

# ARTICLES

## **INTERNATIONAL CRIMINAL JUSTICE: AN ANALYSIS OF INTERNATIONAL CRIMINAL JUDICIAL INSTITUTIONS**

*T.V.G.N.S. Sudhakar\**

*The focus of this article will be on the prosecution and punishment of perpetrators of violations of international criminal law. The article will analyze the desirability and viability of international judicial institutions as a matter of enforcement of international criminal law. In the course of the present article an attempt will also be made to study the principles of state sovereignty and international criminal jurisdiction. It will also make overall assessment of the role played by the United Nations (UN) war crimes tribunals for the former Yugoslavia and Rwanda in respect of prosecution for crimes committed in armed conflicts. This article will also look at the competence of the UN to establish war crimes tribunals.*

### I. INTRODUCTION

In international law, as a part of individual criminal responsibility, an individual natural person may be subject to a certain amount of penal sanction when he is in violation of an international criminal norm arising out of a treaty or customary law. It should be noted that a person who planned, instigated, ordered, committed, or otherwise aided, and abetted in the planning, preparation or execution of a crime is to be held individually responsible for the crimes.

Sometimes, in a post conflict scenario, prosecuting the perpetrators before a national criminal tribunal may be a difficult task. It may not be acceptable to the community and may produce dangers where the judicial systems are lacking the capacity.<sup>1</sup> Therefore, it must be acknowledged that, the adjudication of certain

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\* Associate Professor of Law, W.B. National University of Juridical Sciences, Kolkata. He teaches courses in Public International Law, International Criminal Law and International Humanitarian & Refugee Law.

<sup>1</sup> See Jennifer Widner, *Courts and Democracy in Post Conflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 67 (2001).

crimes may be beyond the scope of national justice systems. In other words, the conduct of individuals can no longer be considered as a matter for national courts alone. The persons who are responsible for committing or ordering to commit the atrocities in armed conflicts must be brought to justice. Some situations may require a judicial system, which transcends national boundaries must be established to end the impunity. It is in such situations, that international criminal tribunals are potentially useful. The tribunal established in 1474 to try *Peter de Hagen Bach*, which composed of judges from the towns in Alsace, Austria, Germany and Switzerland, is considered to be the first ever attempt to establish an international criminal jurisdiction. It was established to try *Peter de Hagen Bach* for murder, rape, perjury and other crimes of violation of laws of god and men during the occupation of the town Breisach.<sup>2</sup>

Important steps were taken in the twentieth century by way of establishing post World War military tribunals. After World War I, Article 227, 229 of the Treaty of Versailles (1919) established a right of Allied powers to try the German Kaiser (Emperor) *Wilhelm II*, and other hundreds of German officers found responsible for committing violations of laws and customs of war before an international military tribunal constituted by the Allied Powers. But *Wilhelm II* went into exile to the Netherlands, and that government refused to surrender him. The Emperor died in 1941. Thus, the initiative failed and he was never put on trial. Germany refused to honor its commitment to hand over the German officers accused of war crimes. However, they were brought to justice before the German Supreme Court in Leipzig, but received light sentences and were soon released. Although, World War I inspired the bringing of the Kaiser and other German perpetrators on trial, but the efforts failed.

The so-called crimes against peace emerged after World War II. International Military Tribunals (IMT) were established at Nuremberg and Tokyo with an international criminal jurisdiction to try the Nazi and the Japanese war criminals for perpetrating grave violations of laws of war. The Nuremberg Tribunal made it clear that aggressive war was not a national right but an international crime. The subsequent UN ad hoc war crimes tribunals for Former Yugoslavia and Rwanda, the International Criminal Court (ICC), the recent hybrid tribunals set up for East Timor, and the Special Court for Sierra Leone, and a mixed tribunal for Cambodia are examples of recent developments in the area of international criminal jurisdiction. Further, the indictment of former Chilean dictator, *Gen. Augusto Pinochet* who was arrested in Britain and the indictment of Chad's exiled dictator, *Hissene Habre* by a Senegalese Court on charges of torture and crimes against humanity are some of the significant and historic developments in international criminal law. In other words, the jurisdictions of international tribunals and national courts must be regarded as a mutually complementary means of mechanisms for securing international criminal justice.

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<sup>2</sup> See Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 322 INT'L REV. OF THE RED CROSS 57-74 (1998).

The Nuremberg and the Tokyo Tribunals were marked as reflecting victors' justice, and they made a significant contribution to the development of international criminal law.<sup>3</sup> In their final judgment, the IMT jurists confirmed that the agreement, which established the IMT, that is the London Charter, was "a valid expression of existing and binding international law."<sup>4</sup> The Nuremberg principles and judgment were unanimously affirmed by the UN General Assembly.<sup>5</sup> It then appointed committees to codify the international criminal law. It also led to steps for the establishment of permanent ICC, which could be accorded international criminal jurisdiction. However, cold war politics blocked the progress in this area for many years. Finally, in July 1998 The UN Diplomatic Conference of Plenipotentiaries was convened in Rome and adopted the Statute of ICC with an overwhelming vote of 120 to 7 with 21 abstentions. This was an important step forward for the system of justice "established by international law clearly has its shortcomings, and the time has come to adopt new rules and set up new institutions to ensure the effective prosecution of international crimes. A criminal court, whether at the national or international level, does not put a stop to crime, but it may serve as a deterrent and, consequently, may help reduce the number of victims."<sup>6</sup> "In the final analysis, the development and enforcement of international criminal law depends on the unified political will and military power of the alliance that creates the international tribunal."<sup>7</sup>

After the World War II, International Court of Justice (ICJ) was created, but it does not have jurisdiction over individuals. Yet, the ICJ also played an important role in respect of cases involving various aspects of international criminal law. Cases pertaining to international criminal law include the *Aerial Incident at Lockerbie* and the *Application of the Convention on the Prevention and Punishment of crime of genocide*.

However, the proliferation of judicial bodies continued even after the Nuremberg and Tokyo tribunals supported by the international community, as shown by the establishment of mixed Panels by the UN administration in Kosovo (2000), the Special Court for Sierra Leone (2002), the Special Panels for Serious Crimes for East Timor (2002), and the Extraordinary Chambers in the Courts for Cambodia (2003).

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<sup>3</sup> See Jonathan I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 464 (1999).

<sup>4</sup> Benjamin B. Ferencz, *A Prosecutor's Personal Account from Nuremberg to Rome*, COLUM. J. TRANSNAT'L L. (1999).

<sup>5</sup> Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, 1946, G.A. Res. 95 (I), reprinted in DIETRICH SCHINDLER AND JITI TOMAN, *THE LAWS OF ARMED CONFLICTS* (3<sup>rd</sup> ed., 1988).

<sup>6</sup> Marie Claude Roberge, *The New International Criminal Court a Preliminary Assessment*, 325 INT'L REV. OF THE RED CROSS 671-691(1998).

<sup>7</sup> Janes Blount Griffin, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 406-07 (2001).

## II. UN WAR CRIMES TRIBUNALS FOR ICTY AND ICTR ESTABLISHMENT OF THE TRIBUNALS

In response to the massive international humanitarian law (IHL) and human rights law violations committed in the armed conflicts of the former Yugoslavia and Rwanda, the UN Security Council (SC) established two *ad hoc* war crimes tribunals known as International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), to prosecute and punish the perpetrators of serious human rights violations, genocide and other violations of IHL. In these instances, the SC acted pursuant to Chapter VII of UN Charter, which empowers the Council to take measures to maintain international peace and security. The competence of the SC in setting up ad hoc war crimes tribunals may be questioned since such a competence has not been expressly mentioned in any part of the UN Charter.<sup>8</sup> The establishment of an international criminal tribunal by a mere SC resolution is an unprecedented move. Therefore, the legitimacy of its establishment has been widely commented.<sup>9</sup> On the other hand, for the first time the UN has established a link between international peace and justice. According to Justice Richard Goldstone, "The Security Council forged an important link that had never been made by an international organ, a link between peace and justice".<sup>10</sup> However, the ad hoc tribunals are judicial organs instituted by the political organ of the UN.

The end of the Cold War made it possible to promote greater international cooperation for the realization of international justice. Since the Nuremberg trials, the ad hoc tribunals were the first for half a century established to try individuals for crimes committed in armed conflicts.

The ad hoc tribunals were established as subsidiary organs within the meaning of Article 29 of the UN Charter.<sup>11</sup> The ICTY, based in The Hague Netherlands, which is the first ever UN ad hoc tribunal,<sup>12</sup> was established for the prosecution of persons who were responsible for committing serious violations of IHL in the territory of Former Yugoslavia since 1991.<sup>13</sup> The tribunal was established

<sup>8</sup> Paul Tavernier, *The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 321 INT'L REV. OF THE RED CROSS 665-621(1997).

<sup>9</sup> Sonja Boelaert-Suominen, *International Criminal Tribunal for the Former Yugoslavia and the Kosovo conflict*, 837 INT'L REV. OF THE RED CROSS (2000).

<sup>10</sup> Justice Richard Goldstone, *Assessing the work of the UN War Crimes Tribunals*, 33 STAN. J. INT'L L. 4 (1997).

<sup>11</sup> According to Article 29 of the Charter, "The Security Council may establish such Subsidiary Organs as it Deems Necessary for the Performance of its Functions." U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force October 24, 1945, art. 29.

<sup>12</sup> First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/49/342-S/1994/1007 (1994), at para. 3.

<sup>13</sup> S.C. Res 827, 25 May 1993, U.N. Doc. S/RES/827 (1993), at para. 2, *reprinted in* 32 INT'L LEG. MAT. (1993).

by the UN Security Council on its own initiative under Resolution 827 adopted on 25 May of 1993.<sup>14</sup> The ICTY was established while the conflict was still under way. The ICTR was established by the UN SC in response to the official request by the Rwandan government under Resolution 955 of 1994.<sup>15</sup> However, Rwanda, which was at that time serving as a non-permanent member in the SC, voted against that resolution. Pursuant to the respective Statutes of the tribunals, each tribunal consists of Trial Chambers and an Appeal Chamber. Each Trial Chamber comprises of 3 judges, and the Appeal Chamber of 7 judges. The ICTR is located in Arusha, Tanzania.

### III. JURISDICTION OF THE TRIBUNALS

The ICTY has jurisdiction to prosecute persons responsible for serious violations of IHL committed on the territory of the former Yugoslavia since 1991.<sup>16</sup> Its jurisdiction covers grave breaches of Geneva Conventions of 1949,<sup>17</sup> violations of laws and the customs of war,<sup>18</sup> genocide,<sup>19</sup> and crimes against humanity.<sup>20</sup> These crimes are defined in the Statute.

The ICTR has jurisdiction to prosecute persons responsible for genocide and serious violations of IHL committed on the territory of Rwanda and other such violations committed in the territory of neighboring States between 1 January and 31 December 1994.<sup>21</sup> The tribunal has jurisdiction over the crimes defined in the Statute. These include genocide,<sup>22</sup> crimes against humanity,<sup>23</sup> and the violations of Common Article 3 to the Geneva Conventions of 1949 and the 1977 Additional Protocol II.<sup>24</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> S.C.Res. 955 (1994), Establishing the International Tribunal for Rwanda, 33 I.L.M. 1598 (1994), adopted at its 3453<sup>rd</sup> meeting on 8<sup>th</sup> November 1994.

<sup>16</sup> Rome Statute of The International Criminal Court, 1998, art.8,U.N. Doc. A/CONF.183/9(1998), 37 I.L.M. 999(1998) [hereinafter "Rome Statute of the ICC].

<sup>17</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art.2,U.N. Doc. S/25704, annex (1993), *reprinted in* 32 I.L.M. 1192 (1993) [hereinafter "Statute of the ICTY].

<sup>18</sup> *Id.*,art.3.

<sup>19</sup> *Id.*,art.4.

<sup>20</sup> *Id.*,art.5.

<sup>21</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, art.7,U.N. Doc. S/INF/50 Annex 1994, *reprinted in* 33 I.L.M. (1994).

<sup>22</sup> *Id.*,art.2.

<sup>23</sup> *Id.*,art.3.

<sup>24</sup> *Id.*,art.4.

Unlike the ICTY, the temporal jurisdiction of ICTR is limited to the calendar year 1994. It may be recalled that although Rwanda initially made an official request to the UN for the establishment of ICTR, owing to its dissatisfaction over the too limited temporal jurisdiction of ICTR, it subsequently voted against the UN Security Council Resolution 995, which established the ICTR. The Rwandan representative to the UN, Ambassador Bakuramutsa, expressed his country's dissatisfaction over the constitution of the tribunal. He argued that the temporal jurisdiction of the Rwandan tribunal was too limited. It would not cover the period during which preparations were being made for committing genocide. It can be argued that the acts committed in the year 1994 did not occur spontaneously but were preceded by planning over a period of time.<sup>25</sup> Further, the UN had ignored the commission of serious crimes even before 1994.<sup>26</sup> The limited nature of temporal jurisdiction will indeed exclude certain crimes. Those expressly made punishable under the Statute, such as significant acts of conspiracy to commit and incitement to commit genocide but occurred prior to 1994, would be excluded from the prosecutorial scope of the tribunal.<sup>27</sup> On the other hand, in Rwanda, the genocide continued even after the year 1994. But for this there is to be no international accountability, and the perpetrators of those atrocities cannot be brought to trial before the ICTR.<sup>28</sup>

The very distinctive feature of the ICTY and the ICTR is that for the first time in the history of international law an international criminal jurisdiction is concurrently vested upon international tribunals and national courts. It marks a significant development in the area of international criminal law.<sup>29</sup> Generally speaking, the issue of concurrent criminal jurisdiction applies between two or more States where the states have the legal capacity to exercise domestic jurisdiction as a claim of right to convict a person basing upon the principle of universal jurisdiction.<sup>30</sup> Although, both the ICTY<sup>31</sup> and the ICTR<sup>32</sup> are legally entitled to exercise jurisdiction concurrently with national courts, yet, the primacy has been vested on the international tribunals. Therefore, while national courts are legally entitled, they are not obliged to exercise jurisdiction. It may be said that the establishment of ad hoc tribunals should not divest the international community's power to prosecute persons in national courts. Most of the humanitarian law and human rights law conventions, including the 1949 Geneva Conventions, have

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<sup>25</sup> Olivier Dubois, *Rwanda's National Criminal Courts and the International Tribunal*, 321 INT'L REV. OF THE RED CROSS 717-731 (1997).

<sup>26</sup> Chris Mana Peter, *The International Criminal Tribunal for Rwanda: Bringing the Killers to Book*, 321 INT'L REV. OF THE RED CROSS 695-704(1997).

<sup>27</sup> Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 354-55 (1997).

<sup>28</sup> David J. Schaffer, *Challenges Confronting International Justice Issues*, 4 NEW ENG. J. INT'L & COMP. L. ANNUAL (1998) available at <http://www.nesl.edu/> PDF.

<sup>29</sup> Frederik Harhoff, *Consonance or Rivalry? Calibrating the Efforts to Prosecute War Crimes in National and International Tribunals*, 7 DUKE J. COMP. & INT'L L. 571-2 (1997).

<sup>30</sup> *Id.*

<sup>31</sup> Statute of the ICTY, *supra* note 17, art.9(1).

<sup>32</sup> Statute of the ICTR, *supra* note 21, art.8(1).

recognized the principle of universal jurisdiction. Accordingly, any State which finds an accused on its territory may exercise the jurisdiction for the prosecutions. But both the ICTY and the ICTR, as provided in articles 9(2) of ICTY and 8(2) of ICTR Statutes, have been vested with a primacy over national courts. At any stage of the proceedings, it is competent for ICTY and the ICTR to make a formal request to the national courts to defer the cases before them. However, neither the Statutes nor the jurisprudence of the tribunals provide the criteria to be employed in making the decision for the deferral. In granting such a primacy, the UN SC discarded the principle of national and universal jurisdiction, and thus eroded state sovereignty as well.<sup>33</sup>

Perhaps the drafters of the Rome Statute of ICC, and Statute of Sierra Leone Special Court might have realized that the UN SC went wrong in granting primacy to ICTY and the ICTR over all national courts. Therefore, the Rome Statute has recognized the right of State jurisdictions over the perpetrators found on their territory, and allows them to bring them to justice in their national courts. The Statute of ICC, instead of vesting primacy over the national courts, embodies the principle of complementarity i.e. the ICC jurisdiction is “complementary to national criminal jurisdictions”.<sup>34</sup> Thus, national legal systems will continue to have primary responsibility to investigate and prosecute crimes set out in the Statute. The ICC will step in only when States are genuinely unwilling or unable to dispense justice. Although the Sierra Leone Special Court Statute accords primacy to the Special Court, it is limited only to the extent of the Sierra Leone national courts and is not extended to national courts of third States.<sup>35</sup>

#### IV. THE WORK OF THE TRIBUNALS

The establishment of two war crimes tribunals has led to the significant development of an extensive international human rights and humanitarian law jurisprudence, and also contributed to the emerging international criminal law through the variety of cases filed before them. Particularly, some substantive legal issues have been adjudicated by these two tribunals that were not decided before. This emerging jurisprudence would serve as a precedent for the newly established ICC, and also for the SCSL and other judicial tribunals to be established by the UN. The two ad hoc tribunals were established mainly in response to the horrific sexual violence committed in the armed conflicts of Former Yugoslavia and Rwanda.

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<sup>33</sup> Oscar Solera, *Complementary Jurisdiction and International Criminal Justice*, 845 INT’L REV. OF THE RED CROSS 145, 147 (2002).

<sup>34</sup> Rome Statute of the ICC, *supra* note 16, art.1.

<sup>35</sup> “The Special Court shall have primacy over the National Courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a National Court to defer to its competence in accordance with the present Statute and the rules of procedure and evidence.” Statute of the Special Court for Sierra Leone, art.8(2) available at <http://www.specialcourt.org>.

Despite the widespread occurrence of rape, the Rwanda tribunal initially failed to include the charges in the indictments. Only in August 1997, after international pressure from women's non-governmental organizations (NGOs) the prosecutor began to charge the perpetrators with crime of rape.<sup>36</sup>

The Statutes confer the authority and responsibility upon the judges to adopt the Rules of Procedure and Evidence to govern the proceedings. The tribunals have adopted detailed rules of procedure and evidence. In the light of new problems and unanticipated situations, they were amended several times. Since the tribunals are *international* criminal judicial institutions, the rules comprised of a combination of major legal systems i.e., the civil and common law. The rules also reflected human rights standards dealing with fair trial guarantees set out in the international legal instruments such as the Universal Declaration of Human Rights (UDHR) and International Covenant of Civil and Political Rights (ICCPR). The tribunals' jurisprudence also contributed to the development of a body of procedural and substantive rules of international criminal law. Yet, ensuring fair trial posed a considerable challenge to the international criminal tribunals. The fundamental concern was that "procedural questions should at no time enable a guilty person to escape justice."<sup>37</sup>

With regard to the composition of chambers, both the Statutes of ICTY and ICTR provided that three judges shall serve in each of the trial chambers and five judges in the appeals chamber. In November 2000, the UN SC by a resolution increased the number of judges from 9 to 11 so that now the ICTR President can select two of the tribunal's judges to sit in the common appeals chamber. A judge is to serve only in the chamber to which he or she is assigned. The Statutes intended to maintain a clear distinction between the two levels of jurisdictions i.e., the trial process and the appeal jurisdiction. The purpose of having recognized the principle of double degree of jurisdiction is that the same rank judges should not review each other's decisions to avoid undermining the integrity of the appeals process. But Rule 27 of Rules of Procedure and Evidence of ICTY<sup>38</sup> and the ICTR,<sup>39</sup>

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<sup>36</sup> Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission Resolution 1997/44, U.N. Doc. E/CN.4/1998/54, 26 January (1998), at para. 52.

<sup>37</sup> Anne-Marie La Rosa, *A Tremendous Challenge for the International Criminal Tribunals: Reconciling the Requirements of International Humanitarian Law with those of Fair Trial*, 321 INT'L REV. OF THE RED CROSS 635-650 (1997)

<sup>38</sup> 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: Rules of Procedure and Evidence, Rule 27 adopted by the Tribunal, first adopted 11 February 1994, 33 I.L.M. 484 (1994). And amended several times. Last amended 11 and 12 July 2002, for the latest version, see for details Tribunal's website: <http://www.icty.org>.

<sup>39</sup> United Nations International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence, Rule 27, U.N. Doc. ITR/3/REV.1 (1995), first adopted on 29 June, 1995, and amended several times, see, 7 AFRICAN J. INT'L & COMP. L. 693 (1995). Last amended 31 for the latest version, see tribunal's website: <http://www.ictr.org>.

adopted the rotation principle. It provides that “permanent judges shall rotate on a regular basis between the Trial Chambers and the Appeals Chamber.” When a judge of a Trial Chamber sits as a judge in the Appeals Chamber, there is every possibility that judges may not reverse their own decisions. It clearly undermines the appeals process of the tribunals, and also undermines the right of an accused who has been convicted to seek a decision against his conviction and sentence reviewed by a higher tribunal as provided in Article 14 Para 5 of ICCPR.<sup>40</sup>

Further, unlike in the Nuremberg trials, the UN ad hoc tribunals excluded the procedure of trial in absentia in the interest of justice and fair trial. This practice is often regarded as unfair.<sup>41</sup>

The Special Rapporteur on Systematic rape, sexual slavery and slavery like practices during armed conflict, Gay J. Mc Dougall, in her update to the Final Report to the Sub-Commission 2000 observed that in particular, “with the conclusion of several precedent-setting cases in both tribunals, jurisprudence is increasingly confirming that sexual slavery and other forms of sexual violence, including rape, committed during armed conflict are violations of international law.”<sup>42</sup> These judgments of the ad hoc Tribunals will influence the practice at the future decisions of ICC. The ICTY, since its establishment, has clarified and developed key concepts of IHL. It has made a significant contribution in reducing the distinction between the legal regimes applicable to international and internal armed conflicts.<sup>43</sup>

At the very outset, it encountered the question regarding the nature of the conflict. In 1995, the Appeals Chamber, in the *Tadic interlocutory Appeal on jurisdiction* held that the conflicts in the former Yugoslavia were mixed, having both international and non-international aspects.<sup>44</sup>

For an act to be an offense, and to be prosecuted by ICTY, it must be related and committed in an armed conflict. In 1997, the Trial Chamber stated:

*“The existence of an armed conflict or occupation and the applicability of IHL to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the Former Yugoslavia. For a crime to fall within the jurisdiction of the international tribunal*

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<sup>40</sup> Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 DENV. J. INT’L L. & POL’Y 308 (1997).

<sup>41</sup> *Id.*, at 305.

<sup>42</sup> Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict, Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/2000/21, 6 June (2000), at para. 45.

<sup>43</sup> Jelena Pejic, *Accountability for International Crimes: From Conjecture to Reality*, 84 INT’L REV. THE RED CROSS 13, 21 (2002).

<sup>44</sup> Prosecutor v. Dusko Tadic, decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, para. 74-77.

*a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of IHL.*<sup>45</sup>

Therefore, it must be noted, that an act committed must be related to the armed conflict, and must not be perpetrated for purely personal motives.<sup>46</sup>

In situations of armed conflicts, the NGOs are among the first to witness the violations of IHL and human rights law. Therefore, there is a every possibility that they may be called to testify before the war crimes tribunals. This question arose before the ICTY Trial Chamber and it ruled that the ICRC had a right to non-disclosure of information in judicial proceedings. This was required for the effective discharge of its mandate. The Trial Chamber was of the view that under customary international law the ICRC had an absolute right of non-disclosure of information relating to its work. The Trial Chamber focused on three fundamental principles: impartiality, neutrality, and independence, on the basis of which the ICRC operates. It is an important decision of ICTY, which recognized the ICRC's long-standing rule of confidentiality.<sup>47</sup>

Further, the ICTY Appeals Chamber has established an important legal precedent. It ruled that war correspondents could be exempted from testifying before an international tribunal. The Appeals Chamber stated that journalists working in war zones could only be called to testify when the evidence sought is of direct and important value in determining a core issue in the case. And that such evidence cannot reasonably be obtained elsewhere. The decision for the first time recognized the journalist privilege.

The *Erdemovic* case has an important place in the ICTY jurisprudence. In this case, the Appeals Chamber established certain preconditions for the acceptance of guilty plea. By a majority, the Appeals Chamber found that duress couldn't afford complete defense under international law to a soldier who was charged with crimes against humanity or war crimes involved in the killing of innocent persons. However, the Appeals Chamber held that duress might constitute a mitigating factor in the determination of sentence.<sup>48</sup>

It is now a well established rule of international criminal jurisprudence as established in the *Furundzija case of ICTY* that rape is not limited to a forcible

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<sup>45</sup> Prosecutor v. Dusko Tadic, Judgment May 1997, *IT-94-I-T*, at para.572.

<sup>46</sup> Marco Sassoli, Laura M. Olson, *The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic case*, 839 INT'L REV. THE RED CROSS 723-769 (2000)

<sup>47</sup> Prosecutor v. Simic et al; Stephane Jeannot, *Recognition of the ICRC's long-standing rule of confidentiality*, 838 INT'L REV. THE RED CROSS 993-1000 (2000); Stephane Jeannot, *Testimony of ICRC delegates before International Criminal Court*, 840 INT'L REV. THE RED CROSS (2000); Gabor Rona, *The ICRC privilege not to testify: confidentiality in action*, 845 INT'L REV. THE RED CROSS 207-219(2002).

<sup>48</sup> Prosecutor v. Erdemovic, Judgment of 7 October 1997, Case No. IT-96-22-A.

sexual penetration or intercourse, and it may also include committing serious sexual act such as the forcible penetration of a women's body by the penis or the forcible insertion of any other object into either the vagina or the anus of a women, and even a oral sex or oral penetration must be regarded as rape.<sup>49</sup>

On 24 May 1999, ICTY issued a significant indictment in which President of Federal Republic of Yugoslavia (FRY), *Slobodan Milosevic* and four other high level officials in the Government of FRY and Serbia (including *Milan Milutinovic*, President of Serbia, *Nikola Sainovic*, Deputy Prime Minister of the FRY, *Dragoljub Ojdanic*, Chief of Staff of the Yugoslav Army, and *Vlajko Stojiljkovic*, Minister of Internal Affairs of Serbia) were indicted. They were indicted on the charges of crimes against humanity, and violations of the laws or customs of war committed since 1999 in Kosovo. This was for the first time a serving head of State was indicted by an international criminal tribunal for serious violations of IHL during an on-going armed conflict.<sup>50</sup> On 2 August 2001, the Trial Chamber of ICTY, in its first conviction for genocide, sentenced the Bosnian Serb Army *General Radislav Krstic* for 46 years. The tribunal found *General Krstic* responsible for the murder of nearly 8,000 Bosnian Muslims after the fall of the Srebrenica.<sup>51</sup>

On 22 February 2001 the ICTY Trial Chamber convicted Bosnian Serbs *Dragoljud Kunarac*, *Radomir Kovac*, and *Zoran Vukovic* for rape, torture, and enslavement committed in Foca, during the Bosnian conflict.<sup>52</sup> For the first time in the history of an international tribunal, charges were brought exclusively for the crimes of sexual violence against women. Further, it was for the first time it was held that crimes such as rape and enslavement were "crimes against humanity". The tribunal ruled that enslavement did not necessarily require the buying or selling of a human being, which had been traditionally required under customary law.<sup>53</sup> With regard to the act of torture, the Trial Chamber was of the view that the elements of torture, by definition, were not the same under IHL and human rights law. According to the Trial Chamber, what was important was the nature of the act, rather than the status of the person who committed the act of torture.<sup>54</sup> The Trial Chamber found that the "presence of a state official or of any other authority wielding person in the torture process is not necessary for the offense to be regarded as torture under international humanitarian law".<sup>55</sup> The decision is a significant ruling and has made a contribution to the development of international criminal law.

<sup>49</sup> Prosecutor v. Anto Furundzija Judgment, Case No. IT-95-17/1-T Judgment of 10 December 1998, para. 183-85. See also, Prosecutor v. Furundzija, 38 I.L.M 317 (1999).

<sup>50</sup> Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/54/187 – S/1998/846, 1999, at para 132.

<sup>51</sup> Prosecutor v. Radislav Krstic, Judgment of 2 August 2001, Case No. IT-98-33-Tf .

<sup>52</sup> Prosecutor v. Dragoljud Kunarac, Radomir Kovac, and Zoran Vukovic Judgment of 22 February (2001), Case No. IT-96-23-T & IT-96-23/1-T

<sup>53</sup> *Id.*, at para. 543.

<sup>54</sup> *Id.*, at para. 495.

<sup>55</sup> *Id.*, at para. 496.

## V. ICTR

By 30 June 2002, ICTR had indicted 80 persons, of those 60 were arrested and 20 are still at large. Earlier its first trial commenced on 9 January 1997. As of September 2006, the tribunal has handed down twenty-five judgments involving thirty-one accused.

The sentenced persons include some prominent persons such as *Jean Kambanda*, the head of the Interim Government, a former Prime Minister; *Jean-Paul Akayesu*, a bourgmestre of Taba commune in Rwanda (Mayor); and *Omar Serushago* a local leader of the Interahamwe militia.<sup>56</sup> A Journalist *Georges Ruggiu*, and the Interahamwe militia leader *Georges Rutaganda* were also convicted.<sup>57</sup> *Pauline Myiramasuhuko* was the first woman to be indicted by an international court.<sup>58</sup> *Pauline* had been charged for committing rape in context of command responsibility.

On 30th and 31<sup>st</sup> May 1996, three accused persons, *Rutaganda*, *Akayesu*, and *Kayishema* appeared before the first Trial Chamber. *Jean Kambanda* pleaded guilty on 1 May 1998, on all the counts contained in the indictment such as, genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity, murder, and extermination.<sup>59</sup> His indictment has implications beyond the issue of individual criminal responsibility. The accused in his plea acknowledged “that genocide did indeed occur in Rwanda in 1994 but also indicated that it was organized and planned at the highest levels, both civilian and military”.<sup>60</sup> This was for the first

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<sup>56</sup> Fourth Annual Report the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the territory of Neighbouring states between 1 January and 31 December 1994, U.N. Doc. A/54/315-S/1999/943 (1999) at para 2.

<sup>57</sup> Fifth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/55/435 –S/2000/927 (2000) at para 2.

<sup>58</sup> Second Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International humanitarian Law Committed in the territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations committed in the territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/52/582-S/1997/868 (1997), at para. 5.

<sup>59</sup> Prosecutor v. Kambanda, Judgment and Sentence, Case No. ICTR 97-23-S (Trial Chamber 4 September 1998), at para. 3.

<sup>60</sup> Third Annual Report the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/53/429-S/1998/857 (1998) at para 3.

time that an accused pleaded guilty before an international tribunal; he freely and voluntarily pleaded guilty for the crime of genocide.<sup>61</sup> The Trial Chamber held: “as Prime Minister of Rwanda *Kambanda* had been entrusted with the duty and the authority to protect the population and that he had abused that trust.”<sup>62</sup> Accordingly, the Trial Chamber found him guilty, and on 4 September 1998 sentenced him for life.<sup>63</sup> Later, *Kambanda* appealed against his sentence before the Appeals Chamber. On 19 October 2000, the Appeals Chamber unanimously dismissed the case on eight grounds of his appeal, and affirmed the conviction and sentence rendered by the Trial Chamber.<sup>64</sup>

*Jean-Paul Akayesu* was the first person to ever have been convicted for the crime of genocide by an international criminal tribunal.<sup>65</sup> This was the first ever judgment on the crime of genocide handed down by an international court having international criminal jurisdiction. *Akayesu* took part in the killing of the *Tutsi* population of *Taba* commune on April 1994, just after the genocide began in Rwanda. In that process of killing, sexual atrocities were used as a weapon of war, and became an integral part of destruction of *Tutsi* population. The Trial Chamber on September 1998 found *Akayesu* guilty of genocide, direct and public incitement to commit genocide, and crimes against humanity, extermination, murder, torture, rape and other inhumane acts. On 2 October 1998, *Akayesu* was sentenced for life.<sup>66</sup> The Trial Chamber, in *Akayesu* case, defined rape as “a physical invasion of a sexual nature, on a person under circumstances which are coercive”.<sup>67</sup> *Akayesu* appealed the judgment. Finally, on 1 June 2001, the Appeals Chamber unanimously rejected each of the grounds of appeal, and confirmed the verdict and sentence of the Trial Chamber.<sup>68</sup>

On 14 December 1998, *Omar Serushago*, former head of the Interahamwe militia in Gisenyi Prefecture pleaded guilty before the Trial Chamber on five counts on which he was charged. However, he pleaded not guilty for count five pertaining to crimes against humanity and rape. After verifying the validity of his plea, the Trial Chamber found *Serushago* guilty for the crime of genocide and of crimes against humanity murder, extermination and torture. Accordingly, the Trial Chamber sentenced him for a single term of 15 years’ imprisonment.<sup>69</sup> *Serushago* lodged an appeal against the sentence of Trial Chamber, which was upheld by the Appeal Chamber.<sup>70</sup>

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<sup>61</sup> *Id.*, at paras. 3, 25.

<sup>62</sup> Fourth Annual Report of ICTR, *supra* note 56, at para 22.

<sup>63</sup> *Kambanda*, *supra* note 59.

<sup>64</sup> *Id.*

<sup>65</sup> Fourth Annual Report of ICTR, *supra* note 56, at para 2.

<sup>66</sup> *Prosecutor v. Akayesu*, 37 I.L.M. 1401 (1998).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Fourth Annual Report of ICTR, *supra* note 56, at para. 25-27; *Prosecutor v. Omar Serushago* ICTR-98-39-S.

<sup>70</sup> *Omar Serushago*, *Id.*

*George Ruggiu*, a Belgian national who worked as a journalist to cover the events during the 1994 Rwandan genocide pleaded guilty, and subsequently was convicted by the Trial Chamber for committing direct and public incitement to genocide, crimes against humanity, and persecution. Accordingly, on 1 June 2000 he was sentenced for twelve years for each of two counts and both the sentences were to run concurrently.<sup>71</sup> It was rather surprising that neither Prosecutor nor *Ruggiu* made an appeal against the judgement.

On 6 December 1999, the Trial Chamber I imposed a single sentence of life imprisonment on *Rutaganda*, a former businessman and the second Vice-President of the Interahamwe for the counts of genocide, crimes against humanity, murder and extermination.<sup>72</sup> *Rutaganda* filed an appeal against the judgment. The Prosecutor also filed an appeal on certain counts entered not guilty.

On 27 January 2000, *Alfred Musema*, a former tea factory director, was convicted and sentenced by the Trial Chamber for life imprisonment on counts such as genocide, crimes against humanity, rape and extermination.<sup>73</sup>

## VI. INTERNATIONAL COOPERATION

There is no international treaty among the States to provide mutual legal assistance in the investigation of crimes under international law. However, a limited number of treaties exist at regional level, and some other treaties may be found between the States in a bilateral form.

The international legal system has no enforcement mechanism independent of the States, and therefore the enforcement of international criminal law is done with the States' cooperation.<sup>74</sup> The ICTY and the ICTR have an authority to impose legal obligations upon all the States to make search and arrest the persons accused of crimes set out in the respective Statutes. It is a binding obligation not only on the States such as those of the former Yugoslavia and Rwanda, but binding on all the member States of UN. The ad hoc war crimes tribunals were established by the UN Security Council by resolutions adopted under its Charter. All members of UN have an obligation under the Charter to accept and carry out the decisions of the Security Council.<sup>75</sup> Therefore, all the UN member States were required to cooperate fully with ICTY<sup>76</sup> and the ICTR<sup>77</sup> in the

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<sup>71</sup> The Prosecutor v. Georges Ruggiu (ICTR-97-32-t); Prosecutor v. Ruggiu, 39 I.L.M. 1338 (2000).

<sup>72</sup> Prosecutor v. Georges Anderson Nderubumwe Rutaganda ICTR-96-3-T.

<sup>73</sup> Prosecutor v. Alfred Musema, ICTR-96-13-T.

<sup>74</sup> Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 416 (1997).

<sup>75</sup> UN CHARTER, art.25, *supra* note 11.

<sup>76</sup> Statute of the ICTY, art.28, *supra* note 17.

<sup>77</sup> Statute of the ICTR, art.29, *supra* note 21.

matters of investigation and prosecution of persons accused of committing serious violations of IHL. States are obliged to comply without any delay with any request for assistance or order of the tribunals in respect of the identification and location of persons, the taking of testimony and the production of evidence, service of documents, the arrest, or detention of persons, and the surrender or transfer of accused to the international tribunals. Accordingly, the UN Security Council by Resolution 978 of 27 February 1995 urged all the member States to arrest and detain persons found on their territory against whom there was sufficient evidence of responsibility of acts committed within the jurisdiction of the Rwanda Tribunal, and inform the same as well as their identity, and the nature of the crime which they believed to have been committed to the Secretary-General and the tribunal's Prosecutor.<sup>78</sup> Already, a number of States have adopted national legislations which expressly provide for cooperation with the tribunals. In any case States cannot escape from their international obligation of cooperation even though States failed to enact national legislation to enforce the international obligations. It is an established rule of international law, as provided in Article 27 of the Vienna Convention on the Law of the Treaties, 1969 that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>79</sup> Some States have refused to cooperate with the tribunals, and failed to fulfill their obligation to implement the international warrants issued by ICTY and the ICTR. Though *Milosevic* and others were indicted, and international arrest warrants were issued by ICTY, against all the members of UN and Switzerland. For the first time, states were ordered to make an inquiry to discover whether the accused had any assets in their territory, if so, to freeze them until the accused are taken into custody.<sup>80</sup>

The Yugoslavia government refused to comply with that order. The reason could be that at that time *Milosevic* was in power. In 2000 presidential elections, *Milosevic* lost the presidency to Vojislav Kostunica. Initially, the new President Kostunica was against the surrender of *Milosevic* to the Hague Tribunal, and said that he would be tried in Yugoslavian domestic courts for corruption charges. Sometimes, international politics plays a crucial role in complying with judicial orders. In fact, the Serbian government was under pressure to surrender *Milosevic* since an international donor's conference was due to take place on 28 June 2001 to consider a huge financial aid package worth about US \$1.2 billion aid for the reconstruction of Serbia.<sup>81</sup> Accordingly, the Federal Government issued a decree for *Milosevic*'s surrender. In the absence of a domestic legislation for the surrender of defendants to the international tribunal, the Yugoslavian constitutional court suspended the decree pending further hearing. The federal government

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<sup>78</sup> Second Annual Report of ICTR, *supra* note 58, at para 3.

<sup>79</sup> Vienna Convention on Law of Treaties, concluded at Vienna, 23 May 1969, art.27, U.N. Doc. A/CONF.39/27 (1969).

<sup>80</sup> Sixth Annual Report of the ICTY, *supra* note 50, at para 132.

<sup>81</sup> HUMAN RIGHTS WATCH, WORLD REPORT 589 (2002).

decided to wait for the court's decision. But the Republic of Serbia opposed the decision, and despite strong domestic opposition, and rejection by the Yugoslavian Supreme Court, the Government of Serbia surrendered *Milosevic* to the tribunal at The Hague on 28 June 2001. It is important to note, "*Slobodan Milosevic's* transfer to the UN war crimes tribunal was a victory for the victims of the Balkan wars and a transformative moment for international justice. The prosecution of a former head of State, indicted when he was a sitting President by an international tribunal was a ground breaking precedent."<sup>82</sup> However, he died while the trial was in progress.

Other international arrest warrants are still to be implemented against the war time President of the Bosnian Serb Republic *Radovan Karadzic*, and war time leader of the Bosnian Serb military forces *Ratko Mladic*. The Bosnian Serb Republic, the Republika *Srpska* is required to cooperate in their arrest.

Unlike the Nuremberg and Tokyo tribunals, which represented a particular segment of the world community, and were considered victors' justice the unique feature of recent war crimes tribunals is that these were not established by either of the parties involved in the armed conflicts. The tribunals were created by the UN which represents the international community.<sup>83</sup> Perhaps, the most often heard criticism of ad hoc tribunals is that they were not established by the UN General Assembly, and therefore do not reflect the will of the entire international community.<sup>84</sup>

Yet, the establishment of UN ad hoc tribunals is a significant, revolutionary step in the evolution of international justice, international criminal law, and international criminalization of internal atrocities and they are aimed to promote the international rule of law. However, the ad hoc tribunals were not perfect bodies. The tribunals also lacked State cooperation. In the initial years of its operations the ICTY faced lack of cooperation from the Serb authorities. This seriously hampered the investigations. Investigators were not permitted to have access to most territories under the control of the Bosnian and Croatian Serb forces.<sup>85</sup> Further, "a significant part of the Bosnian Serb public continues to view the Tribunal as an anti-Serb institution with little credibility."<sup>86</sup> For many years after the ICTY was established, Yugoslavia failed to enact domestic legislation,

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<sup>82</sup> *Id.* at 590.

<sup>83</sup> Scharf, *supra* note 40, at 310.

<sup>84</sup> Djiena Wembou, *The International Criminal Tribunal for Rwanda its Role in the African context*, 321 INT'L REV. THE RED CROSS 685-693 (1997)

<sup>85</sup> Rodney Dixon, *The International Criminal Tribunal for the Former Yugoslavia: Working for Peace and Justice in the Balkans*, 20 SOUTH AFRICAN YEARBOOK OF INT'L L. 30 (1995).

<sup>86</sup> Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 16 (2001).

which could enable it to extend its cooperation to the tribunal. It was only on 11 April 2002, that the Yugoslav Parliament passed such domestic legislation.<sup>87</sup> It happened nearly a decade late. Under this law, National Council for Cooperation has been created. It will have the responsibility for coordinating all the requests from ICTY. It must be noted that US economic pressure was instrumental in the adoption of the cooperation legislation. However, the federal cooperation law has one substantial defect. It bars the surrender of accused indicted after the law came into force.<sup>88</sup>

In the initial years, the attitude of the African States with Rwanda tribunal was also non-cooperative over the way of the tribunal was established, and the competence of the UN Security Council to create it.<sup>89</sup> The Rwandan Tribunal also faced opposition in the beginning from the Rwandan government with its very hostile attitude towards the ICTR and its personnel in Kigali by subjecting them to harassment in the course of their investigation.<sup>90</sup> However, the problem of cooperation with the international authorities by the Rwandan government is lesser than the Former Yugoslavia. It may be recalled that despite Rwanda casting a negative vote on Resolution 955 for the establishment of the ICTR, it said that it would fully cooperate with the tribunal.<sup>91</sup> In Rwandan national courts a number of indicted persons are on trial, or are awaiting the commencement of their trial. In some cases, investigation takes too long. The slow pace of justice in Rwanda continues to be a source of frustration.

*“The concurrent and expeditious prosecution of suspects before the International Tribunal and national courts is an important confidence-building measure, which will greatly contribute to future peace in Rwanda. It is an essential means of preventing vengeful actions and thereby safeguarding the right to life, liberty and security of the person.”<sup>92</sup>*

Since the 1994 genocide, more than 100,000 persons are languishing in the overcrowded Rwandan prisons awaiting justice. There is a growing need to speed up the genocide trials and to ensure justice. Therefore, the Rwandan

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<sup>87</sup> Ninth Annual Report of International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Ninth Annual International Humanitarian Law committed in the territory of the Former Yugoslavia (ICTY) since 1991, U.N. Doc. A/57/379-S/2002/985 (2002), at para. 227.

<sup>88</sup> *Federal Republic of Yugoslavia Serbia and Montenegro*, in HUMAN RIGHTS WATCH, WORLD REPORT 396-97 (2003).

<sup>89</sup> Wembou, *supra* note 84.

<sup>90</sup> Chris Maina Peter, *The International Criminal Tribunal for Rwanda: Bringing the Killers to Book*, 321 INT'L REV. THE RED CROSS 695-704 (1997).

<sup>91</sup> Dubois, *supra* note 25.

<sup>92</sup> Akhavan, *supra* note 86, at 340.

government contemplated an alternative mechanism to complement prosecutions.<sup>93</sup> The Rwandan government has launched a State-run *gacaca* system to speed up the genocide trials. *Gacaca*, which is a domestic judicial system comprising of over 200,000 persons elected as judges, with minor training. However, the *gacaca* system is found to be ineffective, since it raised several serious human rights concerns. In particular, the *gacaca* courts are found to be lacking the fair trial standards.<sup>94</sup>

Both, in the case of ICTY and the ICTR, the Prosecutor does not possess any independent enforceable investigative powers normally available in the national jurisdictions to obtain evidence such as access to public files. For the investigation, the Prosecutor has to rely on the assistance and cooperation of States. This factor is one of the main reasons for the slow progress in the matters of investigation.<sup>95</sup> Moreover, in the case of ICTR, most of the proceedings took place in Kinyarwanda where reliable interpreters are in short supply. Security is another concern for the Rwanda Tribunal. Two of the witnesses in the Akayesu and Rutaganda cases were killed.<sup>96</sup>

The establishment and the work done by the UN war crimes tribunals “not only represents a significant advancement in the development of international criminal law, since the Nuremberg and Tokyo military tribunals, but is also a benchmark for the creation of permanent criminal court.”<sup>97</sup> As Justice Robert H. Jackson, US Chief Prosecutor at Nuremberg pointed out in his opening statement at Nuremberg trial, “We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow”.<sup>98</sup> This statement is more relevant today. The establishment of such ad hoc war crimes tribunals is a desirable tool to ensure the promotion of international criminal justice. The ad hoc tribunals would provide deterrence to the perpetrators responsible for the commission of atrocities in internal conflicts. However, it can only be secured when appropriate situations acquire the attention of Security Council. If the Council’s members, or their allies, or their interest is involved in those situations the Council may not take any concrete action for the establishment of such tribunals.

The Security Council is a political organ of the UN, and it is not free from shadow of political bias. The best example for that is Chechnya armed conflict. Despite the indiscriminate killing of civilians in the capital Grosni, and other

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<sup>93</sup> Laura Olson, *Mechanisms Complementing Prosecution*, 845 INT’L REV. THE RED CROSS 173, 186-89 (2002).

<sup>94</sup> HUMAN RIGHTS WATCH, WORLD REPORT 61-64 (2002).

<sup>95</sup> Frederik Harhoff, *The Rwanda Tribunal a Presentation of Some Legal Aspects*, 321 INT’L REV. THE RED CROSS 711-720 (1997).

<sup>96</sup> Second Annual Report of ICTR, *supra* note 58, at para 51.

<sup>97</sup> Phenyó Keiseng Rakate, *An international Criminal Court for a new Millennium the Rome Conference*, 23 SOUTH AFRICAN Y.B. INT’L L. 217-18 (1998).

<sup>98</sup> Benjamin B. Ferencz, *Telford Taylor: Pioneer of International Criminal Law*, 37 COLUM. J. TRANSNAT’L L. 661 (1999).

surrounding areas by the Russian forces, no attempt was made by the Council for the establishment of war crimes tribunal to prosecute and punish the perpetrators. The reason may be that Russia will exercise its veto power to block Council action. "It should have been obvious that without unanimity among the Five Powers, the UN would be unable to achieve its lofty humanitarian goals. When idealistic principles are surrendered to realistic politics, humanity becomes the victim".<sup>99</sup>

Accordingly, the selective application of international law by the Security Council is a cause for grave concern to the international community. It also undermines the quest for international justice. As the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions points out, the perpetrators committing human rights violations in conflict must be brought to justice and in no case result in selective prosecution:<sup>100</sup> "it is widely accepted that the rule of law rests on the impartial application of well-known legal rules, irrespective of any political discretions or justifications."<sup>101</sup>

Since the end of World War II, a number of conflicts have broken out across the globe, and the perpetrators have killed millions of persons in many armed conflicts. However, no step was initiated, and no one was punished.<sup>102</sup>

Establishment of other war crimes tribunals were considered and created for Cambodia,<sup>103</sup> Sierra Leone, and East Timor. A mixed domestic-international

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<sup>99</sup> *Id.*

<sup>100</sup>Extra Judicial, summary or Arbitrary Executions, Report of the Special Rapporteur, Ms. Asma Jahangir, Submitted Pursuant to Commission on Human Rights Resolution 2000/31, U.N. Doc. E/CN.4/2001/9 (2001), at para. 63.

<sup>101</sup>Dixon, *supra* note 85, at p. 38.

<sup>102</sup>Richard Gold Stone, *Assessing the work of the United Nations War Crimes Tribunals*, 33 STAN. J. INT'L L. 4(1997), at 4.

<sup>103</sup>The 1979 January 7<sup>th</sup> Vietnamese troops invasion of Cambodia overthrew the Pol Pot regime, and installed the Vietnamese backed Government the People's Republic of Kampuchea (PRK) comprising part of former Khmer Rouge cadres such as Hun Sen. The new Government established a Tribunal to investigate and prosecute Pol Pot and Ieng Sary for their role during the Communist Party of Kampuchea (CPK) or known as Khmer Rougeera, A ten member Jury found them guilty for deaths of three million persons. The Tribunal found them guilty of genocide and sentenced to death. Since the trial was held in absentia and without fair process, the trial was regarded as illegitimate and shows trial. Report of the Group of Experts for Cambodia established pursuant to G.A. Res. 52/135 February 1999, Annex U.N. Doc. A/53/850, S/1999/231. In 1996 the United Nations resumed the issue of accountability at the initiative of the then newly appointed Special Representative of the Secretary-General Ambassador Thomas Hammarberg on human rights in Cambodia. Later, his efforts resulted into a Resolution, which was adopted by the Commission on human rights April 1997 the Commission called upon the Secretary-General to "examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law as a means of addressing the issue of individual accountability." Commission on Human Rights Resolution 1997/49 U.N. ESCOR, Situation of Human Rights in Cambodia, U.N. Doc. E/CN.4/RES/1997/49 1997, accordingly, by letter to U.N. Secretary-General Kofi Annan dated June 21 1997 then first Prime

criminal tribunal was established for Cambodia (The Extra-ordinary Chambers) to try former leaders of the Khmer Rouge responsible for the 1970 Cambodian genocide.<sup>104</sup> The negotiations between Cambodian government and the UN for the formation of the tribunal have dragged on for many years.<sup>105</sup> The UN General Assembly adopted a resolution on 18 December 2002, which mandated the Secretary-General to continue the negotiations with Cambodia for the establishment of tribunal.<sup>106</sup> Finally, after the two rounds of negotiations both in New York and

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Minister Norodom Ranariddh then Second Prime Minister Hun Sen requested the U.N. and the international community for assistance to bring the persons responsible for Cambodian genocide during Khmer Rouge era. Letter dated June 21 1997 to U.N. Secretary-General Annex to U.N. Doc. A//1997/488, then the Secretary-General appointed a three/member group of experts to study the existing evidence to determine the nature of the crimes committed by Khmer Rouge leaders between 1975 –1979, and to examine the available legal options to bring them to justice. In the report submitted to the Secretary-General the group of experts concluded that the evidence exist for the prosecutions under both Cambodian law, and international law mainly on the charges of crimes against humanity. And further recommended the UN establishes a tribunal to bring former CPK officials to justice. Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135 February 1999, Annex U.N. Doc. A/53/850, S/1999/23. *See also* seven candidates for prosecution: accountability for the crimes of the Khmer Rouge, Report prepared by Stephen Heder, and Brian D. Tittmore, War crimes Research Office, Washington College of Law, American University and Coalition for International Justice June 2001, available at <http://www.cij.org>.

<sup>104</sup>The Khmer Rouge took the power in the year 1975 over Cambodia, then called Democratic Kampuchea, and responsible for the killing of as many as two million people nearly one-third of the Cambodian population during its four years of brutal regime from April 1975 and January 1979. *See* Seven Candidates for prosecution, accountability for the crimes of the Khmer Rouge, Report prepared by Stephen Heder, and Brian D. Tittmore, *id*.

<sup>105</sup>Disagreement continued between the UN and the Cambodian government over the establishment of the tribunal. With regard to the composition and the control over the tribunal, the UN wanted to establish a mixed tribunal comprising of Cambodian and international judges and prosecutors which must be subjected to international supervision, and which should not be subjected to the control or influence of Cambodian government. During the negotiations UN was also insisting, that amnesties and pardons granted to former Khmer Rouge cadres in particular, amnesty granted to Ieng Sary should not be a bar for prosecutions for atrocities perpetrated during the period of Khmer Rouge era. It may be recalled, the Hun Sen government as a strategy of consolidating his authority and to end the opposition to his government, he decided to dismantle the Khmer Rouge forces,

Prime Minister Hun Sen proclaimed Royal amnesties and given the positions in the Royal Cambodian Armed Forces (RCAF) in exchange to their defections from Khmer Rouge forces. However, the Cambodian Prime Minister Hun Sen was opposing for such moves, and proposing that the Ieng Sary might be spared from prosecution which was under the amnesty granted in 1996. *See* Seven Candidates for prosecution: accountability for the crimes of the Khmer Rouge, Report prepared by Stephen Heder, and Brian D. Tittmore, War crimes Research Office, *id*.

<sup>106</sup>It may be recalled, Cambodia's judicial system is frequently criticized for its lack of independence, resources and notorious corruption. The failure of the Cambodian National judicial and legal system is the major concerns of the UN for setting up a joint tribunal. Since the 1997, the UN and Cambodian government had been involving in the negotiations for the establishment of the tribunal to try the Khmer Rouge. During the negotiations, Cambodia insisted that the Cambodian law adopted by the national Assembly in August

Phnom Penh a draft agreement emerged and on 17 March 2003, both sides issued the draft agreement.<sup>107</sup> Other criminal tribunals have been constituted to try the Indonesian military and other militia leaders for their role in the commission of atrocities during the East Timor civil conflict (the Special Panels).<sup>108</sup>

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2001 must be the bases for the establishment of the tribunal. But the UN insisted that the tribunal should be governed by a memorandum of between the UN and Cambodia rather than the Cambodian law. Due to this disagreement, on 8 February 2002, the UN Secretary-General Kofi Annan announced the withdrawal from the negotiations over the creation of the tribunal. *Cambodia*, in HUMAN RIGHTS WATCH, WORLD REPORT 210 (2003); Suzannah Linton, *New Approaches to International Justice in Cambodia and East Timor*, 845 INT'L REV. THE RED CROSS 93(2002). However, in the month of July, Hun Sen expressed his willingness to make necessary amendments to the law adopted in 2001. In August, Annan announced that he needed a clear mandate from either the UN. The General Assembly or the Security Council to resume the negotiations. HUMAN RIGHTS WATCH, WORLD REPORT 210,518 (2003). On Wednesday, 18 December 2002 the UN. The General Assembly adopted a resolution which was co-sponsored by such as France and Japan, called upon the Secretary-General to resume negotiations with the Cambodian authorities for the formation of the tribunal. However, the General Assembly called in its resolution, that the further negotiations must be based on the law adopted by the Cambodian national Assembly in 2001 which fall far short of international standards. The law establishing tribunal is unable to guarantee the necessary independence, impartiality, and objectivity. Further, the law establishing a mixed tribunal presided over by a majority of Cambodian judges, co-prosecutors and other International Judges and Prosecutors. It must be noted, that there must be a viable and credible judicial process that meet necessary international standards to the impunity. Diluting from international standards would not serve justice. Further, any judicial mechanism is contemplated to establish under the UN auspices should contribute substantially to the long-term commitment of strengthening the national courts i.e, national judicial and legal systems. See, Cambodia: Khmer Rouge must meet international standards, Human Rights Watch press release 19 December 2002 Human Rights Watch, New York, 2002.

<sup>107</sup>Cambodia: Amnesty International's preliminary views and concerns, News Release issued by the International Secretariat of Amnesty International, AI Index: ASA 23/003/2003 (Public) 21 March 2003.

<sup>108</sup>The U.N. Security Council under its Charter VII authority to restore peace and security to East Timor adopted a resolution 1272 on October 25 1999, which established the "United Nations Transitional Administration for East Timor" (UNTAET), has been "mandated to exercise all legislative and executive authority, including the administration of justice." United Nations Security Council Resolution 1272 "On the situation in East Timor", U.N. Doc. S/RES/1272/1999 25 October 1999, 39 I.L.M. 240(2000)-; Accordingly, the UNTAET has established four District Courts in East Timor, located in *Dili, Baucau, Suai*, and *Oecussi*. Appointed East Timorese judges, prosecutors and public defenders. It is a transitional legal system which retained the application of Indonesian law to the extent of that it is consistent with international human rights standards. It led to the establishment of a functional legal system for the transitional period and laying the foundations for the future courts of independent East Timor. It fulfilled the overriding need of justice for the crimes committed against the civilian population throughout the period of the Indonesian occupation, including the campaign of violence perpetrated by the Indonesian military and its militia groups between 1 January and 25 October 1999. In June 2000 the UNTAET created the Special Panels of Dili District Court and court of Appeal. The Special Panels

The international community cannot rely entirely on national justice system to prosecute the perpetrators of international crimes such as genocide, crimes against humanity and war crimes. However, international criminal jurisdiction should commence only when national legal systems fails to provide effective justice to punish the perpetrators for human rights violations. The establishment of ad hoc international tribunals is a rather complex process. Although there is no expressed legal bar, it is not wise to establish a judicial institution by a mere resolution as subsidiary organ of the UN Security Council. The ICTY and the ICTR both have primacy over their respective national courts. Both the ICTY and the ICTR are composed exclusively of international judges elected by the UN. The UN Security Council completely ignored the participation of the national judges from their respective states. The ICTY and the ICTR are also located far from the States where the atrocities were perpetrated. As a result of the form and structure of ICTR, at the time of creation, differences existed in matters of investigation and collection of evidence. With regard to the members of the Security Council, some were in favour of providing a new ad hoc and independent structure, while others favored the extension of existing ICTY jurisdiction. As a compromise, eventually it was decided to create a new ad hoc judicial institution by retaining common attributes to both the tribunals such as it shares the same prosecutor and the Appeals Chamber. In fact, the rational behind the idea to share the same Appeals Chamber with ICTY was, to maintain consistent and concerted operations to ensure the uniformity of jurisprudence and to avoid conflict of decision from that of ICTY.<sup>109</sup> However, no rational could be found in sharing one and same prosecutor by the two tribunals.<sup>110</sup>

The progress in the establishment of ad hoc tribunals is rather slow, and it takes many years. Some times, such delays in setting up war crimes tribunals may result into destruction of crucial evidence, escape of perpetrators, intimidation or disappearance of witnesses. In spite of the reported commission of crimes

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within the Dili District Court have the exclusive jurisdiction over serious criminal offences such as genocide, crimes against humanity, war crimes and torture, as well as murder and sexual offences under the Indonesian penal code. While the first panel commenced its operations in 2001, and the second panel commenced in November 2001. The Special Panels of Dili District court is the mixed national/international justice mechanisms. Each Panel consists of one East Timorese judge, and two international judges furthermore, an Appeals Chamber is similarly composed to hear the appeals on the decisions rendered by the Special Panels, however a Panel of five judges composed of three international judges, and two East Timorese judges may be constituted in cases of special importance. However, some of the elements of right of fair trial affected by the lack of effective administrative structure in the Special Panels. The judges do not have adequate resources, such as research facilities and administrative support. Such resource constraints resulted into the denial of the right of fair trial which include, the right to trial without undue delay, right to public hearing, and right to an interpreter. Justice in practice: Human rights in court administration, Thematic Report 1, Judicial System Monitoring Programme (JSMP), Dili, East Timor, November 2001.

<sup>109</sup>Cecile Aptel, *The International Criminal Tribunal for Rwanda*, 321 INT'L REV. THE RED CROSS 675-683 (1997).

<sup>110</sup>Morris, *supra* note 27, at p. 355.

against humanity, and war crimes during the Liberian civil conflict, no individual perpetrator was punished, and no entity was held responsible, and no action was taken by the UN such as prosecution, investigation, and establishment of war crimes tribunal.<sup>111</sup>

On the other hand, some States experiencing civil wars and armed conflicts are expressing their resentment for UN war crimes tribunals. Particularly, the developing world which is most vulnerable to the civil wars and internal conflicts has fears over the inconsistent and uncertain acts of the Security Council. There is also the apprehension that the Security Council may try to intervene in the internal affairs of the States under the pretext of human rights atrocities and may infringe their sovereignty. Although sovereignty is not absolute, and is subordinated to international law, it must be respected. It should be pointed out that, in the world today sovereign equality is the central aspect of international legal system.<sup>112</sup> One should not forget that it is one of the basic principles of the UN Charter and the organization is based on the sovereign equality of all its members.<sup>113</sup>

It must also be remembered, that international tribunals have only limited resources. Therefore, these mechanisms can supplement but not replace the national courts in the enforcement of IHL. Further, it was very much evidenced by the UN SC resolution 1503, I.E., as a matter of recent progress towards implementation of the ICTY and ICTR Completion Strategy, that number of cases were transferred back to national criminal jurisdictions including the domestic jurisdictions of ICTY and ICTR. These international Tribunals continued to focus on the most senior-level persons accused of the most serious crimes and, the cases of lower to mid-level accused were transferred to national jurisdictions.<sup>114</sup> The national courts will continue to play a vital role and that fact cannot be ignored.<sup>115</sup> Therefore, when measures are considered to promote the culture of accountability and end the culture of impunity for human rights violations, the establishment of ad hoc tribunals should be considered as a last resort i.e., only when the national courts have become inactive, or incapable of ensuring fair and effective criminal justice. The protracted armed conflicts may have an extremely adverse affect on the national judicial systems. The justice system may have collapsed. Much of the physical infrastructure of the courts may have been destroyed during the conflict. Even in such situations, the UN should consider the option of strengthening the national legal systems and national courts with international assistance. There must be a broader program of rebuilding the criminal justice systems at national level, which is the key to the end of impunity.

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<sup>111</sup>Kenneth L. Kain, *The Rape of Dinah: Human Rights, Civil War in Liberia, and Evil Triumphant*, 21 HUM. RTS. Q. 278, 290, 292 (1999).

<sup>112</sup>Michael Byers, *Power, Obligation, and Customary International Law*, 11 DUKE J. COMP. & INT'L L. 81 (2001).

<sup>113</sup>UN CHARTER, *supra* note 11, at art.2, para.1.

<sup>114</sup>The UN SC addressed the ICTY and ICTR Completion Strategies on 28 August 2003, UN doc. S/RES/1503 (2003).

<sup>115</sup>Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 555 (1995).

States should request the international community i.e., the UN for its assistance to strengthen their respective national legal and judicial systems. Even in the absence of such request, the UN should offer assistance which should include both financial and material aid to the States, with a view to re-establish or strengthen the national judicial systems. Assistance to the national legal systems and judiciary may include the training of judges and other legal personnel and providing resources for rebuilding the courts with necessary infrastructure as UN did recently, in both Kosovo and East Timor.<sup>116</sup>

The Third-world countries have also expressed their resentment with regard to the way the tribunals were created and questioned the Security Council's competence in that area. Many States stressed that a judicial organ could not be created on the basis of a resolution by a political organ such as the Security Council. Many countries preferred that the tribunals were created by a treaty rather than by a mere resolution. On the other hand, the traditional approach of establishing a judicial institution by the treaty has been discarded since it is a rather slow process and may take many years to secure the ratification of States. Thus, the Security Council has established the tribunals by exercising its power of enforcement under the Chapter VII of the UN Charter.

Further, some States also argued that the tribunals' universality would have been better guaranteed if the tribunals were established by the General Assembly, which consists of universal membership rather than an organ, which has a limited membership. The Third-world States felt that to ensure that the establishment of tribunals reflects the will of the international community, the ad hoc tribunals like the ICTY and ICTR should be established by the General Assembly in future.<sup>117</sup>

As a matter of national reconciliation, the Government of Sierra Leone requested the UN to establish an international tribunal to bring the perpetrators of atrocities in the civil conflict to justice. In the situation of Sierra Leone, the Security Council rightly requested the Secretary-General to negotiate for an agreement with the Sierra Leone Government to establish an independent special national/international court. It has jurisdiction over the crimes against humanity, and war crimes and other serious violations of IHL as well as crimes under relevant Sierra Leone law.<sup>118</sup> The crime of genocide was not included in the jurisdiction of the special court since the atrocities perpetrated in the conflict did not intend to kill either whole or part of any ethnic group. The Sierra Leone Tribunal is the third ad hoc war crimes tribunal to be established by the UN. But this time, it has recognized the need for national participation for the effective functioning of the court. Unlike

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<sup>116</sup>Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: the United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46 (2001).

<sup>117</sup>Wembou, *supra* note 84.

<sup>118</sup>S.C.Res. 1315, 14 August, 2000 on the situation in Sierra Leone, para 2, 40 I.L.M. 248 (2001).

the ICTY and ICTR, the Special Court is not a subsidiary organ of UN. The SCSL is a treaty-based *sui generis* court, which has been established by an agreement concluded between UN and the Government of Sierra Leone.<sup>119</sup> The seat of the Special Court has been established in Sierra Leone.<sup>120</sup> Hence, it is more effective and can issue binding orders to the government of Sierra Leone.

The Special Court is composed of both international and Sierra Leone Judges, prosecutors and staff. It consists of trial chambers, and one appeal Chamber.<sup>121</sup> Each trial chamber has three judges. Out of three, one is appointed by the Government of Sierra Leone.<sup>122</sup> Similarly, out of five judges in the appeal chamber, two of them are appointed by Sierra Leone, and remaining three judges are appointed by the UN Secretary-General.<sup>123</sup> A Chief Prosecutor is appointed by the Secretary-General in consultation with the Government of Sierra Leone, and a Deputy Prosecutor is appointed by Sierra Leone in consultation with the Secretary-General.<sup>124</sup>

The SCSL is not a perfect body, and not free from certain inherent defects. An important lacuna is that the court is not intended to prosecute all the perpetrators of the conflict. It is aimed only to “prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”.<sup>125</sup> Both ICTY and the ICTR differ in this respect, and have the jurisdiction over natural persons without subjecting to any such limitation.<sup>126</sup> Another lacuna is that although the civil war had begun in March 1991, the temporal jurisdiction of the Special Court is commencing from 30 November 1996.<sup>127</sup> The UN Secretary-General was of the view that “imposing temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the

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<sup>119</sup>Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, 16 January 2002, *available at* <http://www.specialcourt.org/documents/Agreement.htm>.

<sup>120</sup>*Id.*, art. 10.

<sup>121</sup>*Id.* art. 2-3.

<sup>122</sup>*Id.*, art. 2 (2a).

<sup>123</sup>*Id.* art. 2 (2c).

<sup>124</sup>*Id.* art. 3 (1) (2).

<sup>125</sup>*Id.* art.1(1), *See also* the S.C. Res. 1315 recommended the Secretary-General that the proposed Special Court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes during the conflict. *See also* S.C. Res. 1315, 14 August 2000, on the situation in Sierra Leone, para. 3, 40 I.L.M. (2001).

<sup>126</sup>*See* Statute for ICTY, *supra* note 17, art. 6; Statute for ICTR, *supra* note 21, art.5.

<sup>127</sup>*See* Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 (2000), *U.N. Doc. S/2000/915*, at para 25-27. On 23rd of March 1991 the rebel Revolutionary United Front (RUF) forces entered into the Sierra Leone from Liberia and launched the rebellion to overthrow the one-party military rule led by All People’s Congress (NPC). Since March 23 of 1991 was the beginning day of civil war, the temporal jurisdiction of the court could have been fixed from that date.

Court".<sup>128</sup> If the interest of justice is borne in mind, the Secretary-General's view appears to be legally unsound. It represents selective and discriminatory justice. In fact, the very object of establishing the Special Court is to end the impunity, and bring the perpetrators to justice. Justice should not only be done, but effectively seem to be done. It is the cardinal principle of rule of law. It is one of the basic foundations for most of the legal systems in the world. One should not forget, "injustice anywhere is a threat to justice everywhere."<sup>129</sup> Although, it is necessary to ensure prosecution of all the war criminals who are in violation of the law, in the present context it is proved if a political organization like the UN is involved in setting up a special tribunal, there are likely to be political considerations in establishing necessary mechanisms. If the temporal jurisdiction of the Special Court runs from 1996, the truth of the brutal atrocities will never be known. It would leave the persons who perpetrated the atrocities in the initial five years of conflict unpunished. It denies justice to many thousands of victims who suffered some of the worst ever human rights violations in the decade long internal conflict, and are waiting for justice.<sup>130</sup>

Another shortcoming is that some uncertainty surrounds the funding of the Special Court. The Security Council has requested the Secretary-General to recommend the funding of the court from voluntary contributions.<sup>131</sup> The intention of the Security Council to fund the court entirely from voluntary contributions, rather than from the regular UN budget would not provide a long-term assurance, or continuous source of funding. It may therefore jeopardize the functioning of the court. Establishing a judicial organization based on voluntary contributions is neither viable nor sustainable.<sup>132</sup>

However, despite the many difficulties, the UN and the Government of Sierra Leone, on 16 January 2002, finally signed the agreement for the establishment of the Special Court.<sup>133</sup> It created the legal framework for the SCSL. Further, in March, the Sierra Leone parliament adopted an implementing legislation to bring the agreement into force. Finally, the SCSL began its operation in July 2002. The SCSL is based in Freetown, Sierra Leone. In its initial operation, the SCSL is expected to work for a period of three years with a proposed budget of US \$56.8 million. While the funds for the first year are secured, there is a shortfall of funds for the remaining two years.<sup>134</sup> It must however, be agreed, that the establishment of

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<sup>128</sup>*Id.* at para 26.

<sup>129</sup>Dr. Martin Luther King Jr. cited in the AI Index: IOR 40/09/00, Amnesty International, the International criminal Court Fact Sheet 9, Fair trial guarantees.

<sup>130</sup>Amnesty International, Sierra Leone Renewed commitment needed to end impunity, AI-index: AFR 51/007/2001, Sep.24, 2001.

<sup>131</sup>S.C. Res. 1315, *supra* note 118. at para. 8.

<sup>132</sup>*See* Report of the Secretary-General, *supra* note 127, at Para 70. Avril McDonald, *Sierra Leone's Shoestring Special Court*, 845 INT'L REV. THE RED CROSS 141 (2002).

<sup>133</sup>*Id.* at p. 121.

<sup>134</sup>*Sierra Leone*, in HUMAN RIGHTS WATCH, WORLD REPORT (2003).

Special Court is a welcome step, and a progressive development in the area of international criminal law.

Both ICTY and the ICTR, encountered many practical financial and structural difficulties and setbacks in the initial years of their operation. Although, Mr. Ramon Escovar Salom, Venezuela's Attorney General was appointed to the office of Prosecutor of ICTY he accepted it subject to a condition that he would serve from early February 1994. The resignation of the appointed Prosecutor and the delay of five months in the appointment of a new successor for the office increased further the uncertainty for initiating the investigation and prosecution. The new Prosecutor Mr. Richard J. Goldstone of South Africa was appointed only in July 1994.<sup>135</sup> Further, the ICTY and ICTR till recently, shared the same prosecutor and the Appeals Chamber. Only in 2003 the UN SC adopted necessary resolutions to split the positions of ICTY and ICTR Prosecutor, thereby providing full-time positions for both Tribunals.<sup>136</sup> With regard to the ICTY, the judges first met on 17 November 1993 at The Hague.<sup>137</sup> Although, the ICTR judges held their first plenary session on 26 June 1995, it was only on 19 June 1996 that it was recognized that the judges had officially taken the office.<sup>138</sup> Thus, for a period of one year the sessions were primarily ceremonial and no actual business was conducted.

The delay in appointing the Registrar of ICTR created many obstacles to the office of the prosecutor. Since no administrative infrastructure was immediately available, it caused much delay in setting up the prosecutor's office. Due to that delay in the appointment, the Prosecutor was not able to concentrate on his mission. The Registrar was appointed only in the month of September 1995.<sup>139</sup> Despite the heavy workload, and several years of its existence, the ICTR had faced difficulties due to the lack of the necessary staff and technical resources.<sup>140</sup>

For ICTY, only one single Courtroom was available and shared by two Trial Chambers and the Appeal Chamber.<sup>141</sup> The lack of adequate courtroom facility resulted in slow progress in conducting trials. For example, with the commencement

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<sup>135</sup>First Annual Report of the ICTY, *supra* note 12, at paras. 31 and 37.

<sup>136</sup>The UN SC adopted three resolutions on 28 August 2003: Res. 1503 contains the deadlines for completion, Res. 1504 establishes a separate ICTR Prosecutor, and Res. 1505 appointed Hassan Bubacar Jallow (Gambia) as Prosecutor.

<sup>137</sup>*Id.*, at para. 31.

<sup>138</sup>First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/51/399-S/1996/778 (1996), at para 27.

<sup>139</sup>*Id.*, at para. 41.

<sup>140</sup>Third Annual Report of ICTR, *supra* note 60, at para. 4.

<sup>141</sup>Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/50/365-S/1995/728, (1995) at para. 31.

of *Blaskic* case on the 23 June 1997, *Celebici* trial was able to take place only for two weeks in a month.<sup>142</sup> However, two new courtrooms became operational from 5 May and 12 June 1998 respectively.<sup>143</sup> Even for the reported period of 2001-2002 the non-availability of adequate courtroom facilities hampered the anticipated progress in the trials. Although six trials were taking place, only three courtrooms were available. Thus, three trials were taking place in the morning and other three trials were being conducted in the afternoon.<sup>144</sup>

The unavailability of Courtroom facility also created the difficult situation for ICTR. Since the tribunal's premises were not yet ready in Arusha, the first plenary session was held in The Hague.<sup>145</sup> The judicial activity of the ICTR began effectively only in the month of September 1996 with the construction of a courtroom.<sup>146</sup> However, since only one courtroom was available, it did not allow simultaneous hearing of cases by the both the Trial Chambers.<sup>147</sup> The second courtroom was constructed and became operational on 29 August 1997 which made possible the hearing of cases by the both the Trial Chambers simultaneously.<sup>148</sup> The third courtroom was constructed in 1999,<sup>149</sup> and the fourth courtroom was inaugurated on 1 March 2005.<sup>150</sup> Initially, the ICTR had only two trial chambers. Subsequently At the request of the tribunal, the UN SC, by its resolution 1165 (1998), created a third Trial Chamber.<sup>151</sup>

Although, the judicial process is completed in a number of cases at trial level and reached to the stage of appeal, the ICTR is facing some practical problems in the enforcement of its prison sentences. Despite the fact that many countries have offered the prison facilities, the African States are lacking proper prison

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<sup>142</sup>Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the territory of the Former Yugoslavia since 1991, U.N. Doc. A/52/375-S/1997/729 (1997), at para. 38.

<sup>143</sup>Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of the Former Yugoslavia since 1991, U.N. Doc. A/53/219-S/1998/737 at (1998), at para. 136.

<sup>144</sup>Ninth Annual Report of the ICTY, *supra* note 87, at para. 60.

<sup>145</sup>First Annual Report of ICTR, *supra* note 138, at para. 27.

<sup>146</sup>Fourth Annual Report of ICTR, *supra* note 56, at para. 40.

<sup>147</sup>Second Annual Report of ICTR, *supra* note 58, at para. 29 and 61. *See also* Corrigendum, U.N. Doc. A/52/582/Corr.1-S/1997/868/Corr.1, Dec. 2, 1997.

<sup>148</sup>Third Annual Report of ICTR, *supra* note 60, at para. 77.

<sup>149</sup>Fourth Annual Report of ICTR, *supra* note 56, at para 3.

<sup>150</sup>Tenth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/60/229-S/2005/534, 15 August (2005).

<sup>151</sup>Fourth Annual Report of ICTR, *supra* note 56, at 41.

facilities due to the lack of financial resources. Although thousands of rapes were committed during the 1994 genocide, by October 2002 the ICTR has convicted only two defendants for sexual violence, and one of which was reversed on appeal.<sup>152</sup>

Another criticism that has been advanced is that, the concurrent jurisdiction conferred upon the Rwandan national courts and the international tribunal exposed certain difficulties in the administration of criminal justice. The area of particular concern in exercising concurrent jurisdiction is the defendants could enjoy more favorable treatment before the international tribunal rather than the trials before the national courts. It includes the protection from the imposition of the death penalty, which could be imposed by the Rwandan national courts but not by the international tribunal.<sup>153</sup> Therefore, it is enable that former Rwandan genocide leaders those found most responsible are to be tried before the ICTR will receive the life sentence. Where as the less culpable offenders are to face their trial before the Rwandan national Courts and may be subjected to the imposition of death penalty.<sup>154</sup> In the larger interest of justice and the rights of the defendants, it is important to ensure equal treatment among the similarly situated category of persons.

There are many reasons why the ICTR has not achieved the high profile of ICTY. Since its inception, the ICTR had faced many difficulties, such as mismanagement, corruption and under funding. After the receipt of numerous complaints from staff members and member States, and at the request of the UN General Assembly, the UN Office of Internal Oversight Services investigated the functioning of the ICTR. The findings of the Office revealed that in absence of internal control mechanisms, all sections under the purview of the Registry were not functioning effectively. Not a single administrative area of the Registry such as finance, general services, personnel, procurement and security was functioning effectively. It resulted in gross mismanagement in almost all the areas of the tribunal. And also resulted in frequent violation of relevant rules of the UN. Accordingly, on the basis of the recommendations, the UN Secretary-General Kofi Annan requested and received the resignations from both the Registrar and as well as the Deputy Prosecutor of the Tribunal.<sup>155</sup> Compared to The Hague tribunal, the ICTR does not have many resources. However, the Rwandan tribunal is the first ever attempt by the Security Council for dispensing international justice exclusively in the situation of an internal armed conflict,<sup>156</sup> in particular on the African soil.

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<sup>152</sup>HUMAN RIGHTS WATCH, WORLD REPORT 66 (2003).

<sup>153</sup>Morris, *supra* note 27, at pp. 362-64.

<sup>154</sup>Harhoff, *supra* note 29, at p. 584.

<sup>155</sup>Second Annual Report of ICTR, *supra* note 58, at para. 53-57.

<sup>156</sup>Wembou, *supra* note 84.

## VII. CONCLUSION

International criminal law imposes criminal responsibility and liability upon individuals for criminal violations. The development of this branch of international law, reflected in the convergence of two disciplines: namely, the penal aspects of international law and the national criminal law. As a result of gross atrocities committed during the Second World War, which led to the establishment of Nuremberg and Tokyo Tribunals, and that resulted into the explosive development of international criminal law in the post World War II period. Further, several developments have coalesced to advance and strengthen the development of international criminal law during the second half of the 20th century such as, the development of international criminal jurisdiction, the continued reaffirmation of individual criminal responsibility and superior responsibility. The international reaction to reports of heinous crimes committed during the Yugoslav and Rwandan conflicts during the 1990s resulted in the notable and rapid growth of international criminal law. The establishment of the war crimes tribunal for the prosecution of persons responsible for human rights violations in the situations of armed conflicts would also act as deterrence and to end impunity.

The establishment of UN ad hoc war crimes tribunals its Statutes, the Secretary General's Report, the Reports of the Commission of Experts, the Tribunal's Rules of Procedure and Evidence, the UN Security Council and General Assembly Resolutions, and the jurisprudence of these ad hoc tribunals have immeasurably extended the development of international criminal law. Such a revolutionary change has brought the evolution of newly recognized international human rights and humanitarian law and criminal law. Accordingly, IHL has had a formidable impact on the development of international criminal law.

In addition, attempts to seek and promote accountability for gross violations of human rights have had a direct and substantial impact on the elaboration of what constitutes international crimes and demonstrates how a culture of impunity for acts of violence destroys international and as well as the national societies. In addition, the increased interest of domestic courts to prosecute perpetrators for international crimes has resulted in a greater awareness towards State redress for violations of both IHL and human rights law. This is one of the important aspects of the development of universal jurisdiction, which has been elevated to a recognized form of penal reparation.

Thus, the establishment of ICC on a permanent basis will set forth a responsible model for approaching violations of IHL and human rights law in the future. Although, the war crimes tribunals are needed to enforce the international criminal law, the ad hoc tribunals are subject to several constraining factors such as their jurisdiction is chronologically and geographically limited. On the other hand, if a large number of perpetrators are waiting for trial the establishment of international tribunals may not serve the goals sought. In that particular context, they cannot be considered as substitute to the national legal systems. For instance, in Rwanda, over 100,000 persons are awaiting trial.

Yet another problem in setting up the ad hoc tribunals is, the “ad hoc courts, created after tragedies occurred, to punish a limited number of crimes committed in a limited area during a limited time, is not an ideal way to assure universal justice”.<sup>157</sup> On the other hand, if once a number of tribunals are established, these tribunals may function with a risk involving conflicting interpretation and application of law. Thus, a permanent ICC is required for the prosecution and punishment of war criminals. Such an institution could consistently and uniformly interpret and apply the international criminal law and provide an effective international justice,<sup>158</sup> and also avoid uncertainty of the UN Security Council’s actions. It was understood, that until the ICC is established, more additional ad hoc tribunals will prove to be unavoidable, and require to be created by the UN Security Council. The ICC has no retrospective jurisdiction. Yet, the past crimes must not be ignored, therefore more ad hoc tribunals may be needed even after the ICC has become fully operational. The adoption of the Statute for an ICC, and granting the Court jurisdiction over a core list of international crimes such as genocide, crimes against humanity and war crimes made the body of international criminal law more dynamic.

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<sup>157</sup>Ferencz, *supra* note 98.

<sup>158</sup>Toni Panner, *The Establishment of a Permanent International Criminal Court*, 322 INT’L REV. THE RED CROSS (1998).