had undoubtedly tarnished the legacy of the ICTY. Difficulties were also encountered by the ICTY - such as having no police force of its own.

The Burden of work

Pressure on the ICTY to complete all its cases on time has led to some judges introducing new measures - such as time constraints on both prosecution and defence - to try and speed up trials. The system has changed so radically over the years, and the rights are being eroded slowly to the point where it's almost an aspiration that you could get fair trial, rather than a reality.

3.10. LESSONS LEARNT FROM ICTY

The ICTY was successful in overcoming the "victor's Justice" that haunts the legacy of Nuremberg. There was no question of one party prosecuting the personnel of other.[65] There were several other lessons[66] which future International Criminal Tribunals can learn from ICTY:

a) Consistent with domestic practice in many jurisdictions, at the Office of the Prosecutor(OTP), the investigators - most of whom were from police backgrounds - rather than the lawyers were given responsibility over investigations and strategy. At the outset, there was insufficient recognition that the special nature of the investigations and prosecutions would require early and continuing legal direction and coordination.

[65] H.H Judge et al, *International Criminal law: Celebrating its achievements, fearing for its future*, 55, TEXAS LAW REVIEW, 307 (2013).

[66] Minna Schrag, *Lessons Learned from ICTY Experience*, 2, JOURNAL OF INTERNATIONAL CRIMINAL LAW, 427 (2004).

b) Early efforts to obtain computer software that would produce an easily searchable database proved to be very difficult. A priority of any future tribunals should be finding appropriate software. For example, potentially exculpatory material must be accessible; confidential material must be maintained as such; material collected by one investigative team must be available to other teams.

c) Especially at the outset, the failure of the UN bureaucracy to recognize that an international criminal tribunal has special personnel needs hindered the OTP's ability to recruit specialized staff - for example, investigators capable of analysing military data. Like the tendency of many prosecutors and investigators to apply approaches that they used in their domestic experience, this failure illustrates how important it is that all concerned appreciate that an international criminal tribunal is inherently different from a domestic court.

d) Better coordination and supervision at a senior level of investigative and trial teams might have led to more effective recognition and pursuit of investigative leads and identification of potentially exculpatory material.

e) Failure to complete investigations before indictments were presented for confirmation, understandable in light of the early pressure to show quick results, resulted in the need for many amended indictments, perhaps creating an unwarranted impression of carelessness.

f) The investigative staff needed to receive special training in dealing with trauma victims. Because of the trauma experienced by many of the witnesses - unknown in most domestic jurisdictions - and the impact of

their stories on the staff, trauma counsellors were needed for the staff as well.

g) The importance of outreach to people in the former Yugoslavia was not recognized until after the Tribunal had been in operation for more than two years. Much of the outreach required substantial resources for the press office. But even within the OTP with hindsight it would have made good sense to devote resources, for example to communicating with people who had been interviewed, or who had testified, to keep them informed of the status of the cases in which they were involved.

h) Finally, one of the ways in which OTP was very effective was to make a senior staff member responsible to act as liaison with governments and other providers of confidential information, to ensure that agreed-upon procedures for obtaining and maintaining that information were followed and to manage novel issues that inevitably arose. Future tribunals would do well to adopt a similar practice.

The International Criminal Tribunal for Former Yugoslavia has been more than significant achievement despite criticism from certain quarters. It would not be wrong to say it has been the better of all the International Criminal Tribunals of particular jurisdiction to date because of its efficient and transparent nature. The question whether such tribunals are better than an international court of general jurisdiction will be dealt with later, after we deal with the working mechanism of the International Criminal Court. Be that as it may the ICTY has definitely left an indelible legacy as far as International Criminal law is concerned.

CHAPTER IV. THE INTERNATIONAL CRIMINAL COURT AND THE GENERAL JURISDICTION CONUNDRUM

The fact that there were efforts to set up and International court of criminal jurisdiction even by the league of nations has already been dealt with in the first chapter. Moreover the efforts of the General Assembly and the International Law Commission also fell short of full realisation due to the lack of consensus during the cold war period. The efforts to establish an International Criminal Court was again on the top of the agenda of the international community especially after the end of the cold war and setting up of criminal tribunals in Yugoslavia and Rwanda.

4.1. THE DRAFTING AND ADOPTION OF THE ICC STATUTE

It was in the year 1989, after the cold war was drawn to a close that the General Assembly again requested the ILC to address the question of establishing an international criminal court.[67] The question of an international criminal court came to the United Nations agenda by an unexpected route in 1989 after a hiatus of 36 years, following a suggestion in the General assembly by Trinidad and Tobago that a specialised international Criminal Court be established in order to deal with the issue of drug trafficking.[68] In response to the GA's mandate arising out of 1989 special session on drugs, the ILC in 1990 completed a report which was submitted to the 45th session of the GA. Though that report was not limited to the drug trafficking question

[67] General Assembly Resolution 44/39 (4 December 1989)

[68] *Supra*, note 15 at 328.

it was, nonetheless, favourably received by the General Assembly, which encouraged the ILC to continue its work. The ILC produced a comprehensive text in 1993, which was modified in 1994.[69] The judicial institution envisaged in the 1994 ILC Draft to a very great extent took account of the concerns of states and in particular of major Powers. Among the salient features of the ICC delineated in the Draft, the following should be emphasised:

(i) The court had *automatic jurisdiction* (Jurisdiction following from the mere fact of ratifying the statute) [70], solely over genocide; for other crimes such as war crimes and crimes against humanity the Court could exercise its jurisdiction only if such jurisdiction had been accepted by the custodial state, the territorial state, as well as any other state seeking jurisdiction over the accused(Article 21) ;

(ii) Only states parties or the Security Council could initiate proceedings(Article 23 and 25);The prosecutor has no such power.

(iii) The SC had extensive powers with regard to prosecution of cases relating to situations falling under Chapter VII (Threat to peace, breach of peace, or act of aggression) of the UN Charter (Article 23(3)), in case of prosecution could not be commenced except in accordance with a decision of the security Council.

A group of distinguished diplomats, and in particular the Canadian Phillipe Kirsch, who chaired the committee[71], must be credited with having been able skilfully to devise and suggest a number of comprise formulae that in the

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[69] International Law Commission, Report, 46th Session, 2 May -22 July 1994.

[71] Preparatory Committee on the establishment of an International Criminal Court

event permitted the conference to adopt the Statute by 120 votes to 7, with 20 abstentions [72].

4.2. Structure and Functioning of the ICC

The ICC is an independent international organisation, and is not part of the United Nations system. Its seat is at The Hague in the Netherlands. Although the Court's expenses are funded primarily by States Parties, it also receives voluntary contributions from governments, international organisations, individuals, corporations and other entities. On 17 July 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries. The Court is not part of the United Nations, but it maintains a cooperative relationship with the U.N. The Court[73] is based in The Hague, the Netherlands, although it may also sit elsewhere. The Court is composed of four organs. These are the Presidency, the judicial Divisions, the Office of the Prosecutor and the Registry.

4.2.1. The Presidency

The Presidency is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor, and for specific functions assigned to the Presidency in accordance with the Statute. The Presidency is composed of three judges of the Court, elected to the Presidency by their fellow judges, for a term of three years. The President of the Court is Judge Silvia Alejandra Fernandez De Gurmendi (Argentina). Judge Joyce ALUOCH

[72] USA, Libya, Israel, Iraq, China ,Syria and Sudan voted against the adoption of the Statute

[73] *Available at* http://www.icccpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx (Last visited on 14th May 2015).

(Kenya) is First Vice-President, and Judge Kuniko OZAKI (Japan) is Second Vice-President.

4.2.2. The Judicial Divisions

The Judicial Divisions consist of eighteen judges organized into the Pre-Trial Division, the Trial Division and the Appeals Division. The judges of each Division sit in Chambers which are responsible for conducting the proceedings of the Court at different stages. Assignment of judges to Divisions is made on the basis of the nature of the functions each Division performs and the qualifications and experience of the judge. This is done in a manner ensuring that each Division benefits from an appropriate combination of expertise in criminal law and procedure and international law. The judges of the Court are: Silvia Alejandra Fernandez De Gurmendi (Argentina), Joyce Aluoch (Kenya), Kuniko Ozaki (Japan), Sanji Mmasenono Monageng (Botswana), Christine Baroness Van Den Wyngaert (Belgium), Cuno Jakob Tarfusser (Italy), Howard Morrison (United Kingdom), Olga Venecia del C. Herrera Carbuccia (Dominican Republic), Robert Fremer (Czech Republic), Chile Eboe-Osuji (Nigeria), Geoffrey A. Henderson (Trinidad and Tobago), Marc Perrin De Brichambaut (France), Piotr Hofmanski (Poland), Antoine Kesia-Mbe Mindua (Democratic Republic of the Congo), Bertram Schmitt (Germany), Péter Kovacs (Hungary), Chang-ho Chung (Republic of Korea).

4.2.3. Office of the Prosecutor

The Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. The Office is headed by the Prosecutor, Mrs. Fatou Bensouda (The Gambia), who was elected by the States Parties for a term of nine

years. She is assisted by Deputy Prosecutor James Stewart who is in charge of the Prosecutions Division of the Office of the Prosecutor.

4.2.4. The Registry

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court. The Registry is headed by the Registrar who is the principal administrative officer of the Court. The Registrar exercises his or her functions under the authority of the President of the Court. The current Registrar, elected by the judges for a term of five years, is Mr Herman von Hebel (The Netherlands).

4.2.5. Other Offices

The Court also includes a number of semi-autonomous offices such as the Office of Public Counsel for Victims and the Office of Public Counsel for Defence. These Offices fall under the Registry for administrative purposes but otherwise function as wholly independent offices. The Assembly of States Parties has also established a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court and the families of these victims.

4.3. THE JURISDICTION OF ICC

The Court may exercise jurisdiction over genocide, crimes against humanity and war crimes. These crimes are defined in detail in the Rome Statute. In addition, a supplementary text of the "Elements of Crimes" provides a breakdown of the elements of each crime. The Court has jurisdiction over individuals accused of these crimes. This includes those directly responsible for committing the crimes as well as others who may be liable for the crimes,

for example by aiding, abetting or otherwise assisting in the commission of a crime. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute. The Court does not have universal jurisdiction.[74] The Court may only exercise jurisdiction if:

a) The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;
b) The crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or
c) The United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

The mandate of the Court is to try individuals (rather than States), and to hold such persons accountable for the most serious crimes of concern to the international community as a whole, namely the crime of genocide, war crimes, crimes against humanity, and the crime of aggression, when the conditions for the exercise of the Court's jurisdiction over the latter are fulfilled.

4.3.1. Genocide

According to the Rome Statute, "genocide" means[75] any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

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[74] *Available at* http://www.icccpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx (Last visited on 15th May 2015).

[75] Article 6, ICC 1998

(i) killing members of the group;
(ii) causing serious bodily or mental harm to members of the group;
(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(iv) imposing measures intended to prevent births within the group;
(v) forcibly transferring children of the group to another group.

4.3.2. Crimes against Humanity

"Crimes against humanity"[76] include any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

a) murder;
b) extermination;
c) enslavement;
d) deportation or forcible transfer of population;
e) imprisonment;
f) torture;
g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
h) persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds;
(i) enforced disappearance of persons;
i) the crime of apartheid;
j) other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury.

[76] ICC Statute 1998, Article 7.

4.3.3. War Crimes

"War crimes"[77] include grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict and in conflicts "not of an international character" listed in the Rome Statute, when they are committed as part of a plan or policy or on a large scale. These prohibited acts include

a) murder
b) mutilation, cruel treatment and torture;
c) taking of hostages;
d) intentionally directing attacks against the civilian population;
e) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals;
f) pillaging;
g) rape, sexual slavery, forced pregnancy or any other form of sexual violence;
h) conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

4.3.4. The Crime of Aggression

Crime of aggression means[78] the planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty,

[77] ICC Statute 1998, Article 8.

[78] Article 8 bis, Review Conference of the Rome Statute (Inserted by resolution RC/Res.6 of 11 June 2010).

territorial integrity or political independence of another State. The act of aggression includes, among other things, invasion, military occupation, and annexation by the use of force, blockade of the ports or coasts, if it is considered being, by its character, gravity and scale, a manifest violation of the Charter of the United Nations.

The perpetrator of the act of aggression is a person who is in a position effectively to exercise control over or to direct the political or military action of a State.

The Court may exercise jurisdiction over the crime of aggression, subject to a decision to be taken after 1 January 2017 by a two-thirds majority of States Parties and subject to the ratification of the amendment concerning this crime by at least 30 States Parties.

In addition to jurisdiction over Crimes, the court has certain other kinds of jurisdiction as well:

4.3.5. Territorial Jurisdiction

The territorial jurisdiction of the Court includes the territory, registered vessels, and registered aircraft of states which have either (1) become party to the Rome Statute or (2) accepted the Court's jurisdiction by filing a declaration with the Court.[79] In situations that are referred to the Court by the United Nations Security Council, the territorial jurisdiction is defined by the Security Council, which may be more expansive that the Court's normal territorial jurisdiction.[80]

[79] ICC Statute 1998, Article 12.

[80] ICC Statute 1998, Article 13(b).

4.3.6. Personal Jurisdiction

The personal jurisdiction of the Court extends to all natural persons who commit crimes, regardless of where they are located or where the crimes were committed, as long as those individuals are nationals of either (1) states that are party to the Rome Statute or (2) states that have accepted the Court's jurisdiction by filing a declaration with the Court.[81] As with territorial jurisdiction, the personal jurisdiction can be expanded by the Security Council if it refers a situation to the Court.[82]

4.3.7. Temporal Jurisdiction

Temporal jurisdiction is the time period over which the Court can exercise its powers. No statute of limitations applies to any of the crimes defined in the Statute.[83] However, the Court's jurisdiction is not completely retroactive. Individuals can only be prosecuted for crimes that took place on or after 1 July 2002, which is the date that the Rome Statute entered into force.[72] [84]However, if a state became party to the Statute, and therefore a member of the Court, after 1 July 2002, then the Court cannot exercise jurisdiction prior to that date for certain cases.[73] [85]For example, if the Statute entered into force for a state on 1 January 2003, the Court could only exercise temporal jurisdiction over crimes that took place in that state or were committed by a national of that state on or after 1 January 2003.

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[81] ICC Statute 1998, Article 12.

[82] ICC Statute 1998, Article 13(b).

[83] ICC Statute 1998, Article 11(1).

[84] ICC Statute 1998, Article 11(2).

[85] ICC Statute 1998, Article 53(1).

The Rome Statute of the International Criminal Court is not perfect. Considering the wide disagreement that existed at the beginning of the conference, however, it is impressive that the final document garnered as much support as it did. The statute does have some weaknesses, as will any compromise document, but overall it provides an excellent starting point for the consistent prosecution of international crimes. Despite its shortcomings, this court will not be as weak as human rights organizations argue. The fact that the custodial state's being a party to the statute does not automatically lead to ICC jurisdiction is unfortunate, but not crippling. Ideally, all war criminals should be tried in front of an international tribunal, but the existence of universal jurisdiction means that a custodial state can always try the suspect in its own national system.[86] Thus, war criminals cannot travel freely without fear of prosecution in some court. Furthermore, if a war criminal does travel to a state that is willing to grant him a safe harbour rather than prosecute him for his crimes, that state may not be a party to the statute anyway, making it irrelevant in many cases that the custodial state is not included.

4.4. <u>ENFORCEMENT MECHANISM OF ICC</u>

The purposes of the ICC are to punish the most serious crimes committed at an international level and to bring individual perpetrators to justice.[87] Member states are required to cooperate with the ICC in its investigations and prosecutions.[88] If a member state does not cooperate, however, the Rome Statute does not contain a specific repercussion for the offending member.

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[86] Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute,* 49(3) DUKE LAW JOURNAL, 825-853 (1999).

[87] ICC Statute 1998, Article 1

[88] ICC Statute 1998, Article 86-87.

The ICC may request the arrest and surrender of an individual to the ICC.54 When the ICC decides to indict an individual, it may issue a request to a member state or states, specifying the manner in which the member state is expected to cooperate.[89] It will then coordinate with the member state in order to transport the individual from that state to the ICC, which is located in The Hague, Netherlands. If an individual is convicted, then the Trial Chamber sentences him. The Trial Chamber can imprison a convicted criminal for up to thirty years in jail or, when justified by the gravity of the crime, a life sentence.[90] It will then coordinate with the member state in order to transport the individual from that state to the ICC, which is located in The Hague, Netherlands. If an individual is convicted, then the Trial Chamber sentences him. The Trial Chamber can imprison a convicted criminal for up to thirty years in jail or, when justified by the gravity of the crime, a life sentence.[91] While the ICC member states are required to cooperate with the ICC in its investigations and prosecutions, under Article 98 of the Rome Statute, there are circumstances in which ICC member states are either immune or excused from cooperation. Under Article 98(1), member states are not permitted to cooperate with the ICC if the member state has an international obligation or contract that conflicts with its duties under the Rome Statute in regards to the "State or diplomatic immunity of a person or property of a third State." Under Article 98(2), the member state also does not have to cooperate if it has a binding international agreement with another state and cooperation would cause the member state to breach that agreement. The ICC is in a position that could make it either obsolete or a viable international court because the recent events in Kenya and Chad have exposed the cracks existing in the Rome Statute. The ICC must fill in these cracks in order

[89] ICC Statute 1998 Article 89(1)

[90] ICC Statute 1998, Articles 86(1),76(1) and 77(1).

[91] ICC Statute 1998, Article 87(7).

to move forward as a legitimate tribunal. Because the ICC has to rely completely upon its member states in order to enforce its indictments and arrest warrants, the ICC must have mechanisms at its disposal to force the member states to enforce the indictments.

4.5. ACHIEVEMENTS OF THE ICC

The proper functioning of the international criminal court did not start until the year 2003, so it would not be entirely fair judge its successes or failures in such a short span of time. The fact that the Rome Statute passed with such a lopsided victory, despite all of the objections from different sides regarding the semantics of the document, was a major victory in itself. Then, the rapidness of the ratification of the treaty, just four short years after the monumental signing, showed that the need to establish a world criminal court was present. Since the inception of the court, fifty seven additional nations have joined the court, with more coming all the time. The support for the ICC is definitely growing, especially among the smaller nations of the world, as they view the ICC as a support system to their own domestic judicial institution.[92] Some of the other important breakthroughs in the short history are:

The Common law Procedure

The court's decision making process is common law, which means that judges, and not a jury, decide the fate of the accused based on legal precedence and knowledge of the law. The common law practice definitely ensures that the rights of the individual, as well as the palpability of the court

[92] *Available at* http://www.internationalpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/ (Last visited on 16th May 2015).

are handled by professionals. This is very important with an international forum because of the vast differences between hundreds of judicial systems.[93]

The appeal system

In the ICC an appeal can not only be granted for guilty verdict, but also an acquittal. This additional appeal gives the prosecutor a second chance to submit additional evidence that may change the determination of the judgment. In creating a system in which the court can interpret international criminal law, it has correctly identified the issue that needs to be addressed in order for the court to blossom and reach its full potential.[94]

Global awareness

Perhaps the greatest achievement of the ICC is that it has been instrumental in creating a global discussion on justice in the wake of massive human rights violations and atrocities. Moreover, international relations today is, to a significant extent, about how to achieve justice, for whom and when. Increasingly, peace building and conflict resolution processes are interwoven with those of post-atrocity justice. The permanency of the ICC appears to be making this process itself permanent.[95]

Of course, just being in existence isn't enough. Neither is simply shaping the demands and grievances of oppressed peoples. The Court will be judged, to a large extent, on the expectations it has created for itself: that it would be universal, that it would be impartial, that it would not tether itself to power

[93] *Id.*

[94] *Id.*

[95] *Available at* http://justiceinconflict.org/2012/07/09/the-icc-three-remarkable achievements/ (Last visited on 16th May 2015).

politics. One could argue it is none of those things, the answer would of course be a no, but it's still early days.

4.6. CRITICISM OF THE ICC

The ICC has been accused of bias and as being a tool of Western imperialism, only punishing leaders from small, weak states while ignoring crimes committed by richer and more powerful states. Some of the frequently critiqued aspects of ICC are:

4.6.1. A political Actor

The ICC is a legal body, supposedly concerned with justice, and not politics. However, the Court can have considerable political impact because it has significant independent power. The chief prosecutor can initiate an investigation on the basis of a referral from any state which is party to the ICC, or from the UNSC acting under Chapter VII of the Charter of the United Nations. In addition, the prosecutor can initiate investigations *proprio motu*, on the basis of information received from individuals or organisations about crimes within the jurisdiction of the Court. The prosecutor has done this twice since its creation: in Kenya and in Ivory Coast.[96]

4.6.2. A selective Actor

The Court has targeted some individuals, but neglected others equally well known for their violence and crimes. For instance, in the DRC the ICC has not indicted Laurent Nkunda, leader of the rebel group known as the National

[96] Catherine Gegout, *The International Criminal Court: limits, potential and conditions for the promotion of justice and peace,* 34(5),THIRD WORLD QUARTERLY, 800–818 (2013).

Congress for the Defence of the People (CNDP) in Eastern Congo. In Kenya the ICC investigation is not considered fair by everyone, as the ICC prosecutor does not appear to be investigating the worst offenders, but rather those who are easily apprehended.[97]

4.6.3. (In)Significance of the ICC for criminals and victims

The ICC does not seem to have prevented potential criminals from being violent, whether they live in states parties or non-party states to the ICC, but this could change in the future given that some potential criminals seem to fear the ICC. The reaction of individuals indicted by the ICC is indeterminate: some have continued to use violence, whereas others seem to have contained it. Moreover there is no long-term support, and victims who have left the Court remain at the mercy of criminals and their supporters.[98]

4.6.4. Efforts towards peace

The ICC has very ambitious aims, as it is not only concerned with establishing international justice, but also peace. Researchers disagree on the impact a tribunal can have on peace. For some theorists the two aims of justice and peace can contradict one another and, as a result, in its quest to establish justice, the ICC does not always serve the cause of peace.[99]

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[97] *Available at* http://www.brookings.edu/research/opinions/2010/12/17-africa-crime kimenyi (Last visited on 16th May)

[98] *Supra*, note 97.

[99] L Vinjamuri & J Snyder, *Advocacy and scholarship in the study of international war crime tribunals and transitional justice*,7, ANNUAL REVIEW OF POLITICAL SCIENCE, 352–356 (2004)

4.7. ICC- So far So good?

It may be argued that it is too soon to judge the working of the International Criminal Court for it may not give us too good a picture of the coming times. However, In order to improve the impact of the ICC, its members have a crucial role to play in supporting the Court to provide international justice. They must create a safe environment for those victims of crime willing to testify at the ICC, and protect them from further violence. States should also help the ICC implement its arrest warrants, and contribute to the ICC's reparations system for victims of crime. States parties to the ICC could, for instance, include support for victims of grave crimes into their programmes on development. More broadly states must work on promoting justice for all people, independently from the work of the ICC focused on punishment for particular individuals [100] As has been seen throughout this chapter that there are a lot of things that the ICC can learn from its first decade of existence and from the working of the ICTY as well, but a system which is supposed to deliver justice internationally needs some more time especially with the ever changing political equations throughout the globe,

[100] L Arbour, *Economic and social justice for societies in transition,* 40(1), New York University Journal of International Law and Politics, 1–27 (2007).

CHAPTER V. THE FUTURE OF INTERNATIONAL CRIMINAL LAW- A NEED TO PLUG THE LOOPHOLES

The fact of the matter is that despite coming up with historically significant institutions to punish people who were accused of grave crimes, ICL as a system still has got a lot of questions to answer and this chapter will some of such issues which need to be addressed immediately in order to make the system better with regards to delivery of justice and maintenance of world peace.

5.1. ICL AND STATE SOVEREIGNTY

One of the several potential objections, with respect to ICL is the claim that it insufficiently appreciates the importance of state sovereignty. This criticism can take either a theoretical or a practical form. On the theoretical version, the objection states that international criminal law can only come at an undue cost to state self determination and that this is too great a price to pay.[101] Although the ICC does not involve any official transfer of sovereignty, its provisions definitely enjoin upon states to share authority over its citizens. These provisions in the Statute could open the floodgates for intervention in the internal affairs of states.

However The charisma of state's authority is under strain. The staggering rise in intra-state conflicts in the post-Cold War world and the growing tentacles of transnational terrorism have raised questions about state legitimacy. States are no longer considered to be the most effective means of enforcing international norms and order among individuals. The detailed

[101] Allen Buchanan, *From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform*, 111, ETHICS, 674–75 (July 2001).

scrutiny of the human rights records of certain countries by the international community is leading towards a new international order, where the absolutes of state sovereignty are being challenged. In the new international setting stability and order take precedence over equality among states. The sovereign immunity enjoyed by states is being restricted and limited by the emergence of international constitutional structures, which exist beyond the boundaries of states.[102] Joining international regimes like the ICC may not damage sovereignty to an extent to which it would get affected, if one were forced to enter the global structures created by a global hegemon. Thus an approach in which an international constitutional order has the primacy is the way forward in the conflict of punishing war criminals and preserving state sovereignty.

5.2. Distinction between a domestic and an International crime

A very strong objection to the current system in the international law is that, the system in place does not draw a clear line between domestic and international crimes. The tendency since Nuremberg has been to suppose that there must be some special category of crime in order to explain why the international community (or humanity) has been harmed by what would otherwise be a domestic criminal matter. However, this supposition derives from the Westphalian conception of state sovereignty. Once the Westphalian model is rejected, there is no need to hold that the international community must be harmed in order for international jurisdiction to be triggered.[103]

[102] Atul Bharadwaj, *International Criminal Court and the Question of Sovereignty* 27(1), STRATEGIC ANALYSIS, (2003)

[103] *Supra*, note 28.

5.3. INTERNATIONAL CRIMINAL LAW AND THE RESTORATION OF PEACE

The prosecution of the individuals who are accused of grave crimes may be very important as far as the basic motives of ICL are concerned, it may also cause complications in the restoration of peace and security in a region. This is illustrated by the ICTY's indictment[104] of Radovan Karadzic , the former president of Bosnian Serb administration. The fact was that Karadzic was essential to the participation of the Bosnian Serbs in any political process designed to end the conflict and to create a blueprint for the governance of post-conflict Bosnia and Herzegovina. The particular solution adopted in this case was that Karadzic suddenly resigned and disappeared , and Bijllana Plavsic assumed the presidency of the Bosnian Serbs. Having done so, with extraordinary personal and political courage, she successfully persuaded the Serbs to accept the Dayton Peace Accords.[105] Through all its existence ICL has adopted to various issues and now it is the time to find a way to deal with such situations because peace in such cases is as important as justice if not more.

5.4. OVERABUNDANCE

The list of goals proclaimed by international criminal courts and their affiliates is very long. Beside standard objectives of national criminal law enforcement, such as retribution for wrongdoing, general deterrence, incapacitation, and rehabilitation, international criminal courts profess to pursue numerous additional aims in both the shorter and longer time horizon. At various times, the courts have expressed their intention to produce a reliable historical

[104] Prosecutor *v.* Karadzic ICTY IT-95-5/18

[105] *Supra*, note 65.

record of the context of international crime, to provide a venue for giving voice to international crime's many victims, and to propagate human rights values. Courts have also expressed their aspiration to make advances in international criminal law, and to achieve objectives related to peace and security-such as stopping an ongoing conflict-that are far removed from the normal concerns of national criminal justice. And they have always insisted that these-and some additional-objectives be pursued in proceedings solicitous of the rights of the accused.[106] It does not require much pause to realize that the task of fulfilling all these self-imposed demands is truly gargantuan. Unlike Atlas, international criminal courts are not bodies of titanic strength, capable of carrying on their shoulders the burden of so many tasks. Even national systems of criminal justice, with their far greater enforcement powers and institutional support, would stagger under this load.[107]

5.5. COURTS OF GENERAL (ICC) AND PARTICULAR (AD-HOC TRIBUNALS) JURISDICTIONS

Doubtless, the roots of the Rome Statute can be traced back directly to the ICTY and ICTR, along with a draft statute prepared in 1994 by the International Law Commission. The ICC, together with the ICTY and ICTR, form a genus on its own, clearly distinguishable from all other bodies portrayed in this matrix. However, the ICC differentiates itself from the ICTY and ICTR in several legal and structural features, some of which can be briefly addressed. First of all and most obviously, unlike the Yugoslavia and Rwanda tribunals, the ICC is a permanent judicial body, the jurisdiction of

[106] Minna Schrag, *Lessons Learned from ICTY Experience*, 2, JOURNAL OF CRIMINAL JUSTICE, 427-428, (2004).

[107]Mirjan R. Damaska, *What is the Point of International Criminal Justice? ,available at,* HeinOnline – 83 Chi.-Kent L. Rev. 329 2008.

which is not limited by any time limits (of course, save the principle of non-retroactivity) and, at least potentially, has universal reach. Secondly, although the jurisdiction of the two ad hoc tribunals is not exclusive, but concurrent with that of national courts, both have primacy over national courts. At any stage of the procedure, they may formally request the national courts to defer competence. Conversely, the judicial activity of the ICC is intended only to complement that of national courts. It will exercise its jurisdiction only when national courts are unwilling or unable genuinely to carry out the investigation or prosecution of a person accused of the crimes defined in the Rome Statute.[108] The two ad-hoc tribunals that were set up in the mid-nineties in former Yugoslavia and Rwanda to tackle the prevailing situations at the respective places. These courts in addition to leaving their own legacy in the process also catalysed the process of establishing an International Criminal Court.

While the ad-hoc tribunals were established by the security council not only to deliver justice to the victims but also to play an important role to play in the restoration of peace in those particular areas. Both ICTY and ICTR did do their job efficiently but the political influences on their work along with their effect on the peace process was heavily criticised. The ICC on the other hand is independent of the security council except in a few cases, and works under the supervision of the Assembly of State Parties(ASP) which as of now consists of 123 state parties.[109] The ICC although independent has a weaker enforcement mechanism where it is highly dependent on the state parties and the security council of the United Nations.

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[108] *Available at* http://www.pict-pcti.org/courts/ICC.html (Last visited on 16th May 2015).

[109] *Available at* http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx (Last visited on 16th May 2015).

Finally, perhaps what makes the Rome Statute significantly different from all predecessors, and in particular from the two ad hoc tribunals, is that for the first time victims of crimes and their families can access the Court to express their views and concerns and to claim reparation for the wrongs suffered. Indeed, in the Yugoslavia and Rwanda tribunals, victims can enter the courtroom only as witnesses, providing one of the means through which evidence may be brought before the tribunal. In the Rome Statute, however, those who have suffered have been elevated from a mere aid in the judicial process with no own interest to protect but that of the criminal justice system into legitimate participants. Several provisions in the Rome Statute stipulate the involvement of victims during all phases of the case. Most importantly, victims of international crimes can claim reparation for the violation of their rights. They will do so on their own behalf or through their representatives, not through a state espousing their claims.[110]

5.6. <u>THE FUTURE OF INTERNATIONAL CRIMINAL LAW</u>

The International Criminal Law has become the punching bag for the critics irrespective of the continental boundaries. The system has been criticised on several accounts primary of which is the political nature of the system. Although an ideal International Criminal Justice system has to be apolitical, but as of now the due to the global inequalities we have to reconcile with the fact that to leave a system which has had significant success in the last three decades would leave us to a dead end. The fact that as of now the ICC statute has 123 state parties stands testimony to the acceptance of the principles that are envisaged in the Rome Statute. Moreover there have been countries(List States) that are coming forward in helping the ICC with its

[110] *Supra*, note 109.

enforcement mechanism. The fact that victims of atrocities can now not only initiate proceedings but also be a part of the trial is a major improvement as well. The way ICL has evolved over the past thirty years is a testimony to the fact that International Criminal Justice System is here to stay.

There are definitely signs that this situation in the recent past as well with regards to ICL is changing. For example, following the 2011 spring revolutions in the Middle East and North Africa, Tunisia has joined the ICC, and both Egypt and Qatar are considering being part of it. Palestinian leaders too are aware of the Court's potential to promote justice and peace. Given that Palestine became a state, when it became a member of UNESCO in 2011 and a non-member observer state of the United Nations' General Assembly in 2012, it could either accept the Court's jurisdiction on an ad hoc basis, pursuant to Article 12(3), or apply to become a member of the ICC.[111]

The ICC should be open to discussions with, and respectful of, local justice systems, state institutions and people who live in conflict areas. This is all the more important as people must have confidence in their own legal and political systems. At the 2010 ICC Review conference in Kampala, ICC officials promoted the concept of 'positive complementarity', which is about states assisting one another, and receiving additional support from the Court itself, as well as from civil society, to meet Rome Statute obligations. The ICC must avoid being present where local systems of justice can operate, and it should encourage local and national courts to deal with criminal justice.[112] In order to improve the impact of the ICC, its members have a crucial role to play in supporting the Court to provide international justice. They must create a safe environment for those victims of crime willing to testify at the ICC, and

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[111] *Available at* http://www.guardian.co.uk/world/2012/oct/01/us-warns-europe-palestinians-un (Last visited on 10th May 2015).

[112] O Fiss , *Within reach of the state: prosecuting atrocities in Africa*, 31(1), HUMAN RIGHTS QUARTERLY, 59-69 (2009).

protect them from further violence. States should also help the ICC implement its
arrest warrants, and contribute to the ICC's reparations system for victims of crime.

CHAPTER VI. CONCLUSION

The Jurisprudential evolution of the International Criminal Law Regime from being non–existent and finding its way through divine scriptures into the dealings of the warring parties in the tenth and the eleventh century to being a treaty obligation at the end of the twentieth century has been nothing short of being unprecedented. It started in its rudimentary form with the trial of Von Hagenback in the fifteenth century and continued its slow progress towards the nineteenth century through provisions of instruments that were primarily meant for the purposes of humanitarian law i.e. the Geneva Conventions of the second half of the nineteenth century. The efforts to incorporate provisions regarding atrocities committed during the times of war continued in the wake of the Hague Conventions in the early part of the twentieth century. The large scale of destruction caused due to the World War I saw the world community to take the first step towards the establishment of an international Criminal Tribunal under the auspices of the League of Nations. The idea did not materialise due to a variety of reason like the inherent weakness of the League and the lack of interest of the state due to trust deficit between them. The end of the second World War saw the atrocities of the Axis powers lead to worst violations of the basic human rights of the individuals, although the Allied powers were also responsible for large scale destruction like that in Hiroshima and Nagasaki. The fact that the Allied powers won the war gave them an opportunity to take the persons from the Axis powers to task for their misdeeds. In order to prove that they followed the due procedure they established the International Military Tribunal at Nuremberg and the Tribunal for the far-east in order to prosecute the Perpetrators in Europe and Japan respectively. Although both these tribunals were criticised for delivering *victors justice* especially the Tokyo Tribunal. The charge of *victors justice* without a doubt plagued the legacy of the International Military Tribunal

Nuremberg, but the work done by the IMT set out the importance to punish people who with the authority of the state carry on grave human rights violations outside their state at an international level so as ensure justice without the interference of the state. Immediately after the IMT finished its work, the United Nations with the help of the International law Commission tried to find out the feasibility for the establishment of an International Criminal Court. Despite the hard work put in by the ILC the idea could not fructify due to the onset of the cold war. In the early 1990's some grave human rights abuses in certain parts of the globe along with the end of the cold war led the Security Council to establish Criminal Tribunals in former Yugoslavia and Rwanda to deal with the situations in these particular countries. These Tribunals by virtue of being direct offshoots of the security council lacked the requisite apolitical nature. Although these tribunals were not inherently independent they achieved remarkable success in achieving their mandate of bringing the perpetrators of grave crimes to justice. However unlike the IMT the Tribunals were set up when the conflict was still going thus being open to the accusation of stifling the peace process in the particular regions. These Tribunals left a rich jurisprudential heritage especially the issues relating to the crime of Genocide and the sexual crimes in case of armed conflicts. The success of these tribunals led to the establishment of various tribunals in Lebanon and Sierra Leone which met with moderate or little success. One other very important contribution of these Tribunals was that they led the General Assembly and the community of nations to make another effort at the unfinished business of establishing an International Criminal Court. The idea finally became a reality with the adoption of the Rome Statute in the year 1998 which unlike the ad-hoc tribunals was set up by the Assembly of State Parties and was thus independent of the Security Council except under few instances. The Court did not start working till the year 2003 and has since than has tried and indicted many criminals most of whom unfortunately remain at large fugitives due to the not so developed

enforced mechanism of the court. The Court is still in its nascent stages and to expect it to be as good as ad-hoc Tribunals like ICTY would be unfair as those Tribunal had a very limited mandate. The armed conflicts during the past few decades have shown us that International Criminal Law is the need of the hour. The current system is definitely not the ideal system around, but the system needs not only time but also the constant support of the community of the states to sustain itself through in times where its efforts are not enough.

BIBLIOGRAPHY

LEGISLATIONS

1. Genocide Convention, 1948.
2. The Vienna Convention on Law of Treaties. Universal Declaration of Human Rights, 1948.
3. The United Nations Charter,1945.
4. Universal Declaration of Human Rights, 1948.
5. International Convention on Civil and Political Rights, 1966,
6. International Covenant on Economic Social and Cultural Rights.
7. London charter of International Military Tribunal
8. Statute of International Criminal Tribunal for Yugoslavia,1993.
9. The Rome Statute,2002.
10. Review Conference of the Rome Statute Resolution RC/Res.6 of 11 June 2010.

BOOKS

1. Antonio Casesse, "International Criminal Law" 2nd. Edition (2003) Oxford University Press.
2. Alexander Zahar & Goran Sluiter, "International Criminal Law",(2006) Oxford University Press.
3. Gerhard Werle, " Principles Of International Criminal Law", (2005) T.M.C Asser Press.
4. Illias Bantekas, Susan Nash & Mark Mackeral, "International Criminal Law",(2001) Cavendish Publication Limited.
5. John P. Grant J Craig Barker, "International Criminal Law Deskbook", (2006) Cavendish Publication Limited.

6. Oliver Holmes , "The international Criminal court and Problem of State Soverignty." , (2008) Selected Essays.
7. Wiiliam A. Schabas , " An introduction to international Criminal Court", 4th Edition (2011) Cambridge University Press.
8. William A Schabas and Nadia Bernaz, "Routledge Handbook International Criminal Law", (2011) Routledge London and New York Publishers.
9. Robert Cryes, Prosecuting International Crimes Selectivity And International Criminal Law regime. (1St Edition 2005).
10. Timothy L. H. McCormack, Gerry J. Simpson, The Law of War Crimes: National and International Approaches (First edition 1997).
11. M. Cherif Bassiouni, International Criminal Law 40 (2nd Edition,2012)
12. Telfrod Taylor The anatomy of Nuremberg trials (1st Edition 1992).

ARTICLES

1. Christopher Keith Hall *The first proposal for a permanent international criminal court* INTERNATIONAL REVIEW OF THE RED CROSS, 322 (1998).
2. Manley O. Hudson, *The Proposed International Criminal Court,* 32 (3) THE AMERICAN JOURNAL OF INTERNATIONAL LAW, 549-554 (1938).
3. M.Lippman, *Nuremberg: Forty five years later* Connecticut, JOURNAL OF INTERNATIONAL LAW, 1 (1991).
4. Judge & Murphy, *International Criminal Law: Celebrating its Achievements, Fearing for its Future,* SOUTH TEXAS LAW REVIEW, 55 (2013).
5. Andrew Altman & Christopher Heath Wellman, 115 (1) *A Defense of International Criminal Law ETHICS*, 35-67 (2004).
6. H.H Judge et al, *International Criminal law: Celebrating its achievements, fearing for its future*, 55, TEXAS LAW REVIEW, 307 (2013).

7. Minna Schrag, *Lessons Learned from ICTY Experience,* 2, JOURNAL OF INTERNATIONAL CRIMINAL LAW, 427 (2004).

8. Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49(3) DUKE LAW JOURNAL, 825-853 (1999).

9. Catherine Gegout, *The International Criminal Court: limits, potential and conditions for the promotion of justice and peace*, 34(5),THIRD WORLD QUARTERLY, 800–818 (2013).

10. Vinjamuri & J Snyder, *Advocacy and scholarship in the study of international war crime tribunals and transitional justice*,7, ANNUAL REVIEW OF POLITICAL SCIENCE, 352–356 (2004).

11. L Arbour, Economic and social justice for societies in transition, 40(1), NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS, 1–27 (2007).

12. Allen Buchanan, From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform, 111, ETHICS, 674–75 (July 2001).

13. Atul Bharadwaj, International Criminal Court and the Question of Sovereignty 27(1), STRATEGIC ANALYSIS, (2003).

14. Minna Schrag, Lessons Learned from ICTY Experience, 2, JOURNAL OF CRIMINAL JUSTICE, 427-428, (2004).

15. O Fiss , Within reach of the state: prosecuting atrocities in Africa, 31(1), HUMAN RIGHTS QUARTERLY, 59-69 (2009).