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ASSESSING THE ENFORCEABILITY AND ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW: PLUS OR MINUS?

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ABSTRACT

In the old times, it was common to find customs and agreement among various people around the world containing humanitarian elements, albeit primitive, restricted in application and, perhaps, with rather economic objective. Notwithstanding these limitations, the global pattern demonstrates a mutual understanding of the need to regulate conducts during wars and the common feelings that, at all times, human beings, friends or foes, deserve some level of humane treatment. This article examined the sources of IHL, as precursor to advancing argument on IHL enforceability. This article maintained that IHL is enforceable and substantiates argument using various judicial and non-judicial IHL enforcement mechanisms. This article further examined the extent to which ITs are effective in holding accountable those responsible for grave breaches of the four Geneva Conventions (the 'GCs'). For this purpose, some conflict situations, overtime, around the globe resulting in grave breaches of the GCs and international judicial interventions taken to redress same were considered. Whilst identifying some flaws with the international criminal justice, this article believed that the establishment of the International Criminal Court ('ICC'), as a tool to stamp-out impunity, though fraught with much imperfection, is a step in the right direction. Accordingly, it recommends that the ICC requires more time, support and State co-operation to deliver its mandate of ending impunity.

Keywords: Enforceability; Sources; International Humanitarian Law; International Criminal Tribunals

1. INTRODUCTION

It is commonly believed that international humanitarian law ("IHL") is as old as war itself.[1] Human history is replete with evidence reflecting humanitarian concerns in the conduct

[1] See for instance M Sassoli and others, *How Does Law Protect In War? Cases, Documents and Teaching Materials On Contemporary Practice In International Humanitarian Law* (International Committee of the Red Cross - Geneva, 1999) pp 97-98.

of hostilities.[2] Although imperfect, IHL consists of internationally recognized and enforced legal framework which stands out as a realistic branch of public international law ('PIL'). This is so because IHL does not down-play the inevitability of hostilities but aims, primarily, at mitigating as far as possible human sufferings[3] without undermining the effectiveness of military operations. This, IHL achieves by regulating the methods and means of warfare[4] and anchored on some fundamental, though highly subjective, principles, described as 'military necessity', 'proportionality', 'distinction', 'unnecessary suffering' and 'neutrality'.[5]

To the above extent, IHL, which is otherwise described as jus in bello,[6] is distinct from jus ad bellum.[7] The latter is regulated independently.[8] IHL does not meddle into the justification for going to war but concentrates on how hostilities, once commenced, even by the most justified belligerent, are conducted. IHL, therefore, features some inherent limitations. In that, it does not prohibit the use of force, distinguish according to the purpose of the conflict, but presupposes that parties to an armed conflict ('AC') have rational aims, or prohibit a party to overcome (or even kill) the enemy, and, as such, does not protect all those affected by an AC.[9]

Meanwhile, IHL is akin to human rights law ('HRL') in terms of historical and philosophical undertones. To this extent, both corpuses of laws seem intrinsic and complementary to one another. However, whereas IHL protects military personnel placed hors de combat and non-combatants strictly in time of war, HRL protect individual citizens from government's abuses at all times.[10]

This article is not an inquiry into the history, conceptualization, philosophy, justification or future-validity of IHL but answers questions touching on IHL enforceability and effective enforcement by international tribunals ('ITs'). To achieve this end, this essay is divided into two parts. Part One examines the sources of IHL (the 'SoIHL'), such as international conventions ('Treaties'), customary IHL ('CIHL') and peremptory norms, as precursor to advancing argument on IHL enforceability. This article maintains that IHL is enforceable and substantiates argument using various judicial and non-judicial IHL enforcement mechanisms. Part Two examines the extent to which ITs are effective in holding accountable those responsible for grave breaches of the four Geneva Conventions (the 'GCs')[11]. For this purpose, some conflict situations, overtime, around the globe resulting in grave breaches of the GCs and international judicial interventions taken to redress same will be considered.

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2 See the writing of the Chinese Classic on Military Strategy, Sun Tzu in 'The Art of War' before 500 BC; The Indian Code of Manu, developed between 200 BC and 200 AD; The Spirit of Bushido, Japan of the 12th century; Quran 2:109; Deuteronomy 20:10-14 and 20:19-20; Kings 6:22-23.

3 Whether wounded, sick, shipwrecked, prisoners of war or civilians.

4 See for instance Regulation 22 annexed to the Hague Convention II of 1899 and Hague Convention IV of 1907; Article 35(1) of the Additional Protocol I, to the Geneva Conventions of 12 August 1949, of 1977 (Relating to the Protection of Victims of International Armed Conflicts).

5 For a discussion on these items, see Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons [1996] *ICJ Rep* 226 at pp 257-262.

6 Law applicable during time of war.

7 Law of war (that is whether states can or cannot go to war).

8 See Article 2(4) of the UN Charter on the prohibition of the use of force; see also LC Green, *The Contemporary Law of Armed Conflict* (3rd edition, Manchester University Press – UK, 2008) p 23.

9 See M Sassoli and others, footnote 1, pp 67-68.

10 See Y Beigbeder, *Judging War Criminals: The Politics Of International Justice* (Macmillan – Basingstoke, 1999) pp 16-18; Y Dinstein, *The Conduct Of Hostilities Under The Law Of International Armed Conflict* (2nd edition, Cambridge University Press – UK, 2010) pp 19-21.

11 Geneva Convention I, 1949 on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ('GCI'); Geneva Convention II, 1949 on the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ('GCII'); Geneva Convention III, 1949 on the Treatment of Prisoners of War ('GCIII'); Geneva Convention IV, 1949 on the Protection of Civilian Persons in Time of War ('GCIV').

This article in-between discourse identified some flaws with the international criminal justice (the 'ICrimJ'). It believes that the establishment of the International Criminal Court ('ICC'), as a tool to stamp-out impunity, though fraught with much imperfection, is a step in the right direction. Accordingly, it recommends that the ICC requires more time, support and State co-operation to deliver its mandate of ending impunity. Flowing from the foregoing, discussion will now turn to the sources of IHL.

2. SOURCES OF INTERNATIONAL HUMANITARIAN LAWS

As earlier stated, IHL is a relatively old concept. In the old times, it was common to find customs and agreement among various people around the world containing humanitarian elements, albeit primitive, restricted in application and, perhaps, with rather economic objective.[12] Notwithstanding these limitations, the global pattern demonstrates a mutual understanding of the need to regulate conducts during wars and the common feelings that, at all times, human beings, friends or foes, deserve some level of humane treatment.[13] Modern IHL was born in the middle of the nineteenth century, starting with the humanitarian commitment of Henry Dunant[14] following the Battle of Solferino, 1859.[15] However, codified IHL, in the form of multilateral treaties,[16] occurred in 1864 with the adoption of the first GC.[17] This effort led to two remarkable developments. One, the national Red Cross societies and the International Committee of the Red Cross were established in 1863 and 1864 respectively. Two, it set in motion the necessary mechanism for the conclusion of other GCs.[18] Consequently, the primary IHL Treaties are the GCs, together with the Additional Protocols to the GCs[19] (the 'Geneva Law') and The Hague Conventions[20] concluded in 1899 and in 1907 on the request of Tsar Nicolas II (the 'Hague Law').

In sum, whilst the Geneva Law explores the amelioration of the conditions of victims of ACs and, by the Additional Protocols, extends the protection to civilian population and objects, in international and non-international armed conflicts ('IACs' and 'NIACs') alike,[21] The Hague Law seeks measures to regulate the conduct of hostilities (the means and methods

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12 For instance, the prohibition to poison wells, very common in African traditional law and reaffirmed in modern treaties, was most probably made to prohibit the exploitation of conquered territories rather than to spare the lives of the local inhabitants; and the prohibition to kill prisoners of war, was probably made to guarantee the availability of future slaves rather than to save the lives of former combatants.

13 See M Sassoli and others, footnote 1, pp 97-98.

14 The founding father of the International Committee of the Red Cross.

15 See A Cassese, 'Current Challenges To International Humanitarian Law' in A Clapham and P Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, (1st edition, Oxford University Press - Oxford, 2014) pp 3-4.

16 Unlike national efforts such as the Army Order, No 10, popularly known as Lieber Code of 1863, entitled 'Inst6ructions for the Government of the United States Armies in the Field' signed into law by President Abraham Lincoln, which codified the customary law of land warfare, in the context of the American Civil War.

17 See the Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.

18 That is the Convention of 1929 concerning the Treatment of Prisoners of War; the 1929 Convention on the Wounded and Sick (amending and updating the previous agreement) as well as the four Geneva Conventions of 1949 and the two Additional Protocols of 1977.

19 Additional Protocol I, 1977 to the Geneva Conventions of 12 August, 1949 on the Protection of Victims of International Armed Conflict ('API'); Additional Protocol II, 1977 to the Geneva Conventions of 12 August, 1949 on the Protection of Victims of Non-International Armed Conflict ('APII'); and Additional Protocol III, 2005 to the Geneva Conventions of 12 August, 1949 on the Protection of Victims of Non-International Armed Conflict ('APIII').

20 See The Hague Declarations of 1899 and The Hague Conventions I-XIV, 1907.

21 See Common Article 3 to the GCs.

of warfare). Unlike the Geneva Law, The Hague Law contains 'a general participation clause', which, prima facie, renders it inapplicable in conflicts involving non-party to The Hague Law.[22] However, most of The Hague Law provisions have become declaratory of CIHL, thereby applicable to both party and non-party states alike under CIHL. Meanwhile, modern treaties apply as between states-party to a treaty even if a non-party is also involved in the conflict.[23] This is the approach adopted by the Geneva Law.

With respect to standing the test of time, the Geneva Law, today, remains valid and is virtually of universal application and are generally considered to embody CIHL. Aside its declaratory character, The Hague Law remains complementarily relevant. For instance, Hague Declarations prohibiting the use of dum-dum bullets[24] and reparation by states for violations.[25] Although IHL Treaties have been criticized of being 'one war behind reality' and can only bind States Parties to them,[26] the indisputable fact remains that these Treaties, over the years, have constituted a formidable protective net which considerably have attenuated the devastation of war.[27] They have also served as readily available legal points of reference to belligerents on the conduct of hostilities. However, it should be clearly stated that the rules embedded in these treaties and those of the subsequent treaties,[28] are not completely new, but derived, largely, from customary rules and uses.[29]

CIHL consists of rules which, as a result of consistent and widespread state practice, have become accepted as legally binding (opinio juris)[30]. Although, much of IHL has now been codified in Treaties, important aspects of belligerent activity, especially in maritime warfare, continue to be regulated by CIHL.[31] By the Martens clause, CIHL fills any existing lacuna in IHL Treaties.[32] Moreover, where CIHL rules are codified, they possess declaratory effect only, though binding on state-parties to the treaty. Such CIHL rule remains binding on all states.

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22 A clause stating that a treaty would cease to be binding if a state not party to the treaty became involved in the war.

23 See UK Ministry of Defence, *The Manual Of The Law Of Armed Conflict* (Oxford University Press – Oxford, 2004) p 4.

24 See Hague Declaration III of 1899.

25 See Hague Regulations annexed to Hague Convention IV, 1907.

26 See M Sassoli and others, footnote 1, p 105.

27 See A Cassese, footnote 15, pp 5-6.

28 See for instance Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925; the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, with its Two Additional Protocols, 1954 and 1999; the Convention on the Prohibition of Development, Production, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and On their Destruction, 1972; the Convention On the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques, 1976; the Convention on the Prohibition or Restrictions On the Use of Certain Conventional Weapons Which may be Deemed to be Excessively injurious or to Have Indiscriminate Effects, 1980 with its Protocols I-V, 1980, 1995 and 2003; the Convention On the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, 1993; the Convention On the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997; and the Statute of the International Criminal Court, 1998.

29 See M Sassoli and others, footnote 1, pp 97-98.

30 That is 'a belief that a practice is rendered obligatory by the existence of a rule of law requiring it'. See *North Sea Continental Shelf Cases* [1969] ICJ Rep 3 at p 44.

31 UK Ministry of Defence, footnote 23, p 5.

32 On the Martens Clause see International Court of Justice, The Advisory Opinion on Nuclear Weapons, footnote 5, p 257; *Prosecutor v Furundzija* (ICTY: Trial Chamber, Judgment, 1998); *Prosecutor v Kupreskic et al* (ICTY: Trial Chamber, Judgment, 2000) paras 525-526; *Prosecutor v Martic* (ICTY: Trial Chamber, Judgment, 2007) paras 466-467; the Preambles to Hague Conventions II, 1899 and IV, 1907; Article 1(2) of API; and 1980 Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons; see also A Cassese and others, *International Criminal Law: Cases & Commentary* (Oxford University Press – Oxford, 2011) pp 5-6.

To determine general practice of States, Military manuals containing States' instructions restraining their soldiers' actions, belligerents' statements, including accusations against the enemy of IHL violations and justification for their own behavior, and third-party's statements on the belligerents' conduct and claimed norm in diplomatic fora have to be considered.[33] It is difficult, however, to identify States' general practice resulting in legally binding principles, i.e., CIHL. This is so on a number of grounds. One, States' practices are not uniform or constant but evolving, depending on conflict situations, and always subject to controversy. Two, the manipulative nature of war propaganda makes it virtually impossible to locate the true military objective targeted under various circumstances. Three, it is particularly difficult to determine, from the conducts of individual soldiers, which acts are constitutive of a State's practice.[34] Finally, very few States, generally Western States, have sophisticated military manuals.[35] Therefore, it outrageously defeats the whole essence of CIHL to consider their contents as evidence of States' general practice.

Although CIHL rules may normally be drawn or inferred from judicial decisions,[36] the latter do not constitute primary source of law under International Law ('IL').[37] However, they influence the development of contemporary IL by stating the existence or absence of a particular international standard.[38] To this extent, it may be argued that the decisions of various ITs, from Nuremburg to the ICC, can validly translate to subsidiary SoIHL, at least in prescribing international standards with respect to the laws and customs of war.

This reasoning borrows from the general legal principle inherent in Article 38(1)(C) ICJ Statute. It also holds sway on the premise that, though previous judicial decisions are not binding under IL unless as against the same parties in a latter matter,[39] ITs may be persuaded by the reasoning in previous judicial decisions, whether of the tribunal itself, other ITs or national courts' decisions. The arising question from the foregoing therefore is whether IHL, given its various sources, is enforceable and, if so, how is it enforced? To these questions, discussion will now turn.

3. ARE INTERNATIONAL HUMANITARIAN LAWS ENFORCEABLE?

Unequivocally, the answer to the above question is in the affirmative. This is understandably so at least on the ensuing three distinct, but interwoven, grounds: First, Treaties[40] constitute an important SoIHL. Treaties bind only parties to them and must be observed in good faith.[41] To this extent, every state-party to IHL Treaties has a duty to domesticate same, depending on whether such state is a monist or dualist state, and to ensure compliance with the terms of the treaties. Failure of which may attract state or individual responsibilities.[42] However, whilst some treaties have obtained virtually a universal acceptance, others are far from this reality.[43] Hence, CIHL becomes an indispensable SoIHL.

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33 See M Sassoli and others, footnote 1, pp 108-109.

34 Even though States are responsible for the behaviour of individual soldiers whether or not he acted in conformity with their instructions but this does not imply that such behaviour is also State practice.

35 See M Sassoli and others, footnote 1, p 109.

36 See A Cassese and others, footnote 32, p 13; *Prosecutor v Tadic,* Appeal Chamber Judgment 15 July, 1999, paras 299-292.

37 See a combine reading of Articles 38 (1) (c) and 58 of the ICJ Statute.

38 See I Blishchenko, *International Humanitarian Law,* (Progress Publishers – Moscow, 1987) pp 22-23.

39 See article 58 of the Statute of the International Court of Justice.

40 That is the Geneva Law, Hague Law and other Treaties.

41 See Article 26 of the Vienna Convention on the Law of Treaties, 1969.

42 See for instance Articles 49-51 GCI, Articles 50-52 GCII, Articles 129-131 GCIII, Articles 146- 148 GCIV, Article 91 API and Article 3 Hague Convention IV, 1907.

43 A good example of this is the API to the GCs, 1977.

Second, CIHL provides for minimum standard of universally applicable rules, irrespective of IHL Treaties.[44] Unlike the relative application of treaties, CIHL applies across-board (universally)[45], independent of express states' consent, unless a persistent objector to such rule before it crystallizes as a CIHL.[46] To Cassese, however, it is doubtful whether the position of a persistent objector remains tenable under modern international relations.[47] The difficulty here remains determining what amounts to States' practice. Finally, international crimes ('ICs'), a major category of which war crimes ('WCs'), crimes against humanity ('CAH') and genocide are sub-categorized, have risen to the level of jus cogens.[48] They constitute obligatio erga omnes and are inderogable.[49] The complexity associated with enforcing IHL violations as jus cogens, however, is that, though, the international community ('IC') is agreed on the existence of some fundamental values as jus cogens, they differ as to its extent, identity, significance and consequences.[50]

Notwithstanding the above, certain legal obligations are foisted on states by virtue of the higher status of such crimes. These include the duty to prosecute or extradite, the non-applicability of statutes of limitation, the non-applicability of immunities,[51] the non-applicability of the defence of obedience to superior orders (save as mitigation of sentence), the universal application of these obligation whether in time of peace or war, their non-derogation under states of emergency, and universal jurisdiction over perpetrators of such crimes.[52] It, therefore, follows that IHL is enforceable to the extent that its grave breaches constitute WCs, CAH or genocide.

4. HOW ARE INTERNATIONAL HUMANITARIAN LAWS ENFORCED?

Enforcement of IHL refers to the totality of actions taken to ensure observance of IHL and, in the event of alleged or actual violation, to bring perpetrators to account.[53] Enforcement of IHL involves a wide variety of mechanisms ranging from non-judicial to judicial processes. However, the concept would be limited, in discussion here, to the extent that it does not include preservative measures taken to curtail violation of IHL such as

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44 See R Kolb and K Del Mar, 'Treaties For Armed Conflict' in A Clapham and P Gaeta (eds), footnote 15, p 54.

45 It is acknowledged that CIHL may not always be general in application. It may sometimes be confined to a region or even to the bilateral relations between two states. See for instance the *Case Concerning the Right of Passage Over Indian Territory (Merits)* [1960] ICJ Rep 6 at p 39.

46 See Y Dinstein, 'The Interaction Between Customary International Law and Treaties' (2006) 322 RCADI p 243 at pp 285-287; J Charney, 'The Persistent Objector Rule And The Development of Customary International Law' (1985) 56 *BYIL* p 1; I Bantekas, *International Criminal Law* (Hart Publishing – Oxford and Portland, 2010) p 5.

47 See A Cassese, *International Law* (2nd edition, Oxford University Press – Oxford, 2005) p 162-163.

48 See MC Bassiouni, 'International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice' in A Cassese (ed), *The Oxford Companion To International Criminal Justice* (Oxford University Press – Oxford, 2009) pp 131-142 at p 131; NHB Jorgensen, *The Responsibility of States for International Crimes* (Oxford University Press – Oxford, 2000) pp 85-99.

49 See Article 53 of the Vienna Convention on the Law of Treaties, 1969, UN Doc A/CONF 39/27; see also I Bantekas, footnote 46, p 6.

50 See A Cassese, *International Law,* footnote 47, pp 198-212.

51 See D Akande, 'The Application of International Law Immunities In Prosecutions of International Crimes' in J Harrington and M Milde and R Vernon (eds), *Bringing Power To Justice?* (McGill-Queen's University Press - Montreal & Kingston 2006) pp 47-98.

52 See MC Bassiouni (ed), 'History of International Investigation and Prosecutions' in *International Criminal Law*, Vol III (3rd edition, Martinus Nijhoff Publishers - Leiden, 2008) p 8; A Cassese, *International Law,* footnote 47, pp 205-208.

53 See UK Ministry of Defence, footnote 23, p 412.

dissemination of IHL texts to armed-forces personnel,[54] training of qualified personnel[55] and provision for legal advisers[56] or measures taken to supervise conduct such as third-party surveillance[57] and media publicity.[58]

5. ENFORCEMENT OF IHL: NON-JUDICIAL MECHANISMS

(a) Truth Commissions

Truth commissions ('TCs') are temporary official non-judicial fact-finding bodies set up to investigate an allegation of a pattern of gross HRL or IHL violations over a period of time.[59] Because it is constituted per occasion, every TC is unique.[60] However, central to all their activities are the collection of statements from victims, witnesses and perpetrators, research and investigation into the root causes of the alleged violations, organization of public hearings and outreach programmes and issuance of a final report as a summary of its findings and recommendations.[61] The reports of such inquiries often propose legal action to deal with violations or to prevent their recurrence.[62] Like commissions of inquiry, which would be dealt with anon, concern for personal safety has the potential of deterring vulnerable witnesses from testifying before TCs.[63] Article 90API established an International Humanitarian Fact-Finding Commission (the 'IHFC') as IHL enforcement mechanism. However, the IHFC has been inactive hitherto.[64] Cassese ascribes this flaw to the IHFC's 'complex and cumbersome' nature and 'because substantially, it is a quasi-judicial mechanism designed to intervene only on an ex post basis'.[65]

Moreover, the aftermath of TCs' activities raises other two important questions. One, whether reliance on information collected, under the assurance of confidentiality, by a TC during a subsequent criminal trial does not impinge on the right to presumption of innocence of an accused, given that such accused might have rendered incriminating testimony against himself during the process.[66] Under this circumstance, it is unclear what recourse a prosecutor, a defence counsel or a criminal court could have to such evidence.[67]

Two, there is also the issue whether a TC or other authority in furtherance of the activities or recommendation of a TC can grant amnesties to persons suspected of having committed

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54 See Articles 47, 48, 127, 144, 83 and 19 of GCs I, II, III, IV, API & APII respectively

55 See Article 6(1 & 3) API.

56 See Article 82 API.

57 For ICRC, see Article 11 GCs I, II & III; Article 12 GC IV; Article 5 API; for Protecting Power, see Article 10 GCs I, II & III; Article 11 GC IV; Article 5 API.

58 For materials on the excluded areas, see UK Ministry of Defence, footnote 23, pp 414-415.

59 See N Michel and K Del Mar, 'Transitional Justice' in A Clapham and P Gaeta, footnote 15, p 866.

60 Since the mid-1970s to the present day, about 40 truth commissions have been established. See N Michel and K Del Mar, ibid.

61 See UN Doc HR/PUB/06/1, p 17-20.

62 See UK Ministry of Defence, footnote 23, p 412.

63 See the Report of the Commission of Inquiry into Post-Election Violence, 15 October, 2008, p 9 available at http://www.issafrica.org/15-oct-2008-report-of-the-waki-commission-of-inquiry-into-post-election-violence-in-kenya.

64 See F Kalshoven, *Reflections on the Law of War - Collected Essays* (Koninklijke Brill - Leiden, 2007) pp 835-841; K Erich, 'The International Humanitarian Fact-Finding Commission' (1994) 43 *ICLQ* 174; A Cassese, footnote 15, pp 10-12.

65 See A Cassese, footnote 15, ibid.

66 Some of these concerns may be raised with respect to the dual functioning of the Sierra Leone Truth and Reconciliation Commission and the Special Court of Sierra Leone. To date, there has never been a request made by the Special Court of Sierra Leone for evidence obtained by the Commission on a confidential basis.

67 See N Michel and K Del Mar, footnote 59, p 853; A Bisset, 'Rethinking the Powers of Truth Commission in Light of the ICC Statute' *JICJ* (2009) 7(5) 963-982.

serious ICs. It is settled that a blanket amnesty[68] is unacceptable.[69] This is to discourage impunity by prohibiting amnesties to persons suspected of having committed serious ICs and in line with states' obligation not to derogate from peremptory norms of IL.[70] However, it need be noted that instances abound where amnesties for certain crimes may not only be acceptable but desirable. For instance, in a transitional society, where majority of the population participated in an AC without having committed serious IL, amnesties may be an appropriate mechanism to assist the reintegration of such persons into society in line with Article 6(5) APII. Examples that readily come to mind are the situations in South Africa after the Apartheid Regime, Sierra Leone, Ghana and El Salvador.[71]

(b) Commissions of Inquiry

Like TCs, commissions of inquiry ('CoI') are temporary non-judicial mechanisms the primary purpose of which is truth-seeking and, for our limited purpose, relating to an alleged violation of HRL and IHL violations. The outcome of their work is also a report with findings and recommendations. Unlike truth commissions, CoI are often constrained by time. Consequently, they pay more attention to a general overview of the events and de-emphasize elaborate victims' participation and truth-seeking process.[72] A CoI may be established at the domestic level, by an individual State, or at the international level, typically under the auspices of the United Nations (the 'UN') or any other international organization. The facts revealed by reports of CoI may serve as a basis to initiate criminal investigation and prosecutions or any other judicial processes.[73]

The above point is true of the CoI established in Kenya to probe the Post-2007 Presidential Election Violence,[74] the international CoI on HRL and IHL violations in Darfur, chaired by Late Antonio Cassese[75] and the UN International Independent Investigative Commission established to assist the Lebanese authorities in their investigation of the bombing of 14 February 2005 that resulted in the death of former Lebanese Prime Minister, Rafik Hariri and 22 others.

(c) Reparation of Victims

IHL enforcement may also take the form of demand for or provision of compensation for victims of such violations. It is long-established under IL that a breach of an engagement involves an obligation to make reparation in adequate form.[76] This may also take

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[68] That is amnesties that cover any crime committed in the past.

[69] See the Nuremberg Declaration on Peace and Justice, p 4; *Prosecutor v Furundzija* (supra) at paras 154-157.

[70] See N Michel and K Del mar, footnote 59, p 866; A Cassese, *International Law,* footnote 47, p 208.

[71] See the Nuremberg Declaration on Peace and Justice, footnote 69; *Prosecutor v Furundzija* (supra) at paras 154-157.

[72] See N Michel and K Del Mar, footnote 59, pp 854-856.

[73] See N Michel and K Del Mar, ibid.

[74] This is otherwise referred to as Waki Commission and led to the ICC issuance of Warrant of Arrest against President Uhuru Kenyatta. See *Prosecutor v Francis Kirimi Muthuara, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11, Pre Trial Chamber II, Decision on 'the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute' (23 January 2012).

[75] Recommendations from this commission triggered the UN SC referral of the situation in Darfur to the ICC and on 5 April, 2005, the Office of the Prosecution of the ICC received 2500 items of evidence collected by the commission and the names of persons contained in a sealed envelope that the UN Secretary-General passed on to the OTP from the commission. See Office of the Prosecutor of the ICC, 'First Report of the Prosecutor of the ICC, Mr Luis Moreno Ocampo, To the Security Council Pursuant to UNSCR 1593 (2005)', 28 June, 2005, p 2.

[76] See *Case Concerning the factory of Chorzow* [1927] PCIJ, Series A, No 9, Judgment, p 21.

the form of restitution.[77] Arguably, traditional reparation mechanism only recognizes state reparation[78] and not individual rights directly.[79] On this note, Cassese has vehemently criticized IHL for 'practically failing to secure compensation to victims, particular with respect to rebels, or other non-state organizations, let alone terrorist organizations'.[80] However, the emerging trend under IL is that victims' reparation for grave breaches of IHL may be individual or collective.[81] Therefore, individual victims may directly and successfully claim reparation from a State-Party to IHL Treaties or an individual alleged to have committed grave breaches of IHL.[82] However, the difficulty of determining the means of accessing these claims remains.

There is the option of initiating proceedings before a national court. The impediment here would be that national courts may decline jurisdiction on ground of State Immunity. Though, there is suggestion that 'a State is never entitled to immunity from any act that contravenes jus cogens, regardless of where or against whom that act was perpetrated',[83] it is yet to be seen how individuals would surmount this hurdle.

Although, state immunity may be obstacle to individual victim's claims to reparation against States before national courts, there is no such jurisdictional bar under IL.[84] To this extent, a victim's claim for reparation against a State before International Human Rights Courts ('IHRCs') once domestic remedies have been exhausted may prove useful.[85] Similarly, reparation may rather be sought against an individual perpetrator. In this case, such proceedings can be brought before a national court, IHRCs or other ITs, whether as part of the criminal proceedings against him or a separate civil suit.[86] A major impediment here would be the financial ability of an individual perpetrator to withstand claims from a wide-range of

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77 As contemplated under the ICTY and ICTR Statutes, Article 24(3) and 23(3) respectively.

78 See also the judgment of the ICJ in DRC v Uganda (2005) ICJ Rep, 168; Article 3 of The Hague Convention IV, 1907; Articles 51/52/131/148 respectively of the GCs; and Article 91 API.

79 See RP Mazzeschi, 'Reparation Claims By Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview' *JICJ* (2003) 1(2) pp 339-347 @ 347; N Michel and K Del Mar, footnote 59, p 879.

80 See A Cassese, footnote 15, p 14.

81 For collective reparation, see F Rosefeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92 IRRC pp 731-746.

82 See the perspective under Article 75(1) of the ICC Statute and Rules 94-97 of the Rules of Evidence and Procedure of the ICC; see also discussions on the point by C Muttukumaru, 'Reparation To Victims' in F Lattanzi and WA Schabas (eds), *Essays On The Rome Statute of The International Criminal Court, Vol 1* (Editrice il Sirente – Fagnano Alto, 2000) pp 303-310; A Cassese and others, *Cassese's International Criminal Law* (3rd edition, Oxford University Press – Oxford, 2013) pp 286-288; WA Schabas, *An Introduction To The International Criminal Court* (4th edition, Cambridge University Press – Cambridge, 2011) pp 361-362; K Kittichaisaree, *International Criminal Law* (Oxford University Press – Oxford, 2001) pp 323-324.

83 See Dissenting opinion of Judge Wald of the US Court of Appeal in *Princz v Federal Republic of Germany* [1994] 103 ILR pp 604-621 at pp 612-621; A Gattini, 'War Crimes and State Immunity in the Ferrini Decision' *JICJ* (2005) 3(1) pp 224-242.

84 See the Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', annexed to UN General Assembly Resolution 60/147, 'Basic Principles and Guidelines on the Right to a Remedy', 21 March 2006, para 15; N Michel and K Del Mar, footnote 59, p 879.

85 Relying on Article 41 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedom, 4 November, 1950 and entered into force on 3 August 1953, 213 UNTS 221) and Article 63(1) of the American Convention on Human Rights (American Convention on Human Rights, 22 November, 1969, entered into force on 18 July, 1978, 1144 UNTS 123.

86 See Article 75(2) ICC Statute; C Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations', *LJIL* (2002) 15(3) pp 667-686.

victims in the event of a mass violation.[87] With respect to cases where individual perpetrators are genuinely unable to provide reparation to their victims, MC Bassiouni, former Special Rapportuer to UN Commission on Human Rights rightly recommended that the state should intervene to provide the requisite reparation.[88] Though, there is no obligation on the state to do so.[89] Finally, victims' reparation may be championed through mechanisms established at the international level with the assistance of the UN.[90] An example that readily comes to mind is the good work of the UN Compensation Commission[91] after the Security Council (the 'SC') established that Iraq was liable for injury caused by Iraq's unlawful invasion and occupation of Kuwait. Similarly, victim reparation may be voluntarily pursued by the State, such as Germany's effort to compensate victims of the Holocaust.[92]

(d) Reprisals By An Aggrieved State

Reprisals are extreme measures taken by an aggrieved State to compel an adversary to comply with IHL.[93] Reprisals are not retaliatory acts or acts of vengeance. They usually consist of unlawful acts that only become lawful because they are in response to a delinquency by another State.[94] However, to be valid, a reprisal action must only be taken, proportionately and by the appropriate authority of the aggrieved State, in response to serious and manifest violation of IHL rules by an adversary, after repeated caution to the adversary to desist from violation, including exploring other reasonable measures, and reasonable notice that reprisals are imminent.[95] They must not be in violation of IHL rules.

A major challenge with this means of enforcement is that because the assessment of IHL violation, per case, is subjective to the acclaimed aggrieved party, it may enable more powerful States to hit more vulnerable adversary indiscriminately after orchestrating enough propaganda through the media. Again, it is unlikely to locate a reprisal action that would not be in violation of IHL as innocent civilian population and objects are, most often than not, the victims of the circumstance.

(d) National Administrative Controls

Sometimes, States may take administrative steps to check or curtail the excesses of (or even to discipline) members of its armed forces. This may include, among other control measures, dismissal, court-marshalling, deprivation of service benefits, etc. For instance, on 27 January, 1998, the Argentinean government stripped Alfredo Astiz of his rank of retired captain, his uniform and naval pension for his involvement in and subsequent glorification of the horrors of the 'Dirty War' of the 1970s.[96]

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87 For instance, in Bemba Gombo's trial (*Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08)), victims were well over 1000 persons.

88 See UN Commission of Human Rights, Final Report of the Special Rapportuer, Mr MC Bassiouni, 'The Rights To Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms', 18 January, 2000, UN Doc E/CN 4/2000/62, p 10, para 18; see also the Basic Principles and Guidelines, footnote 84, para 16.

89 See N Michel and K Del Mar, footnote 59, p 882.

90 *Ibid*, p 881.

91 The Commission was created in 1991 as a subsidiary organ of UN SC Resolution 692 of 20 May 1991 and pursuant to Resolution 687 of 3 April 1991.

92 See N Michel and K Del Mar, footnote 59, p 881.

93 See UK Ministry of Defence, footnote 23, p 420; A Cassese, *International Law,* footnote 47, p 299.

94 See A Cassese, *Ibid*.

95 See UK Ministry of Defence, footnote 23, p 421.

96 *Ibid*, p 412.

However, the difficulty often associated with this means of enforcement stems from the lack of political will of States to accept the reality of its officers' wanton violation of IHL, unless in extreme circumstances, as to subject them to such disciplinary measures. It is on record that the United States of America **('USA')** does not prosecute its peace-keeping forces for WCs.[97]

(e) Sundry Enforcement Mechanisms

Aside the foregoing, other non-judicial measures to compel compliance to IHL rules exist. These include, but not limited to, third-party intervention, peaceful or forcible, to compel a delinquent party to desist from IHL violation, such as Good Office, mediation, conciliation, etc. At its peak, such intervention may result in imposing international sanctions against the delinquent State. In this regard, interventions, forcible or otherwise, are most effective where championed by more powerful international organizations, such as the UN, or powerful State, such as the USA.

The challenge emanating there-from is the propensity of such powerful States only intervening against their foes and in favour of their allies. For instance, despite serious breaches of IHL alleged against Syria and Israel, the international community, and, particularly, 'the World's Police Countries' led by the USA, seem less perturbed.

This selective enforcement, it is humbly submitted, undermines and, perhaps, ridicules the humanitarian value of these mechanisms. Perhaps, specific obligation on States to act in the event of alleged commission of grave breaches of IHL by belligerents and without discrimination may prove useful in this regard.

6. ENFORCEMENT OF IHL: JUDICIAL MECHANISMS

(a) National Prosecution

States have an obligation under IL to investigate IHL or HRL violation, to ensure that perpetrators are prosecuted and punished and to provide victims with adequate remedies.[98] This, a State can achieve through its courts[99] or those of the countries where the perpetrators committed the crimes or are detained. However, it is unlikely that a government that has authorized or permitted abuses constituting IHL or HRL violation will allow its courts to punish the perpetrators. This explains the eventual celebration of impunity in certain quarters[100] as perpetrations end up being granted amnesties as compromise to national reconciliation and justice.[101] Unfortunately, such impunity cannot lead to reconciliation or civil peace. It only threatens the people's belief in a democratic society, creates disrespect for

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[97] See TW Pittman and M Heaphy, 'Does the United States Really Prosecute Its Service Members For War Crimes? Implications For Complementarity Before The International Criminal Court' *LJIL* (2008) 21(1) p 165-183 at p 167.

[98] See Y Beigbeder, footnote 10, p 125.

[99] For instance, the Iraqi Special Tribunal constituted to try Saddam Hussein for war crimes and crimes against humanity committed. It is also on record that between 27 June and 3 September 1968, 3 officers of the Nigerian Army were court-marshaled, sentenced to death and executed by firing-squad at Benin-City and Port-Harcourt for killing civilians and a rebel Biafran soldier placed *hors de combat*. See New Nigeria, 28 June, 1968, p 1; Daily Times - Nigeria, 3 September, 1968, p 1; Daily Times – Nigeria, 4 September, 1968, p 1.

[100] For instance, there were the Armenian genocide during World War I, the massacres in the USSR from 1917-1950s, the 1965 massacres in Indonesia etc.

[101] For instance, on 14 June 1995, the Peruvian Congress proclaimed a general amnesty to all the members of the military and police who had been the object of a complaint of an inquiry, indictment, trial or condemnation.

laws, promotes collective rebellion against the leaders and individual revenge.[102] MC Bassiouni, acting as UN chief investigator in former Yugoslavia, had maintained that '[t]here cannot be peace without justice. When people feel aggrieved, they cannot reconcile'.[103]

(b) International Adjudication of Dispute

As earlier noted, traditionally, liability of individual soldiers on the battle-field is borne by their states, just as reparation only recognizes states.[104] This is due to the long-standing recognition of states alone as subjects of IL. To this extent, the International Court of Justice served the adjudicatory role of determining liability of states for IHL violation by their armed-forces.[105] Whilst this might have worked well at some point, it only represents a collective responsibility for such crimes alleged. Hence, it fosters impunity. This explains, as we will soon see, the new trend in recognizing individuals as subjects under IL and to hold them individually responsible for crimes they perpetrated during the course of IACs or NIACs.[106]

(c) International Criminal Tribunals

Arguably, the earliest attempt at setting up international tribunals to prosecute individuals for violation of IHL is traceable to the aftermath of World War I ('WWI'). Today, there is a permanent international criminal court (the 'ICC') mandated to bring an end to impunity. The process toward the eventual attainment of this goal was gradual and circumstantial. It started with abortive earlier attempts, the establishment of the Nuremberg and Tokyo International Military Tribunals (the 'NIMT' and 'TIMT' respectively), the establishment of two ad hoc ITs and other hybrid criminal courts, i.e., the International Criminal Tribunals for the former Yugoslavia and Rwanda (the 'ICTY' and 'ICTR' respectively) and Sierra Leone, Cambodia and East Timor.[107] This segment of the essay will serve dual-purpose, first, as a judicial mechanism for IHL enforcement and, second, in evaluating the extent to which ITs have held perpetrators of grave breaches of IHL accountable.

(d) The Treaty Of Versailles And The Leipzig Trials

Following the outrage caused by the atrocities committed by the vanquished powers, in particular Germany, during WWI, the victors, i.e., the Allied States ('Allies'),[108] were provoked to set an example to forestall future occurrence.[109] As a start-point, the Treaty of Versailles was concluded. It provided for a special tribunal and the punishment of leading figures responsible for the offence against international morality and the sanctity of treaties.[110]

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[102] See Y Beigbeder, footnote 10, pp 125-126.
[103] Cited in Y Beigbeder, *ibid*, p 125.
[104] See the judgment of the ICJ in DRC v Uganda (2005) ICJ Rep, 168; Article 3 of the Hague Convention IV, 1907; Articles 51/52/131/148 respectively of the GCs; and Article 91 API.
[105] On the role of the ICJ in dispute resolution, see JG Merrills, *International Dispute Settlement* (5th edition, Cambridge University Press – Cambridge, 2011) pp 116-161; see also NHB Jorgensen, footnote 48, pp 208-229.
[106] For further reading on this, see NHB Jorgensen, footnote 48, pp 151-157.
[107] See A Cassese and others, footnote 82, pp 253-270.
[108] Comprised chiefly of the USA, Great Britain, France, Italy and Japan.
[109] See A Cassese and others, footnote 82, p 253.
[110] See articles 227-230 of the Treaty of Versailles, 1919; LS Sunga, *Individual Responsibility in International Law for Serious Human Right Violations* (Martinus Nijhoff - Dordrecht/Boston/London, 1992) pp 22-23.

However, the Netherlands, where the former German Emperor (Wilhelm II) had taken refuge, refused to extradite him chiefly because the Netherlands was not a signatory to the Treaty of Versailles and the crimes for which the Emperor was charged was unknown to the Dutch Law.[111] With respect to prosecuting German military personnel alleged to have committed war crimes, no international court was set up nor were they tried by courts of the Allies.[112] Out of the 895 Germans originally listed for trial, the Allies, subsequent to German proposal to try the indictees, short-listed only 45 cases for prosecution.[113] In 1921, 12 cases were brought to trial before the German Supreme Court. Eventually, only 6 persons were convicted and sentenced to terms of imprisonment ranging from 2 months to 4 years.[114] To this extent, the Versailles' attempt was flawed and ineffective, hence abortive. Moreover, it was too obvious that the trials were victors'-imposed-justice and exuded inklings of partiality from the outset. Also, the charge against Wilhelm II under article 227 was clearly political rather than of a criminal character based on IHL.

Further, aside Wilhelm II, the Versailles' attempt failed to prosecute other leading figures comprised of generals and admirals. Finally, the eventual trials at the German Supreme Court were 'to fulfill all righteousness' as against 'prosecuting war criminals for outrageous atrocities committed'. Notwithstanding the above, the Versailles' attempt was laudable for its significant precedents to ICrimJ. It set in motion the campaign for an international organ of criminal jurisdiction. It also preserved the high premium placed on state sovereignty and Head of State immunity under IL at the time.

7. THE NUREMBERG & TOKYO INTERNATIONAL MILITARY TRIBUNALS

After World War II ('WWII'), an IT, eventually, judged and sentenced high-level politicians and senior military officers for their varying responsibility in the commission of various atrocities during WWII, for the first time.[115] This significant innovation followed the abortive attempts to bring war criminals to justice after WWI and the unveiled mass atrocities perpetrated by the Nazis before and after WWII, which created horror[116] and an urge for revenge and punishment.[117] In August 1945, the Allies convened the London Conference to decide the means by which the world would punish high-ranking Nazi war criminals. The resultant charter established the NIMT to prosecute individuals for crimes against peace, WCs and CAH. In effect, however, only high-level German officials were tried in Nuremberg. With respect to low-ranking officials, the Allies prosecuted them through their courts sitting in their respective zones of occupation.[118] The NIMT met from 14 November 1945 to 1 October 1946.

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[111] See A Cassese and others, footnote 82, pp 253-254; Y Beigbeder, footnote 10, pp 27-28.

[112] As was envisaged under articles 228-230 of the Treaty of Versailles.

[113] See C Mullin, *The Leipzig Trials – An Account of the War Criminals and A Study of German Mentality* (Witherby Press – London, 1921) p 27; A Cassese and others, footnote 82, p 254; Y Beigbeder, footnote 10, pp 27-29.

[114] See A Cassese and others, footnote 82, p 254; Y Beigbeder, footnote 10, pp 27-29.

[115] See Y Beigbeder, *ibid*, p 27.

[116] In his testimony of 15 April 1946 before the Nuremberg Tribunal, Rudolf Hoess, a commandant of the Auschwitz concentration camp from May 1940 to December 1943, revealed that 'at least 2, 500, 000 Jews were executed by gassing and burning, and at least another half million succumbed to starvation and disease, making about 3, 000, 000'. It is now estimated that 5, 100, 000 persons were murdered between 1941 and 1945 at the instigation of the Nazi power for the only reason that they were Jews. Also, it is estimated that 10 million Chinese died as a result of Japanese invasion, most of whom were civilians. See Y Beigbeder, footnote 10, pp 30-31, 52.

[117] See Y Beigbeder, *ibid*, p 27.

[118] Pursuant to the Control Council Law No 10.

Similarly, by the Potsdam Declaration in 1945, the Allies announced their intention to prosecute leading Japanese officials for the same crimes.[119] This birthed the Tokyo Charter, which established the Tokyo International Military Tribunal (the 'TIMT').[120] By and large, the Tokyo Charter was modeled on the Nuremberg Charter. However, differences existed between both texts with particular reference to their provisions on the structure of the tribunals and the charges that could be preferred against defendants.[121] The TIMT trials lasted for two-and-a-half years and have been a subject of much controversy. Some believe that the trials were a vehicle of vengeance for the Japanese attack on Pearl Harbor in Hawaii on 7 December, 1941, without declaration of war.[122] Others have criticized the charter as ex post facto legislation, as the crimes proscribed therein did not exist in IL prior to 1945.[123]

The NIMT and TIMT supplemented the military and national tribunals established by the authorities of the Allies.[124] The NIMT and TIMT trials were designed to render tragic historical phenomena plainly visible and to set the records right for posterity.[125] This was made possible by the strong support provided by the USA. Whereas, the Versailles' experience showed the extent to which ICrimJ can be sacrificed on the altar of political expedience, the NIMT and TIMT experiences revealed conversely, how effective it could be when there is political will and the necessary resources to prosecute war criminals.[126] The NIMT and TIMT experience is also remarkable on other grounds. First, they deviated from the monopoly over criminal jurisdiction, common-held state/collective responsibility by recognizing individual criminal responsibility of war criminals and expounded new crimes. Second, they broke the genes of prosecuting only servicemen and low-ranking officers as both tribunals prosecuted high-profile politicians and military officials for the first time.[127] Finally, the NIMT and TIMT charter and case law contributed immensely to the development of core principles of IHL. For instance, they eliminated the defence of obedience to superior orders.

However, the NIMT and TIMT trials, like the Versailles' experience, were one-sided and imposed a victors' justice over the defeated. Also, the NIMT and TIMT were not independent but judicial bodies, with judges and prosecutors, acting as organs common to the appointing states.[128] Further, unlike the NIMT's, the TIMT charter lacked the substance and form of a multilateral and freely negotiated agreement among the Allies as it was promulgated, without prior consultation with other Allies, as an American executive order by the American Supreme Commander for the Allies in Japan.[129]

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[119] See Articles 6 and 10 of the Declaration.

[120] Some of the Allied States in the Pacific theatre prosecuted the Japanese for war crimes under their respective military laws. See RJ Pritchard, 'War Crimes Trials in the Far East' in R Bowring and P Kornick (eds), *Cambridge Encyclopedia of Japan* (Cambridge University Press – Cambridge, 1993) p 107.

[121] For more on the differences, see BVA Roling and A Cassese, *The Tokyo Trial And Beyond* (Polity Press – Cambridge, 1993) p 2.

[122] See A Cassese and others, footnote 82, p 257.

[123] See BVA Roling and A Cassese, footnote 121, pp 3-5.

[124] The USA and UK, in particular, established military courts in their zones of occupied Germany and Italy. In Belgium, France, Holland, Norway, Czechozlavia, Poland, Yugoslavia and some other countries, national tribunals pronounced sentence upon war criminals surrendered by virtue of arrangements made by the United Nations War Commission, an important inter-Allied body set up by a diplomatic conference in October, 1943.

[125] See A Cassese and others, footnote 82, p 256.

[126] See A Cassese and others, *ibid*, p 257.

[127] For a list of high-profile defendants prosecuted by the NIMT and TIMT, see Y Beigbeder, footnote 10, pp 35-38 and pp 56-60 respectively.

[128] See A Cassese and others, footnote 82, pp 257-258.

[129] See A Zahar and G Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press – Oxford, 2008) p 5.

Meanwhile, the USA's indiscriminate use of atomic bombs in Hiroshima and Nagasaki continues to ring a bell, particularly, in the minds of Japanese, as a blatant, unacknowledged and unpunished WC.[130] Again, the later discovery that the USA had secretly bargained with and granted amnesty to the leaders of Unit 731[131] is an affront to human rights concern and qualifies the USA as a 'belated accomplice to a particularly odious' WC and CAH.[132]

8. THE TWO ADHOC TRIBUNALS: ICTY AND ICTR

The period following the Cold War is characterized by the establishment of ITs empowered to prosecute and punish serious breaches of IHL. This is so because, for the first time after the UN was founded, the IC experienced a sense of outrage only similar to that created by the WWII. The conflicts that erupted in the former Yugoslavia, particularly in Bosnia and Herzegovina, and Rwanda, and the consequent massacres that took place, served to ignite these feelings.

The response of the IC to both conflicts was 'tardy and lukewarm'.[133] Hence, the establishment of the ICTY[134] and the ICTR[135] served as a 'belated face-saving measure'.[136] This belated initiative was to reaffirm the stand of the IC to foster global peace and security. The ICTY and the ICTR, therefore, were to ensure that such violations of IHL were halted and effectively redressed and with the sincere objective to deter future occurrence. Accordingly, by their mandates, the ICTY and ICTR were empowered to exercise jurisdiction over grave breaches of the GCs, and in the case of Rwanda, Article 3 common to the GCs and of APII, violations of the laws and customs of war, genocide and CAH allegedly perpetrated in the former Yugoslavia, since 1 January, 1991, and Rwanda between 1 January and 31 December 1994.

The establishment of these tribunals was welcomed with much criticism. First, the trials were only face-saving measures taken by the IC, and accordingly, highly politicized. Second, the SC lacked the competence to establish ad hoc tribunals under its powers to maintain global peace and security. Third, the granting of primacy to the tribunals over national courts was unlawful. Fourth, in the case of ICTY, most of the crimes under its jurisdiction relate to IACs and not NIACs. Finally, the action of the SC was prejudicial as it is selective in administering justice.[137] Whilst it is not in doubt that setting up the tribunals was face-saving to the IC, the courts have consistently held, on objections to their jurisdiction, that the SC has the competence to take all measures necessary to promote global peace and security, including setting up ad hoc tribunals, if need arises.[138]

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130 See Y Beigbeder, footnote 10, p 74.

131 The Unit 731 was the Japanese army's principal bacteriological warfare research and experimentation organization, classified as top secret of the Japanese military, led by Army Medical Lieutenant General Ishii Shiro and officially designated as a 'Water Purification Unit'. The facility was the site of experiments aimed at developing and testing bacteriological agents and means of delivering them as weapons of war. This entailed the use of live human beings as experiment animals by exposing them to various diseases.

132 See Y Beigbeder, footnote 10, p 75.

133 See Cassese and others, footnote 82, p 259.

134 The ICTY was established, pursuant to the powers of the Security Council under chapter VII of the UN Charter, through **UNSC** Resolution 827 of 25 May, 1993.

135 The ICTR was established, pursuant to the powers of the Security Council under chapter VII of the UN Charter, through UNSC Resolution 955 of 8 November, 1994.

136 See Cassese and others, footnote 82, p 259.

137 See Cassese and others, *ibid*, p 260.

138 See *Prosecutor v Tadic* (IT-94-1) Trial Chamber Decision On The Defence Motion On Jurisdiction, 10 August, 1995, paras 1-40.

Similarly, the courts had upheld the legality of its primacy over national courts on ground that the primacy was necessary to forestall forum shopping or fake proceedings.[139] They have also maintained that the conflicts that erupted in the former Yugoslavia qualified both as IAC and NIAC.[140] With respect to the criticism on selective justice, to Cassese:

> '… such justice, however objectionable, is better than no justice at all... As long as an international criminal court endowed with universal jurisdiction was lacking, the establishment of ad hoc tribunals proved salutary'.[141]

Though, both tribunals have been faulted for being slow, very costly in dispensing justice, subject to the whims of the UN, as they were created as UN subsidiary organs,[142] and other flaws associated with prosecuting the alleged crimes from afar.[143] They, however, have proved quite effective in holding accountable a number of perpetrators of grave breaches of the GCs in former Yugoslavia and Rwanda, high and low-ranking officials alike.[144] They also provided for restitution of victims' properties and victims' compensation.[145] In the latter situation, a victim is subjected to further rigour of proving his claims before a national court.[146] Currently, as completion strategies, plans are underway to transfer the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR to an International Residual Mechanism for Criminal Tribunals (the 'Residual Mechanism').[147] The ICTY and the ICTR wings of the Residual Mechanism were billed to have commenced function in 2013 and 2012 respectively. As far as IHL enforcement is concerned, the Residual Mechanism is laudable as it takes care of the possibility of letting unprosecuted perpetrators of grave breaches of GCs during the conflicts in the former Yugoslavia and Rwanda off the hook in the name of wounding up the activities of the tribunals.

9. INTERNATIONALIZED OR MIXED COURTS

Following other conflict situations around the world and the consequential atrocities and violations of the GCs and the laws and customs of war committed, the UNSC took similar

[139] See *Prosecutor v Tadic, ibid,* paras 41-44.

[140] See *Prosecutor v Tadic* (IT-94-1) Appeal Chamber Judgment, 15 July, 1999, paras 88-97; see also *Prosecutor v Tadic, ibid,* paras 45-83.

[141] See Cassese and others, footnote 82, p 260.

[142] See A Zahar and G Sluiter, footnote 129, p 9.

[143] For further discussion on drawbacks of both tribunals, see F Pocar, 'The International Criminal Tribunal for the Former Yugoslavia' in R Bellelli (ed), *International Criminal Justice: Law and Practice From The Rome Statute To Its Review* (Ashgate Publishing – UK, 2010) pp 67-77; E Mose, 'The International Criminal Tribunal for Rwanda' in R Bellelli (ed), *International Criminal Justice: Law and Practice From The Rome Statute To Its Review* (Ashgate Publishing – UK, 2010) pp 79-99.

[144] Some of the cases handled by both tribunals are *Prosecutor v Akayasu, Jean* (ICTR-96-4); *Prosecutor v Bagaragaza, Michel* (ICTR-05-86); *Prosecutor v Bagilishema, Ignace* (ICTR-95-1A); *Prosecutor v Bagosora et al (Military 1)* (ICTR-98-41); *Prosecutor v Bikindi, Simon* (ICTR-01-72); *Prosecutor v Basengimana, Paul* (ICTR-00-60); *Prosecutor v Bizimungu et al (Government II)* (ICTR-99-50); *Prosecutor v Aleksovski* (IT-95-14/1); *Prosecutor v Babic* (IT-03-72); *Prosecutor v Banovic* (IT-02-65/1); *Prosecutor v Blagojevic & Jokic* (IT-02-60); *Prosecutor v Blaskic* (IT-95-14); *Prosecutor v Bobetko* (IT-02-62); *Prosecutor v Boskoski & Tarculovski* (IT-04-82); *Prosecutor v Bralo* (IT-95-17); *Prosecutor v Brdanin* (IT-99-36); *Prosecutor v Cesic* (IT-95-10/1); *Prosecutor v Delic* (IT-04-83); *Prosecutor v Deronjic* (IT-02-61); *Prosecutor v Dokmanovic* (IT-95-13a). For a comprehensive list of indictees and convicts, see cases on www.ICTY.org and www.UNICTR.org.

[145] See Rules 105-106 and 104-105 of the Rules of Evidence and Procedure of the ICTY and ICTR respectively.

[146] See Rule 106, *ibid*.

[147] The Residual Mechanism was established by UNSC Resolution 1966.

steps to establish other ad hoc tribunals, mixed with national and international elements in terms of structure and jurisdiction.

In this regard, the UNSC established, among others, the Special Court for Sierra Leone,[148] East Timor Special Panel for Serious Crimes,[149] the Extraordinary Chambers in the Courts of Cambodia,[150] the War Crimes Chamber of Bosnia, Special Court of Kosovo[151] and the Special Tribunal of Lebanon[152] to judge and punish perpetrators of grave breaches of the laws and customs of war, CAH, violations of common Article 3 to the GCs and APII and, where appropriate, some national offences committed during the various conflicts specified by the enabling instruments.

By their unique characteristics, these courts aim at improving on the ICTY and ICTR legacies. They tend particularly to bridge the gaps of expediency and efficiency of the trying tribunals, reduce cost of conducting trials drastically and bring prosecution closer to the victims and territories where the crimes were alleged to have been committed. To some considerable extent, these courts have proved effective in discharging their mandates.[153]
However, the courts had to contend with the practical problems of dealing with their conflicting national and international components. There are also the problems of financing this piece-meal dispensation of justice in various countries and other security concerns.

10. THE INTERNATIONAL CRIMINAL COURT

Whereas, the earlier discussed ad hoc tribunals and internationalized courts were limited both temporally and geographically to the varying conflicts for which purposes they were established to address, their laudable achievements motivated the IC to establish the ICC, a permanent judicial organ with global jurisdictional reach and institutional independence, to punish very serious crimes 'and thus potentially able to respond to violations occurring anywhere'.[154] Therefore, the core objective of the ICC is to bring an end to impunity globally.[155] The ICC was created by a treaty, the ICC Statute, and which came into force on 1 July 2002. The legal implication of this, like any other treaty obligation, is that it only binds parties to the treaty.[156] The treaty, however, cleverly conferred powers on the SC to refer cases to the ICC under its charter-based powers. Accordingly, cases could be referred to the ICC by a State Party, the SC or the Prosecutor *proprio motu.*[157]

Unlike its predecessors, the ICC exercises a complementary jurisdiction to those of national courts and its jurisdiction can, therefore, only be triggered where national justice fails or such State is unwilling or unable genuinely to prosecute the alleged crime.[158] The ICC has

[148] It was established through UN SC Resolution 1315 (2000).
[149] It was established by section 10 of the UNTAET Regulation 2000/11 (as amended by REGULATION 2001/25).
[150] It was established through an Agreement signed between the UN and the Cambodian Government in 2003 and amended in 2004.
[151] It was established through UNMIK Regulation 2000/64 of 15 December, 2000.
[152] It was established through UN SC Resolution 1757 (2007).
[153] For instance, the Special Court of Sierra Leone tried the former President of Liberia, Charles Taylor for WCs perpetrated under his watch during the Liberian conflict.
[154] See A Cassese and others, footnote 82, p 262.
[155] See paragraph 5 of the Preamble to the ICC Statute.
[156] See BB Jia, 'The International Criminal Court and Third States' in A Cassese (ed), *The Oxford Companion To International Criminal Justice* (Oxford University Press – Oxford, 2009) pp 160-167 at pp 160-161; See D Akande, 'The Jurisdiction Of The International Criminal Court Over Nationals Of Non-Parties: Legal Basis And Limits' *JICJ* (2003) 1(3) p 618 at pp 618-619.
[157] See Article 13 of the ICC Statute.
[158] See paragraphs 6 and 10 of the Preamble, Articles 1 and 17 ICC Statute. See G Hafner and others, 'A Response To The American View As Presented By Ruth Wedgwood' *EJIL* (1999) 10(1) p 108 at pp 115-116; L Yang, 'On The Principle Of Complementarity In The Rome Statute Of The International

jurisdiction over individual nationals of States alleged to have committed the crime of genocide, CAH, WCs and the crime of aggression and over which the ICC has jurisdiction under Article 12 ICC Statute.[159] The ICC Statute is so elaborately drafted to cover wide-range of WCs associated with violations of IHL both in IACs and NIACs.[160] To this extent, the ICC currently serves as a potent platform to punish IHL violations anywhere in the world.[161]

The immediate point above holds true of the barrage of cases that have come up for prosecution before the ICC[162] and others that were on the waiting list at a time.[163] To some considerable extent, the ICC has been very efficient, effective and transparent in holding war criminals accountable for IHL violation.[164] Also, the ICC Statute provides elaborately for victims' participation in trials and their adequate reparation, thereby maintaining a perfect equilibrium between justice and peace.[165] However, criticisms abound that the ICC indulges in selective justice. This is so because all cases so far before the ICC are African-based and it becomes worrisome whether the agenda of ending impunity is on Africa and not the rest of the world. It has also been criticized on the basis that the powers conferred on the SC have been largely politicized in that they are exercised in bringing cases of foes, as against friends, before the ICC. Moreover, the prosecutor is believed to wield too much power than required for dispensing ICrimJ. Finally, the fact that the ICC is not saddled with universal jurisdiction, a compromise intended to favour the major powers, chiefly the USA, is a drawback to its

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Criminal Court' *Chinese JIL* (2005) 4(1) p 121 at pp 121-124; D Akande, 'The Effect Of Security Council Resolutions And Domestic Proceedings On State Obligation To Co-operate With The ICC' *JICJ* (2012) 10(2) p 299 at p 300*;* DDN Nsereko, 'The ICC And Complementarity In Practice' *LJIL* (2013) 26(2) pp 427-447 at p 428.

159 See combined reading of Articles 5-8*bis* and 12 of the ICC Statute.

160 See Article 8 of the ICC Statute.

161 See C Kreb, 'The International Criminal Court As A Turning Point In The History of International Criminal Justice' in A Cassese (ed), *The Oxford Companion To International Criminal Justice* (Oxford University Press – Oxford, 2009) pp 143-159; see also SR Ratner and JS Abrams, *Accountability For Human Rights Atrocities In International Law: Beyond The Nuremberg Legacy* (Oxford University Press – Oxford, 2001) pp 343-345.

162 Such as the Ugandan, DRC, CAR, Mali situations have been referred to the ICC by the States involved, while the situations in Darfur and Libya have been referred to the ICC by the Security Council.

163 For example, the situations in Georgia, Afghanistan, Guinea and Palestine. For further reading on this, See Report of the ICC, UN Doc A/64/356, paras 44-51.

164 For a comprehensive list on persons prosecuted by the ICC, see the ICC official website, www.icc-cpi.int. See for instance Judgment pursuant to Article 74 of the Statute, *The Prosecutor v Lubanga Dyilo* (ICC-01/04-01/06-2842), Trial Chamber 1 (14 March 2012); Decision on sentence pursuant to Article 76 of the Statute, *The Prosecutor v Lubanga Dyilo* (ICC-01/04-01/06-2901), Trial Chamber 1 (10 July 2012). Mr Lubanga was convicted as charged and committed to 14years imprisonment less time spent in detention from 16 March 2006. See also Decision establishing the principles and procedures to be applied to reparation, *The Prosecutor v Lubanga Dyilo* (ICC-01/04-01/06-2904) Trial Chamber 1 (7 August 2012); See Judgment rendu en application de l'article 74 du Statut, *The Prosecutor v Germain Katanga* (ICC-01/04-01/07-3484), Trial Chamber II (7 March 2014); Decision relative a'la peine article 76 du Statut, *The Prosecutor v Germain Katanga* (ICC-01/04-01/07-3484) Trial Chamber II (23 May 2014). Mr Katanga was committed to 12years imprisonment upon conviction for war crimes and crime against humanity. See comments on this case in C Stahn, 'Justice Delivered Or Justice Denied?' *JICJ* (2014) 12 (4) p 809; See Judgment pursuant to Article 74 of the Statute, *The Prosecutor v Ngudjolo Chui* (ICC-01/04-02/12-3) Trial Chamber II (18 December 2012), the ICC handed down its second judgment in this case with an acquittal of the defendant; other cases are *The Prosecutor v Sylvestre Mudacumura* (ICC-01/04-01/12); *The Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08); *The Prosecutor v Joseph Kony, Vincent Otti and Okot Odhiambo* (ICC-02/04-01/05); *The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* (ICC-02/05-01/07); *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (ICC-02/05-01/09); *The Prosecutor v Uhuru Muigai Kenyatta* (ICC-01/09-02/11); *The Prosecutor v Saif Al-Islam Gaddafi* (ICC-01/11-01/11);*The Prosecutor v Simone Gbagbo* (ICC-02/11-01/12); *The Prosecutor v Laurent Gbagbo and Charles Ble Goude* (ICC-02/11-01/15) etc.

165 See Articles 68 and 75 thereof.

essence of existence.[166] This is worsened by the reality that a good number of countries are yet to ratify the Statute.

Notwithstanding the above, it need be noted, finally, that the ICC appears to be the best ICrimJ has, so far, been able to offer. It has proved, hitherto, successful in the struggle to combat impunity and is still in its infancy, being 13years down the memory lane. Thus, it may not yet be due for outright condemnation. To this extent, the ICC needs more time, support and States' co-operation to wriggle out of the influences of international politics and, as such, concentrate on its noble mandate of bringing an end to impunity.

11. CONCLUSION

So far, this article has examined the SoIHL. It has shown that, like any other branch of PIL, IHL is enforceable through unique means ranging from judicial to non-judicial transitional justice mechanisms such as TCs, CoI, victims' reparation and criminal prosecution, national and international alike, etc.

It identified the victors'-imposed-justice as a syndrome plaguing ICrimJ overtime but cured by the establishment of various ad hoc tribunals such as ICTY, ICTR and other internationalized criminal courts. Whereas, these tribunals were limited in jurisdiction temporally and geographically, the establishment of the ICC has emerged to bridge this vacuum. It also emphasized that over the years, ITs have effectively held perpetrators of grave breaches of IHL accountable, the emergence of the ICC, as a permanent and independent court with worldwide jurisdiction, is a milestone in crowning the efforts of the IC in its bid to bringing an end to impunity and ensuring global peace and security.

[166] See SD Dubriske, 'The International Criminal Court: A Case Of The United States Having Its Cake And Eating It Too' in DA Maccuish (ed), *The International Criminal Court: Why We Need It, How We Got It, Our Concern About It* (Air University Press – Alabama, 2005) pp 25-69.