

The Ad-hoc Tribunals and International Criminal Justice: Valor or Vanity*

Abstract

In the early 1990s, the international community witnessed inhumane criminal atrocities perpetrated in the former Yugoslavia and Rwanda. In order to put an end to these atrocities the International Criminal Tribunals for the former Yugoslavia and Rwanda (*Adhoc tribunals*) were established by the United Nations. The Security Council felt that the tribunals could put an end to such atrocities and take effective measures to bring to justice the persons who were responsible for them and thus contribute to the restoration and maintenance of peace. The Council further asserted that it believed that creating the tribunals would contribute to ensuring that violations are halted and effectively redressed. This paper argues that the ad hoc tribunals have experienced significant political manipulations and operational shortcomings. Despite acknowledging these shortcomings, this paper insists that both tribunals have provided a valuable addition to the cause of international criminal justice. The *ad hoc* tribunals represent a historic step towards ending the tradition of impunity for mass crimes by establishing an effective system of international criminal law. The ad hoc tribunal jurisprudence have given new life and strength to the positive

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development of international criminal law. The tribunals have demonstrated that international criminal justice is, indeed possible and thus, paved the way for the establishment of the International Criminal Court (ICC).

Introduction: From Former Yugoslavia to Rwanda

The international community struggled to find a way to deal with the gross violations of humanitarian law that occurred in the former Yugoslavia and Rwanda. No international framework was yet in place to enforce international humanitarian law against the offenders, but most observers recognised that the nations involved could not be left to prosecute the offenders on their own.¹ As heinous acts such as "mass killings, massive, organised and systematic detention and rape of women and the continuance of the practice of 'ethnic cleansing' including the acquisition and the holding of territory," continued in the former Yugoslavia, the United Nations decided to take action to bring the perpetrators to justice.

Although tensions in Yugoslavia had been mounting since the early 1980s, it was 1990 that proved the decisive year in which war became more likely. At the last 14th Extraordinary Congress of the League of Communists of Yugoslavia in January 1990, the Serbian dominated assembly agreed to abolish the single-party system, however Slobadan Milosevic, the then head of the Serbian party branch (League of Communists of Serbia) used his influence to block and vote-down all other proposals from the Croatian and Slovene party delegates. This prompted the Croatian and Slovene delegations to walk out and thus the break-up of the party,² a symbolic event representing the end of "brotherhood and unity." The first of these conflicts, known as the 'ten-day' War was initiated by secession of Slovenia from the Federation on 25 June, 1991. The second in this series of conflicts,

¹ Catherine Cisse, *The International Tribunals for the Former Yugoslavia and Rwanda; Some Elements of Comparison* (1997) 7 *Transnational Law & Contemporary Problems*, 103,104 ("The conflicts in Yugoslavia and Rwanda have revealed ... the inadequacy of the national judicial systems to effectively and impartially punish those responsible for violations of international humanitarian law").

² Available at

http://news.bbc.co.uk/1/hi/english/static/in_depth/europe/2000/milosevic_yugoslavia/communism.stm accessed 26 May, 2010.

the Croatian War of Independence, began when Serbs in Croatia who were opposed to Croatian independence announced their secession from Croatia.³

In February 1993, armed conflict raged in parts of the territory of the former Yugoslavia, in spite of the presence of a UN Peace-keeping Force and various Security Council decisions intended to stop the fighting and the atrocities. Given reports of continuing atrocities and recommendations from various sources, including the Commission of Experts headed by M. C. Bassiouni, the Council decided on 22 February, 1993 to establish an International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.⁴ It requested the Secretary-General to submit, if possible within 60 days, a report on all aspects of the matter. The ball was then in the Secretariat's court. The Secretary-General, to no one's surprise, assigned the task to the Under Secretary General, the Legal Counsel. He, in turn set up a working group of six legal officers in the Secretariat's Office of Legal Affairs to prepare the draft report. The team had no contemporary, acceptable model on which to base its work: For example of actual, functioning war crimes tribunals, it could only refer to the Nuremberg and Allied Control Council No. 10 Tribunals of almost 50 years before.

Consequently, Security Council Resolution 827 1993 established the International Criminal Tribunal for the former Yugoslavia (ICTY). Resolution 827 referred to a report "on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision to establish a tribunal, taking into account suggestions put forward by member States."

As the Council Resolution and the report of the Secretary-General make clear, the Tribunal was established under Chapter VII of the United Nations

³ Yugoslav Wars, available at http://en.wikipedia.org/wiki/Yugoslav_wars, accessed 26 May 2010.

⁴ See Security Council Resolution 808 (1993).

Charter as an enforcement measure binding on all States. That legal basis was novel and provoked various expressions of concern and reservation.⁵ As the Security Council was deemed not to have been empowered to "legislate" international law, it was imperative to get the substantive legal right.⁶ It was in that context that the Secretariat included in its draft only those provisions which it considered to be "beyond any doubt part of customary international law."⁷ Thus, neither Common Article 3 to the Geneva Conventions, which had not been used for individual criminal responsibility, nor the 1977 Additional Protocols, which had not achieved universal adherence, were included. As the Council was, for the first (and as far as anyone knew, for the only) time, establishing a binding enforcement measure, a judicial organ, having the power to sentence individuals to imprisonment, it was thought prudent, in spite of temptation, not to use the occasion to advocate "progressive" interpretations, clarifications or additions, but rather to stick as much as possible to what was incontrovertibly customary international law.⁸

The ICTY was set up because the Security Council felt that the tribunal could "put an end to such crimes and take effective measures to bring to justice the persons who are responsible for them," and thus "contribute to the restoration and maintenance of peace."⁹ The council further asserted that it believed that creating the ICTY would contribute to ensuring that violations are halted and effectively redressed.¹⁰

The ICTY is an *ad hoc* court, located in The Hague, the Netherlands. The ICTY should not be confused with the International Criminal Court and the International Court of Justice, both courts are also based in The Hague, but have a permanent status and different jurisdictions. The ICTY has jurisdiction over War Crimes, crimes against humanity and genocide

⁵ Larry D. Johnson, Ten Years Later: Reflections on the Drafting (2004) 2 *Journal of International Criminal Justice*, 368 - 379.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Security Council Resolution 827 (1993), Preamble.

¹⁰ *Ibid.* See also Michael Scharf, The Tools For Enforcing International Criminal Justice in the New Millenium: Lessons from the Yugoslavia Tribunal (1999) 49 *De Paul Law Review* 925, 928 - 33

committed since 1991 on the territory of the former Yugoslavia.¹¹ Article 2 grants the tribunal jurisdiction over grave breaches of the Geneva Conventions (which only apply in international armed conflicts),¹² whilst Article 3 provides the tribunal with jurisdiction over a non-exhaustive list of violations of the laws or customs of war.¹³ The Tribunal decided in 1995 that this provision covered war crimes in both international and non-international armed conflicts,¹⁴ a decision that paved the way for some of the tribunal's most innovative jurisprudence. The tribunal has jurisdiction over genocide and crimes against humanity pursuant to Articles 4 and 5 of its Statute respectively.¹⁵ The open-ended nature of the temporal jurisdiction of the ICTY means that the tribunal has jurisdiction over the later conflicts in Kosovo and the former Yugoslav Republic of Macedonia¹⁶ and peacekeepers in the area, things not anticipated by the drafters.

The Tribunal operates three Trial Chambers and one Appeal Chamber. The President of the tribunal is also the Presiding Judge of the Appeal Chamber. Currently, this is Patrick Lipton Robinson of Jamaica. On 17 November 2008 he was elected as the new President of the ICTY by the permanent judges in an Extraordinary Plenary Session. Judge O-Gon Kwon (South Korea) was elected as the new Vice-President.¹⁷ Patrick Lipton Robinson's predecessors were Antonio Cassese of Italy (1993 - 1997), Gabriel Kirk McDonald of the United States (1997 - 1999), Claude Jorda of France (1999 - 2002), Theodor Meron of the United States (2002 - 2005), Fauster Pocar of Italy (2005 - 2008).

There are 16 Permanent Judges¹⁸ and 12 *ad litem* Judges¹⁹ who serve on the tribunal. They are elected to four - year terms by the UN General Assembly.

¹¹ ICTY Statute, Arts. 1, 8.

¹² *Ibid.*, Art. 2. *Tadic*, paras 2,1D. 1995 Paras 79 - 8

¹³ *Ibid.*, Art. 3.

¹⁴ *Ibid.*, *Tadic*, paras 2.1D. 1995 Paras 86 - 93

¹⁵ ICTY Statute, Arts 4 & 5.

¹⁶ Security Council Resolution 1160 (1998)

¹⁷ Judge Robinson elected new ICTY President, available at

<http://www.leaglejusticeportal.net/en/cache/DEF/9/992.html>, accessed 26 May 2010.

¹⁸ (1) Fauster Pocar (Italy, 2001 - 2009) (2) Kevin Parker (Australia, 2003 - 2009) (3) Patrick Lipton Robinson (Jamaica, President, 1998 - 2010) (4) Carmel A. Agius (Malta,

They can be re-elected. The Office of the Prosecutor (OTP) is responsible for investigating crimes, gathering evidence and prosecuting indictees. It is headed by the Prosecutor, Serge Brammertz. Previous Prosecutors have been Ramon Escovar Salom of Venezuela (1993 - 1994), Richard Goldstone of South Africa (1994 - 1996), Louise Arbour of Canada (1996 - 1999), Eric Ostberg of Sweden, and Carl Del Ponte of Switzerland (1999 - 2007) who until 2003, simultaneously served as the Prosecutor of the International Criminal Tribunal for Rwanda (ICTR) where she led the OTP since 1999.²⁰

Since the very first hearing (referral request in the *Tadic case*) on 8 November, 1994, the Tribunal has indicted 161 individuals, and has already completed proceedings with regard to 100 of them; five have been acquitted, 48 sentenced (seven are awaiting transfer, 24 have been transferred, 16 have served their term, and one died while serving his sentence), 11 have had their cases transferred to local courts. Another 36 cases have been terminated (either because indictments were withdrawn or because the accused died, before or after transfer to the Tribunal).²¹

Presiding Judge, 2001 - 2007) (5) Alphonsus Martinus Maria Orie (Netherlands, Presiding Judge 2001 - 2007) (6) Mohammed Shahabuddeen (Guyana, Judge 1997 - 2009) (7) Mehmet Guney (Turkey, Judge 2001 - 2007) (8) Liu Daqun (China, Judge 2000 - 2012), (9) Andresia Vaz (Senegal, Judge 2005 - 2011) (10) Theodor Meron (United States, Judge 2001 - 2007) (11) Wolfgang Schomburg (Germany, Judge 2001 - 2007) (12) O. Gon Kwon (South Korea, Vice President 2001 - 2007) (13) Jean-Claude Antonetti (France, Judge 2003 - 2009) (14) Howard Morrison CBE (United Kingdom, Judge 2009 - 2012) (15) Christine Van Den Wyngaert (Belgium, Judge 2003 - 2009) (16) Bakone Justice Moloto (South Africa, Judge 2005 - 2011). See list of Judges provided on Organs of the Tribunal available at <http://www.icty.org.sid/151>, Accessed 20 May, 2010.

¹⁹ (1) Krister Thelin (Sweden, *Ad Litem* Judge 2003 - 2009) (2) Janet M. Nosworthy (Jamaica, *Ad Litem* Judge 2005 - 2011) (3) Frank Hoepfel (Austria, *Ad Litem* Judge 2005 - 2011) (4) Arpad Prandler (Hungary, *Ad Litem* Judge 2006 - 2012) (5) Stefan Trechsel (Switzerland, *Ad Litem* Judge 2006 - 2012) (6) Antoine Kesia - Mbe Mindua (Congo, *Ad Litem* Judge 2006 - 2012) (7) Ali Nawaz Chowhan (Pakistan, *Ad Litem* Judge 2006 - 2012) (8) Tsvetana Kamenova (Bulgaria, *Ad Litem* Judge 2006 - 2012) (9) Kimberly Prost (Canada, *Ad Litem* Judge 2006 - 2012) (10) Ole Bjorn Stole (Norway, *Ad Litem* Judge 2006 - 2012) (11) Frederick Harhoff (Denmark, *Ad Litem* Judge 2007 - 2013) (12) Flavia Lattanzi (Italy, *Ad Litem* Judge 2007 - 2013). See list of Judges provided on Organs available at <http://www.icty.org.sid/151>, accessed 20 May, 2010.

²⁰ International Criminal Tribunal for the Former Yugoslavia, available at http://en.wikipedia.org/wiki/International_criminal_tribunal_for_the_former_yugoslavia, accessed 26 May, 2010.

²¹ *Ibid.*

On the other hand, after the genocide in Rwanda in early 1994, the United Nations Security Council established a similar International Tribunal to prosecute the perpetrators. The Rwanda conflict was between the government of President Juvenal Habyarimana and the rebel Rwandan Patriot Front (RPF). Grumblings of the Tutsi in diaspora contributed to the conflict. Tutsis who had been exiled for over thirty years were coalescing in an organisation known as the RPF. The Hutus in Rwanda considered these Tutsis to be an evil aristocracy that had rightly been exiled. They observed that the descendants of these Tutsis no longer had any knowledge of Rwanda, and spoke English instead of French. The exiled Tutsis, however, demanded recognition of their rights as Rwandans, including, of course, the right to return there. These Tutsis began to pressure the Rwandan government, and eventually obliged the Habyarimana government to make concessions.²² The conflict began on 2 October 1990 when the RPF invaded and ostensibly on August 4, 1993 with the signing of the 'Arusha Accords' to create a power sharing government.²³ However, the assassination of Habyarimana in April, 1994, when his plane was shot down as it was preparing for a landing at Kigali, proved to be the catalyst for the Rwandan Genocide, the commonly quoted death toll for which is 800,000.²⁴

The International Criminal Tribunal for Rwanda (ICTR) or the *Tribunal penal international pour le Rwanda* (TPIR), is an international court established in November 1994 by the United Nations Security Council in Resolution 955 in order to judge people responsible for the Rwandan Genocide and other serious violations of international law in Rwanda or by Rwandan citizens in nearby States, between 1 January and 31 December 1994.²⁵ In 1995 it

²² Rwandan Civil War, available at http://en.wikipedia.org/wiki/Rwandan_civil_war, accessed 26 May, 2010.

²³ Timeline: Rwanda (http://news.bbc.co.uk/2/hi/africa/country_profiles/1070329.stm), BBC News, 8 August 2008; to support wording "Ostensibly ended". Accessed 20 May 2010.

²⁴ Rwandan Civil War, *op. cit.* That night elements of the *interahamwe* and the presidential guard began to kill opposition politicians and prominent Tutsis. Over the following days it became clear that the target of these killings was the entire Tutsi population along certain moderate Hutus.

²⁵ United Nations Security Council Resolution 955 S-RES-955 (1994) available at [http://www.undemocracy.com/S-RES-955\(1994\)](http://www.undemocracy.com/S-RES-955(1994)) on 8 November 1994 - accessed on 26 May, 2010.

became located in Arusha, Tanzania under Resolution 977.²⁶ Unlike the ICTY Statute, the ICTR Statute was drafted by the members of the Security Council, following closely the model of the ICTY Statute. Rwanda, then a member of the Security Council was initially supportive of the establishment of ICTR. Since it did not succeed in including the death penalty, excluding crimes other than genocide from the court's jurisdiction or granting the court jurisdiction, before 1994 in the ICTR Statute, it voted against the creation of the ICTR. Unfortunately for Rwanda, it did not affect the legality of the tribunal, which finds its basis, like the ICTY, in Chapter VII of the UN Charter.²⁷

The ICTR, like the ICTY has jurisdiction over war crimes, crimes against humanity and genocide²⁸ although the definitions of the last two crimes are different from those in the ICTY. In particular, the definition of crimes against humanity has an additional requirement of discrimination for all crimes against humanity,²⁹ and the jurisdiction of the ICTR over war crimes is limited to those in non-international armed conflicts.³⁰ The ICTR's jurisdiction over these crimes is limited to where they occurred, in Rwanda or were committed by Rwandans in neighbouring States, between 1 January and 31 December 1994.³¹ The ICTR has primacy over domestic courts, in the same way as the ICTY.³²

The ICTR consists of 16 judges in four "Chambers," three to hear trials and one to hear appeals. In addition, there are 9 *ad litem* judges, making 25 in all. At present, all 9 *ad litem* judges are assigned to Chambers II and III. There is an additional pool of 9 further *ad litem* judges who may be called on in the case of a judge being absent.³³

²⁶ United Nations Security Council Resolution 977 S-RES-977 (1995) available at [http://www.undemocracy.com/S-RES-977\(1995\)](http://www.undemocracy.com/S-RES-977(1995)) on 22 February 1995 - Accessed on 26 May, 2010. From 2006, Arusha also became the location of the African Court on Human and People's Right.

²⁷ S/PV.3453,2,10-12. China abstained on the resolution, Cited in Robert Cryer *et.al*, *op. cit.* at p. 113.

²⁸ ICTR Statute, Arts 2,3 and 4 respectively.

²⁹ *Ibid.*, Art.3.

³⁰ *Ibid.*, Art. 4.

³¹ *Ibid.*, Art. 1.

³² *Ibid.*, Art. 8(1).

³³ Trial Chamber I - Erik Mose - Presiding Judge, Bakhtiyar R. Tuzmukhamedov - Member, Joseph Masanche - Member (*Ad Litem* Judge), Mparany Rajohnson - Member (*Ad litem* Judge). Trial Chamber II - William Sekule - Presiding Judge, Arlette Ramaroson - Member, Joseph Asoka Nihal De Silva - Member, Solomy Balungi Bossa - Member (*Ad litem* Judge),

The Office of the Prosecutor is divided into two sections: The **investigation section** is responsible for collecting evidence implicating individuals in crimes committed in Rwanda in 1994 and the **Prosecution section** is responsible for prosecuting all cases before the tribunal. Hassan Bubacar Jallow of The Gambia is the current Prosecutor of the ICTR. He has previously served as The Gambia's Attorney-General and Minister of Justice from 1984 to 1994, and subsequently as a Judge of Supreme Court of The Gambia from 1998 to 2002. He was appointed by the Security Council on September 15, 2003 to replace Carla Del Ponte.³⁴

So far, the Tribunal has finished about 50 trials and convicted about 29 accused persons. About 11 more trials are in progress. 14 individuals are awaiting trial in detention, but the Prosecutor intends to transfer 5 to national jurisdiction for trial. About 13 others are still at large, some suspected to be dead.³⁵

Criticisms and Weaknesses of the Ad Hoc Tribunals

Notwithstanding the differences in historical circumstances, geographical setting and legal structure, there are striking similarities between the ICTY and ICTR on the one hand and the Post-World War II tribunals, especially Nuremberg, in their experiences and in the reaction they have inspired. The *ad hoc* tribunals have experienced significant political manipulations and operational shortcomings. Despite acknowledging these shortcomings, we insist that both tribunals have provided a valuable addition to the cause of international criminal justice. We now turn to the acknowledged shortcomings of the *ad hoc* tribunals and the defensive responses where necessary.

Unlike municipal criminal judicial systems, the ICTY is not part of a frame work that ensures that its arrest warrants and other orders will be executed. Also, unlike the Nuremberg and Tokyo tribunals, it does not have the support of the Allied powers that wielded full authority and control over Germany and Japan. Rather, the ICTY must rely on States and international organisations to carry out these functions.³⁶ A State's obligation to cooperate

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Gabriel Lark McDonald, Problems, Obstacles and Achievements of the ICTY (2004) 2 *Journal of International Criminal Justice*, p. 558 - 571

with the tribunal flows from the fact that the ICTY has been established by a decision of the Security Council taken under Chapter VII of the Charter. That decision is, therefore, binding on all States by virtue of Article 25 of the United Nations Charter.³⁷ States therefore, have a binding obligation to take whatever steps that are required to implement the decision.³⁸ Article 29 of the ICTY Statute sets forth the obligation of all States to cooperate with the tribunal and comply with its requests for assistance or orders. It states thus:

States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber.³⁹

However, the ICTY does not have the direct power to compel this co-operation.⁴⁰ In the event of non-compliance, it must rely on the Security Council to enforce its orders and requests.⁴¹

As of Spring 1998, however, the ICTY had issued some 205 arrest warrants and only six had been executed by the States.⁴² The ICTY acknowledged

³⁷ First Annual Report of the ICTY to the General Assembly and Security Council of the United Nations. UN Doc. A/49/342-S/1994/1007, 29 August 1994, at Para. 84, cited in Gabriel Kirk McDonald, *op.cit.* Article 25 provides "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"

³⁸ Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1998), UN Doc: S/25704, 3 May 1993, para 125 cited in Gabriel Kirk McDonald, *op. cit.* See also Art. 25 UN Charter.

³⁹ ICTY Statute, Art. 29.

⁴⁰ DA Mundis, *Reporting Non-Compliance: Rule 7bis*, in R. May et al (eds.), *Essays on ICTY Procedures and Evidence in Honour of Gabriel Kirk McDonald*, (The Hague: Kluwer Law International, 2001), 421 - 438, at 421 ('In the event that states fail to comply with the orders and decisions of the Tribunal, The Tribunal possesses no independent police or military force to ensure compliance. Rather, as a subsidiary organ of the security council, the Tribunal must look to that body to enforce its orders in the event of non compliance by states.').

⁴¹ First Annual Report of the ICTY, *op. cit.* at Para 86 cited in Gabriel Kirk McDonald, *op.cit.* See also Art. 41 UN Charter. (Authorising the Security Council to decide what measures are necessary to give effect to its decisions).

⁴² GK McDonald, *International Support for International Criminal Tribunals and an International Criminal Court*, (1998) 13 *American University International Law Review*, 1413 - 1439 at 1431.

the effect of this lack of cooperation in its Fourth Annual Report, transmitted to the General Assembly and the Security Council: ... "the tribunal remains a partial failure though no fault of its own because the vast majority of indictees continue to remain free, seemingly enjoying absolute immunity."⁴³

G.K. McDonald stated thus:

In response to my fourth report of non-compliance, the Security Council adopted Resolution 1207, said to be 'undoubtedly the strongest response to any of the reports made by the President of the Tribunal. This resolution unequivocally ordered the Federal Republic of Yugoslavia (FRY) to transfer three indicted persons and facilitate Tribunal access to Kosovo. Yet, even this strong response failed to bring an end to the blatant non compliance.'⁴⁴

He continued:

On the verge of the twenty-first century, it is simply unacceptable that territories have become safe-havens for individuals indicted for the most serious offences against humanity. It must be made absolutely clear to such States that this behaviour is legally as well as morally wrong. The Security Council has the authority and wherewithal to rectify this situation. For the benefit of all peoples of the Former Yugoslavia, I urge you to act.⁴⁵

The former judge (1993 - 2000) and President (1993 - 1997) of the ICTY summed up his criticisms as follows:

(i) The crime scene is usually far away; (ii) often, the crime has been committed many years before; (iii) the Prosecutor has no autonomous means of gathering the evidence or arresting the suspect, but must rely on the cooperation of state authorities in the place where the crime was committed, where the evidence lies, or where the suspect lives; (iv) Consequently, in the case of crimes involving numerous defendants, the Prosecutor has no control over the arrest of the various accused, and is thus not in a position to ensure that all accused are tried; (v) it is difficult for the Prosecutor or the court to protect

⁴³ Fourth Annual Report of the ICTY to the General Assembly and Security Council of the United Nations. UN Doc. A/52/375-S/1997/729, 18 September 1997, Para, 175.

⁴⁴ Gabriel Kirk McDonald, Problems, Obstacles and Achievements of the ICTY, *op.cit.*

⁴⁵ Letter from President McDonald to the President of the Security Council Concerning outstanding Issues of State Non-Compliance. UN Doc. S/1999/1117, 2, November 1999, cited in Gabriel Kirk McDonald, *Ibid.* See also ICTY, Press Release - 'Letter from President McDonald to the President of the Security Council Concerning outstanding Issues of State Non-Compliance; 2, November 1999, available online at http://www.un.org/icty/press_real/14444-e.htm, accessed 24 September 2010.

witnesses from threats from the concerned State or from the ethnic group to which the accused belongs; (vi) trials are conducted in two or three languages, with the associated difficulties related to the production or translation of documents or interpretation of testimonies; (vii) judges often do not use the same working language and this may slow down the process of drafting the judgment; and (viii) international courts often decide not to send cases concerning low level defendants to national courts, for these courts are either unable or unwilling to hold fair trials.⁴⁶

A problem that plagues all judicial systems is time management. How can we render justice quickly and efficiently? In an international tribunal, time management is even more difficult. Investigations in a distant country are necessarily long and trials involve more than two competing legal theories or one isolated criminal act. International criminal tribunals are confronted with crimes on a massive scale, the ins and outs of which are often very difficult to untangle. The trial is the time when victims recount their sufferings at length and the accused explain, also at great length, the legitimacy of their political or military decisions. Each fact must be proven by calling on complex legal concepts, with no prior established precedent, and within a procedural framework that encourages neither the prosecution nor the defence to accelerate proceedings. Time management is also an issue for the accused, whose pre-trial detention is prolonged, and for the international community, which rightly desires that the tribunal carries out its mission of rendering justice in a reasonable time, in accordance with the rules and as required for reconciliation.⁴⁷

The multicultural context of an international tribunal must also be taken into account, as it results in all texts and rules,⁴⁸ even those on which all trial participants agree, being interpreted differently by each of them, in the light of their own legal system, not to mention their own way of thinking.⁴⁸

⁴⁶ Antonio Cassese, *The ICTY: A Living and Vital Reality* (2004) 2 *Journal of International Criminal Justice*, 585 - 597

⁴⁷ Claude Jorda, *The Major Hurdles and Accomplishments of the ICTY: What the ICC Can Learn from Them*, (2004) 2 *Journal of International Criminal Justice*, 572 - 584.

⁴⁸ *Ibid.*

Many lament that the ICTY is cumbersome and costly, and that its trials are lengthy.⁴⁹ It has also been observed that the defendants spend too much time in pre-trial detention. We submit that these criticisms, although not ill founded, miss an important point: the unique features of international criminal proceedings. In short, the authors of these criticisms are blinded by the "domestic analogy" in that they compare international trials with those that take place in their own countries. That domestic trials are markedly different from those conducted at the international level should by now be clear.⁵⁰

The relationship between law and politics is central for any analysis of the operation and evolution of an international criminal justice system, and is often debated, even within well established democracies that possess highly advanced judicial systems. The issue is particularly complex in the context of the ICTY and ICTR: the political environment in which it was created, the very choice to create tribunals for one kind of conflict and not another, the ambiguous role of legislator played by the Security Council, and the conditions in which judges are elected have muddled the image of the tribunals from the very start.⁵¹

The tension between peace and justice during the conflict in the former Yugoslavia proves that international justice cannot ignore the surrounding political environment. The ICTY has at times, both benefited from and paid a heavy price for this. For instance, it was able to obtain the transfer of Milosevic to The Hague because it was in Washington's interest to ensure that the former Serbian President be tried, in order to justify the war in Kosovo. This explains the intense political and financial pressure placed on the authorities in Belgrade to convince them to hand the former President over to the ICTY. Yet, at the same time, American policy regarding the ICC was being tightened, especially after the 11 September attacks in 2001. America's simultaneous support for the ICTY in trying

⁴⁹ Larry D Johnson, 10 Years Later: Reflections on the Drafting (2004) 2 *Journal of International Criminal Justice*, 368 - 379 - " Critics have pointed to the Statute as having created a tribunal that is too slow, too costly, ineffective and inefficient"; see also Antonio Cassese, *op.cit.*

⁵⁰ Antonio Cassese, *op. cit.*

⁵¹ Claude Jorda, *op. cit.*

Milosevic and its deep opposition to the ICC placed Serbia in a singular position: it was threatened with sanctions by Washington, on the one hand, if it refused to cooperate with international justice in the form of the ICTY and, on the other hand, if it undertook to support international justice by ratifying the Statute of the ICC.⁵² This American policy triggered a series of consequences for the Serbian public, already sceptical concerning the independence of the ICTY, this selective approach to international justice further discredited the work of the Hague tribunal. The election of Milosevic and Seselj during the legislative elections in late December 2003 testifies to this. The ICTY judges were also placed in an uncomfortable position.⁵³ The ICTY trials on persons and groups living in the former Yugoslavia is meager and tardy.⁵⁴ In some cases, as for example, the Milosevic trial proceedings had an adverse effect and ultimately rekindled nationalism and ethnic animosity.⁵⁵ It is perceived in some countries of the former Yugoslavia as slanted against the Serbs.⁵⁶ This perception may also have been stirred up, to some extent, by the injudicious policy of some major powers. Instead of even-handedly putting pressure (by resort to tough sanctions) through the Security Council, on all States of the former Yugoslavia, some major powers have preferred bilateral pressure and the use of economic leverage towards individual countries. This is most unfortunate.⁵⁷

The most agreed-upon outstanding limitation is the ICTR's one-sidedness. As Moghalu's comprehensive account demonstrates, the ICTR has only punished those from the former Hutu led regime, not RPF officials. The limited temporal mandate of January 1 to December 31, 1994 is quite significant in itself. It means that subsequent atrocities committed by RPF in Rwanda and the Congo are off their agenda.⁵⁸ Moreover, as Moghalu acknowledges the reason RPF officials have been spared even from 1994

⁵² Pierre Hazan, The Revolution by the ICTY: The Concept of Justice in Wartime, (2004) 2 *Journal of International Criminal Justice*, 533 - 540.

⁵³ *Ibid.*

⁵⁴ Antonio Cassese, *op.cit.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Moghalu Kingsley, *Rwanda's Genocide: The Politics of Global Justice*, (New York: Pelgrave, 2005).

crimes is not due to the absence of serious crimes, but because of successful pressure from the RPF-led government. When the third Chief Prosecutor, Carla Del Ponte made a concerted effort in 2002 - 2003 to investigate RPF crimes, the Rwanda government retaliated by not granting needed travel visas, breaking off cooperation in general with the tribunal, and enlisting the assistance of the United States to put pressure on Del Ponte.⁵⁹ The end result was, through the severing of the Unified Prosecutor for ICTY and ICTR, the removal of Del Ponte from the position of ICTR Prosecutor. This failed effort signalled the extreme unlikelihood that any substantive RPF person would be indicted in the remaining tenure of the ICTR.⁶⁰

According to the ICTR's former Deputy Chief Prosecutor, "prosecutions cannot happen in a vacuum." In short, the ICTR does not have the means or political support to force the RPF to surrender its officials or soldiers. Doing so would risk fatally undermining the ability of the ICTR to function at all. Although this one sided focus may be an "imperfect outcome," it is preferable to abandoning the enterprise all together.⁶¹ Under this view, it matters greatly that RPF crimes pale in comparison to the Hutu genocide. According to Richard Goldstone, the first Chief Prosecutor, ICTR, "I certainly did not have evidence of massive crimes committed by the RPF ... I think crimes have to be of the magnitude that justify doing it."⁶²

Contrary to the above, as early as 1994, both Human Rights Watch and a UN Commission of Experts documented ample war crimes and crimes against humanity committed by RPF forces with the former finding the RPF responsible for the murder of 30,000 civilians in 1994.⁶³ In the following years, in the wake of Rwanda's intervention into the Congo

⁵⁹ *Ibid*; see also Hesketh Eric, Pole Pole: Hastening Justice at UNICTR (2005) 3 *Northwestern University Journal of International Human Rights*, 8 - 42.

⁶⁰ *Ibid.*, at 149.

⁶¹ *Ibid.*, at 150.

⁶² Richard Goldstone, quoted in Peskin Victor, Beyond Victor's Justice? The Challenge of Prosecuting the winners at the International Criminal Tribunals for the former Yugoslavia and Rwanda (2005) 4 *Journal of Human Rights*, 213- 231. Moghalu, expresses a similar statement -- "faced with these (political pressure) limitations, the tribunal should focus its efforts on the more heinous crimes of genocide and crimes against humanity committed against Tutsis" *Ibid.*, at 150.

⁶³ Quoted in Moghalu Kingsly, *op. cit.* at 27-28; see also Peskin Victor, *op. cit.* at 216.

conflict, RPF atrocities further magnified. The RPF-led government is estimated to have killed between 120,000 and 150,000 Hutus in Rwanda since 1994 and over 200,000 in the Congo.⁶⁴ A June 1998, UN report labelled Rwanda's killings in the Congo in 1997 and 1998 as crimes against humanity and possibly genocide.⁶⁵ Of course, the ICTR's mandate only covers 1994. Yet as Luc Reydamas observes, "as the ICTR's jurisdiction already extends to Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States..., it seems logical for the Security Council simply to widen the temporal jurisdiction of the ICTR."⁶⁶ By not doing so, a powerful signal of impunity has been sent.

Goldstone's legal explanation, then, for why the Prosecution has not prosecuted RPF crimes is not persuasive even with a mandate limited to the year 1994. Indeed, Moghalu and defenders of the ICTR readily concede the pivotal role of RPF pressure, assisted for mostly strategic reasons by the US government. The first two Prosecutors, Goldstone and Louise Arbour made no real effort to investigate RPF crimes. Arbour, in fact, reports fearing severe reprisals if her office did so: "The Rwandan government was reading my mail. We were infiltrated... so if I sent someone off to do an investigation of the RPF, they might be killed. I would not do it."⁶⁷ As stated above when Del Ponte did make a serious effort, the RPF succeeded in getting her removed from office. Accordingly, the ICTR experience has sharply demonstrated the resiliency of political manifestation (the leading element of victor's justice) in international criminal justice.

Like Nuremberg and Tokyo, the ICTR is legitimising the "selective and occasional enforcement" of international criminal justice and thereby not contributing to a "viable and equitable global policy."⁶⁸ The goal of truth

⁶⁴ Cobban Helena, *The Legacies of Collective Violence* (2002) 27 *Boston Review*, 11 Available at <http://www.bostonreview.net/BR27.2/Cobban.html> . Accessed 25 May 2010. See also Moghalu Kingsley, *op.cit.* at 172.

⁶⁵ *Ibid* at 12.

⁶⁶ Reydamas Luc, *The ICTR Ten Years On - Back to the Nuremberg Paradigm?* (2005) 3(4) *Journal of International Criminal Justice*, 977-9

⁶⁷ Louise Arbour, Quoted in Peskin Victor, *op.cit.*

⁶⁸ Maogoto Jackson, *op. cit.* at 108.

telling is also poorly served. The ICTR, like the Post-World War II tribunals offers a distorted and one-sided narrative of what has, in fact, been a protracted conflict that extends to neighbouring States.⁶⁹ By excluding the period prior to and following 1994 and exempting the serious crimes of the RPF, the ICTR, in the words of Luc Reydam, "transforms a long history of symmetrical barbarism... into a truncated history of asymmetrical conflict."⁷⁰ Hence, the ICTR egregiously simplifies the conflict into an isolated tale of evil Hutu perpetrators and innocent Tutsi victims.

Although some of the bottom-line rulings of the ICTR may be appealing at face value, the quality of legal reasoning is suspect. Alison Des Forges, who has produced one of the most authoritative accounts of the 1994 genocide, has found a number of problems with the quality and competence of both Prosecutors and Judges: "The poor quality of evidence and the poor quality of the legal argumentation has meant that the cases that have been completed and where the accused have been found guilty remain seriously flawed."⁷¹

The sentencing policy of various ICTY Trial Chambers lends itself to objections. In particular, there is broad discrepancy between the sentences passed by some Chambers and those passed by others. In the event, individuals standing trials and found guilty by a Trial Chamber may thus be subjected to penalties that vary, depending on the Trial Chamber that has sat on the case. To avoid inconsistency, the judges might perhaps agree upon a set of broad sentencing guidelines, to a large extent based on the judicial practice of courts of the former Yugoslavia (as requested by Article 24(1) ICTY Statute). These guidelines might provide useful indications to individual Chambers and thus ensure a minimum of uniformity or coherence in sentencing.⁷²

⁶⁹ Mamdani Mahmood, When Victims become killers: Colonialism, Nativism and the Genocide in Rwanda, (H-Africa: H-Net Reviews, May, 2004), Available at <http://www.h-net.org/reviews/showrev.php?id=9362>. Accessed 20 June 2009.

⁷⁰ Reydam Luc, *op. cit.* at 2.

⁷¹ Des Forges Alison, The International Criminal Tribunal for Rwanda. Remarks to a Symposium, Justice in the Balance: Military Commission and International Criminal Tribunals, March 16 ,2002, 9

⁷² Antonio Cassese, *op. cit.*

Another widely acknowledged shortcoming of the ICTR has to do with general mismanagement. In February, 1997, the UN Inspector General issued a scathing indictment of nearly every aspect of the ICTR, including its finances, the quality of its personnel, and its procurements.⁷³ The report also condemned the bureaucratic infighting, the lack of oversight, and the poor prosecution strategy. In 2001, the International Crisis Group found the ICTR's performance to be "lamentable."⁷⁴ Another limitation agreed upon by most observers is the ICTR's minimal contribution to reconciliation in Rwanda.⁷⁵ In fact, neither the Tutsis nor the Hutus hold a favourable view of the ICTR.

In like manner, the creation of the ICTY has not prevented a recurrence of crimes in the former Yugoslavia. The fall of the enclave of Srebrenica, and later, the thousands of Albanians forced out of Kosovo remain as scars on the hearts of those who believed in the exemplary virtue of a tribunal. Perhaps, it is not in itself a sufficient mechanism; perhaps, it is still too hesitant to pose a sufficient threat to remove all residue of nationalism at least in the part of the world. The situation there remains troublesome.⁷⁶ The ICTY has not also deterred persons from committing further crimes (in July 1995, when the Srebrenica massacre occurred, the tribunal had already been in existence for 21 months). Nor has it significantly contributed to restoring peace or to reconciling the opposing ethnic and religious groups.⁷⁷

The ability of the ICTY to indict the heads of the warring parties worried many political leaders. Accordingly, they turned the moral argument to their favour, explaining that any concern for justice is fundamentally immoral in time of war because it delays peace thereby increasing the number of victims.⁷⁸ The most eloquent criticism was anonymous, but

⁷³ Scharf Michael, *Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide*, (1999) 52 (2) *Journal of International Affairs*, 621 - 638.

⁷⁴ Cobban Helena, *op.cit.* at 5.

⁷⁵ Cobban Helena, *Healing Rwanda*, available at <http://bostonreview.net/BR28.6/cobban.html>, accessed 25 May 2010; See also Moghalu Kingsley, *op.cit.*; Kamatali Jean-Marie, *From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans* (2005) 12 *New England Journal of International and Comparative Law*, 89-102.

⁷⁶ Claude Jorda, *op.cit.*

⁷⁷ Antonio Cassese, *op. cit.*

nonetheless perfectly well informed, in an article which appeared in the review; Human Rights Quarterly in 1996:

The quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow. That, for the human rights community, is one of the lessons of the former Yugoslavia. Thousands of people are dead who should have been alive - because moralists were in quest of the perfect peace. Unfortunately, a perfect peace can rarely be attained in the aftermath of a bloody conflict. The pursuit of criminals is one thing. Making peace is another.⁷⁹

The ICTY Prosecutor's response to this criticism was that:

A peace accepted by a society with the willingness and ability to heal, with the willingness and capacity to move itself beyond the abuses of the past, is the only really viable peace. Such is the peace that the international community should be seeking to promote. A peace master minded by and in order to accommodate the concerns of vicious war criminals defiant of all fundamental international law prescriptions or norms is no such effective or enduring peace.⁸⁰

Richard Goldstone's eloquent refutation is doubly interesting. In theory, it justifies the fact that justice must transcend political objectives, including the search for peace. In practice however, until the Srebrenica massacres, he did not indict any political or military leaders, despite the assassination of both wounded people and staff at the Vukovar hospital, the existence of Bosnian Serb detention camps, the policy of ethnic cleansing, and the seige of Saragaro. The Prosecutor has always claimed that the evidence was lacking at the time. Yet, M.C. Bassiouni, who headed the Commission of Experts on war crimes in the former Yugoslavia, as well as most of the judges and even some staff in the Office of the Prosecutor, were convinced that the indictment of political and military leaders at the highest levels would have been possible had there been the will to do it.⁸¹

⁷⁸ Pierre Hazan, *op.cit.*

⁷⁹ R Goldstone, *Bringing War Criminals to Justice during an ongoing War*, in J Moore (ed.), *Hard Choices, Moral Dilemmas in Humanitarian Intervention* (Lanham M.D: Rowman and Littlefield Publishers, 1998) at 198, cited in Pierre Hazan, *op.cit.*

⁸⁰ *Ibid* at 204.

⁸¹ Pierre Hazan, *op. cit.*

Conclusion: The Road to International Criminal Court

Irrespective of the aforementioned criticisms, the *ad hoc* tribunals represents a historic step towards ending the tradition of impunity for mass crimes by establishing an effective system of international criminal law. The *ad hoc* tribunals jurisprudence have given new life and strength to the positive development of international criminal law, international humanitarian law and human rights law and establishes an important foundation upon which other criminal tribunals, both international and national, in The Hague and elsewhere, can build as they join in the common mission of bringing the long era of impunity for mass atrocities to an end.

In 1989, with Cold War coming to a close, the International Law Commission began work on a draft statute for an international criminal court. The disintegration of the former Yugoslavia and the violations of international humanitarian law that occurred in the process, as well as the 1994 genocide in Rwanda, provided dramatic confirmation that an international criminal court with attendant procedural provisions was indeed still needed, perhaps more urgently than previously believed.⁸²

From a global perspective, the contributions of the *ad hoc* tribunals for the former Yugoslavia and for Rwanda are undisputed. First, there has emerged an insistence on accountability. The culture of impunity that enabled leaders to commit atrocities, free of criminal culpability, has been irrevocably altered. Secondly, they have demonstrated the ability of the international community to ensure that individuals accused of even the most heinous violations of humanitarian law receive fair trials. Thirdly, the tribunals have demonstrated that international criminal justice is, indeed possible and thus, have paved the way for the establishment of the International Criminal Court (ICC) and other courts.

We do not pretend that the *ad hoc* tribunals have been free from error or from inefficiency in its history, but its work in building a model of international criminal adjudication will serve as a basis for future prosecutions of serious violations of humanitarian law, whether conducted by the ICC or by domestic judicial entities.

⁸² *Ibid.*

However, the evolution of an international criminal procedure may prove to be one of the *ad hoc* tribunals' most important contributions. The tribunals have demonstrated that international criminal justice is, indeed possible and thus, have paved the way for the establishment of the International Criminal Court (ICC). Nevertheless, due to political reasons this idea of creating an international criminal court did not turn into reality until 1998.

On 17 July 1998, 120 states adopted the Rome Statute during a United Nations conference in Rome and was the culmination of a nearly decade-long negotiation process.⁸³ Attending the conference were 160 States, 33 international governmental coalitions, and a coalition of more than 200 non-governmental organizations ("NGOs").⁸⁴ This statute provides the legal basis for the court and effectively established the ICC. In early 2002, the required amount of 60 States then ratified the Statute of the ICC, and thus initiated the establishment of the ICC. The statute has since been ratified by a myriad of other States, so that today about 121 States are party to the ICC. The ICC, is the first permanent treaty based international criminal court, that officially became operational on July 1, 2002 in The Hague, Netherlands.

That the Rome Statute would be adopted - particularly in its current form - however, was anything but a foregone conclusion. Indeed, a handful of core issues concerning the ICC jurisdiction over crimes, the mechanism for triggering prosecution, and the role of the United Nations Security Council were the subject of much negotiation.⁸⁵ Although a number of States favoured an independent prosecutor with power to initiate proceedings and no Security Council veto on prosecutions, some powerful States, such as the United States, pushed for granting to the Security Council a greater role in determining cases to pursue.⁸⁶ Nevertheless, at the conclusion of negotiations, the Rome Statute, States voted to adopt was one that envisioned a powerful and independent court.

⁸³ MH Arsanjani, The Rome Statute of the International Criminal Court (1999) 93(1) *The American Journal of International Law*, 22-43. (Of those states in attendance, 120 voted in favour of adopting the statute, seven voted against, and 21 abstained).

⁸⁴ C Fehl, Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches (2004) 10(3) *European Journal of International Relations*, 357- 394.

⁸⁵ William A Schabas, *An Introduction To The International Criminal Court*, 3rd ed. (New York: Cambridge University Press, 2007).

⁸⁶ *Ibid.*

The need for an international criminal court was clear. The ICC was meant to respond to criticisms such as "victor's justice" and "selective justice"⁸⁷ and ensure that everyone would be equal before justice no matter what his/her status is. Moreover, due to incapability or unwillingness of national courts, the perpetrators of serious international crimes were going unpunished. The reasons for this lay with the widespread nature of such violations and involvement of State or military officials and leaders in these atrocities.⁸⁸ Since the end of World War II until 1998, there have been about 250 conflicts and about 170 million people have died in these conflicts and in violations of tyrannical regimes,⁸⁹ But all the perpetrators of these crimes, with few exceptions (e.g. some were tried and punished by the ICTY and ICTR), have not been brought before justice and have remained unpunished.⁹⁰ These concerns were restated in the Preamble of the Rome Statute of the International Criminal Court:

...Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured, [and later] Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...⁹¹

The establishment of the ICC was, *per se*, a significant event, especially as the century old idea finally became a reality. One of its important aspects is that the ICC has the power to prosecute individuals who have committed crimes of genocide, war crimes and crimes against humanity. This did not exist in international relations for a long time, only State responsibility was accepted and this power is conferred on the International Court of Justice. The ICC as an independent and impartial court of international character will prosecute individuals, based on criminal law principles and guaranteed principles of fair trial rights.

⁸⁷ KJ Fisher, A Review of Bringing Power to Justice? The Prospects of the International Criminal Court by J. Harrington, M Milde, R Vernon (2006). (2006 - 2007) 38 *Ottawa Law Review*, 117(book review).

⁸⁸ P Kirsch, The Role of the International Criminal Court in Enforcing Criminal Law (2007) 22 *American University International Law Review*, 540-542.

⁸⁹ M. Cherif Bassiouni, *Crimes Against Humanity in international Criminal Law*, 2nd Revised edition (London: Kluwer Law International, 1999) 554.

⁹⁰ *Ibid.*

⁹¹ Adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (Hereinafter Rome Statute).

Moreover, the ICC is substantially different from any other international criminal tribunal that has gone before it. Unlike the *ad hoc* international criminal tribunals such as those established to deal with crimes committed in Rwanda and the former Yugoslavia, its jurisdiction is not circumscribed to dealing only with particular atrocities in particular States. Furthermore, it operates independently of the United Nations Security Council and accords no veto power to the permanent members of the Council over decisions regarding what cases to commence or prosecute.⁹² Rather, according to the terms and provisions of the Rome Statute, it is an independent ICC prosecutor elected by a majority of signatory nations who may decide whether to initiate investigations on his own, or based on referrals from a State Party or the United Nations Security Council. And, by committing to the treaty creating the ICC, States agree that such investigations may be commenced against the State's own nationals for the covered crimes of genocide, crimes against humanity, or war crimes, as long as those crimes were committed after the court came into existence or after the State ratified the treaty, whichever is later.

Under the "complementarity" provision of the Rome Statute, the ICC operates as a court of last resort; State Parties may only avoid international prosecution of their nationals if they themselves proceed with the case domestically. The statute provides that where the State Party is "unwilling or unable genuinely" to proceed with a case, the ICC Prosecutor may obtain jurisdiction over the case.⁹³ And, it is the ICC that determines the "unwillingness" or "inability" of a State to carry out an investigation and prosecution on its own. Therefore, States that do not commence investigations and prosecutions of individuals committing the crimes covered by the Rome Statute, or States that commence proceedings that are evidently impartial or lacking in resolve could risk an ICC determination that they are "unwilling" to prosecute a meritorious case.⁹⁴ Similarly, States may be deemed "unable" to carry out the required investigation where they cannot obtain witnesses or evidence, or where they otherwise do not possess the national judicial system necessary to conclude the proceedings.⁹⁵

⁹² C Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals* (2001) 55(3) *International Organization*, 655-91.

⁹³ Rome Statute, Art. 17; Williams A. Schabas, *op.cit*; M.H. Arsanjani, *op.cit*.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*.