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Ad hoc International Criminal Tribunal

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Abstract

The Ad Hoc Tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) played an important role in catalysing the creation of the International Criminal Court (ICC). First, they demonstrated that international criminal justice was possible, even if it would not be easy. Second, they demonstrated that creating ad hoc tribunals in response to atrocities was not a sustainable solution.The International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), which have been in operation for ten years already, have had a significant influence on the growth of the system of international criminal law. Those contributions include significant jurisprudence on substantive and procedural law, as well as on the types of culpability under international law and the determination of specific historical facts, which renders them undisputed. The Rome Statute's design was also influenced by ad hoc tribunals, and many of its characteristics were included by the Rome Statute's authors. The Rome Statute's authors attempted to address what they believed were the shortcomings of the ad hoc tribunals, but at the same time, the ICC was also a response to those tribunals.The work of the ICC and other special courts and tribunals was made possible by the International Tribunals' demonstration that contemporary international humanitarian law can be fairly applied and that accountability can be crucial in bringing war-torn states back to the rule of law. Nevertheless, despite these and other significant accomplishments, some have criticised the International Tribunals for their perceived sluggish justice delivery and high operating costs.

Introduction

"The most serious crimes of concern to the international community as a whole must not go unpunished."

-Preamble of Rome Statute

In order to provide victims of international crimes with justice, the UN has participated in the establishment of many tribunals. The ICTY and the ICTR are two ad hoc criminal tribunals that were formed by the Security Council. The Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and other tribunals have all had interactions with the UN in various capacities. The ICC is mandated to be a permanent international criminal court, filling the role of these ad hoc criminal courts even though the UN is still actively involved in transitional justice and rule of law issues. Research on various facets of the work of the tribunals can be supported by a number of secondary sources of information.It was thought until the early 1990s that the offspring of the Nuremberg and Tokyo IMTs would take a while to materialise. However, the United Nations brought back the concept of international criminal tribunals in reaction to two conflicts in the 1990s (the Rwandan genocide of 1994 and the Yugoslav wars of disintegration). These tribunals will be discussed in detail in this chapter along with their procedures. This chapter will also highlight some of the praise and criticism that have accompanied the Tribunals' up

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to this point in operation, despite the fact that it is still too early to draw any firm conclusions regarding the Tribunals.

The International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), which have been in operation for ten years already, have had a significant influence on the growth of the system of international criminal law. The establishment of some historical facts, which renders them incontrovertible, as well as significant jurisprudence on substantive and procedural law, as well as on modes of culpability under international law, are examples of these contributions. In terms of practical matters, the International Tribunals have had an impact on the creation of high-tech courtrooms, methods of presenting evidence that have served as a model for the International Criminal Court (ICC), and other hybrid international criminal courts, as well as the protection of victims and witnesses at a high standard.[2]The work of the ICC and other special courts and tribunals was made possible by the International Tribunals' demonstration that contemporary international humanitarian law can be fairly applied and that accountability can be crucial in bringing war-torn states back to the rule of law. Nevertheless, despite these and other significant accomplishments, some have criticized the International Tribunals for their perceived sluggish justice delivery and high operating costs. Yet when efforts were made to establish their "completion strategies," the ink on revisions to the Statutes and Rules of Procedure and Evidence intended to boost the effectiveness of the International Tribunals had barely dried. This process led to the development of a plan by the ICTY to complete its mandate by 2010.

ICTY (International Criminal Tribunal for the Former Yugoslavia)

It was established by UN Security Council resolution 827 of 25 May 1993.Beginning in 1991, the armed conflict that tore the Federal Republic of Yugoslavia into its individual entities was marked by egregious violations of international humanitarian law on a large scale.Since the Nuremberg and Tokyo trials, the ICTY is the first international war crimes tribunal. It was established by the UN as the first war crimes court. In accordance with Chapter VII of the UN Charter, it was created by the Security Council.

The main goal of the ICTY is to prosecute those people who are most accountable for heinous crimes like murder, torture, rape, enslavement, property destruction, and other offences detailed in the Tribunal's Statute. The International Criminal Tribunal for the former Yugoslavia (ICTY) seeks to punish offenders and bring justice to the thousands of victims and their families in order to prevent further atrocities and promote a long-lasting peace in the region.[3]Resolutions 808 and 827 of the Security Council, dated 22 February and 25 May 1993, respectively, created the ICTY. Its headquarters are in The Hague, Netherlands. The ICTR has its headquarters in Arusha, Tanzania, and was formed by Security Council Resolution 955 of November 8, 1994. Annexed to these resolutions are the Tribunals' Statutes.The Tribunals devised their own Rules of Procedure and Evidence, which were enacted on 11 February 1994 for the ICTY and 29 June 1995 for the ICTR, since there is no worldwide rule of criminal procedure. The ICTR adopted rules that are

[2] Mundis A. Daryl "The Judicial Effects of the "Completion Strategies" on Ad Hoc International Criminal Tribunals", *Cambridge University Press,* Available at, https://www.jstor.org/stable/pdf/3246095.pdf?refreqid=excelsior%3A6c005cef93315ab0cb729e839b1ff827&ab_segments=&origin=&initiator=&acceptTC=1,
[3]Available at, https://www.icty.org/en/about

quite similar to the ICTY's. The common law system, as opposed to civil law, that controls the majority of Anglo-Saxon States, served as a major inspiration for the Rules. The civil law system is viewed as being inquisitorial, whereas the common law system is frequently characterised as having an accusatorial (or adversarial) approach.[4]

Structure of ICTY:

There are three main organs of the ICTY-

- Registry- the registry is responsible for the administrative management of the tribunal, including for example – the victims and witnesses programme, transport of the accused their conditions of detention and public affairs.
- Office of the prosecutor- – it is the organ whose responsibility is to investigate allegations, issue indictments (which have to be confirmed by a judge) and bring matters to the trial.
- Chambers- - the final organ of ICTY is the chambers. It consists of a presiding judge and two other judges; they are subject to the appellate control of the Appeals chamber. This seven-member chamber sits in the panel of five is headed by the President and is the final authority on matters of law in the tribunal.[5]

The registry is responsible for the administrative management of the tribunal, including, for example, the victims and witnesses programme, transport of accused, their conditions of detention and public affairs. The office of prosecutor is the organ whose responsibility it is to investigate allegations, issue indictments and bring matters to trial. The final organ of ICTY is the chambers. The Trial Chambers consist of-

- A presiding judge
- Two other judges;

They are subject to the appellate control of the Appeals Chamber. This seven-member chamber is headed by the President and is the final authority on matters of law in the tribunal.

ICTY Jurisdiction:

The Statute of the ICTY describes the jurisdiction of the Tribunal, which is limited to serious violations of international humanitarian law in the territory of the former Yugoslavia since the beginning of hostilities in 1991.

It had jurisdiction over four clusters of crimes committed on the territory of the former Yugoslavia since 1991:

[4] Camus Albert "The Practical guide to Humanitarian Law", *Medecins Sans Frontieres*, Available at, https://guide-humanitarian-law.org/content/article/3/international-criminal-tribunals-for-the-former-yugoslavia-icty-and-rwanda-ictr/

[5] Kaur Ravleen "International Criminal Tribunals", Available at, file:///C:/Users/ya503/Downloads/scribd.vpdfs.com_international-criminal-law%20(1).pdf

- grave breaches of the Geneva Convention
- violations of the laws or customs of war
- genocide, and
- crimes against humanity
- The maximum sentence it could impose was life imprisonment.

Grave Breaches of the Geneva Conventions of 1949

The four Geneva Conventions establish guidelines for the protection of prisoners of war who are unable to fight, as well as sick, injured, or shipwrecked military personnel and civilians who do not participate in the conflict.The Geneva Conventions oblige the States Parties to establish all legislation necessary to offer appropriate criminal punishment for those who violate or command the violation of "grave breaches" of those conventions. Additionally, they are required to look for individuals who are claimed to have committed, or to have given the order to commit, such violations and either bring them before their courts or extradite them to another State for trial. The Tribunal is authorised to investigate these serious violations in accordance with **Article 2** of the ICTY Statute.

"The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- *wilful killing;*
- *torture or inhuman treatment, including biological experiments;*
- *wilfully causing great suffering or serious injury to body or health;*
- *extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*
- *compelling a prisoner of war or a civilian to serve in the forces of a hostile power;*
- *wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;*
- *unlawful deportation or transfer or unlawful confinement of a civilian;*
- *taking civilians as hostages."*[6]

Violations of the laws or customs of war

The conduct of an armed conflict, particularly its treatment of civilians, is governed by the laws or customs of war. A non-exhaustive list of offences that fall under the purview of the ICTY are listed in **Article 3** of its statute. For instance, using poisonous weapons, wilfully destroying cities without military necessity, destroying places of worship, and stealing either public or private property are all on the list.

[6]"Mandates and Crime under ICTY", United Nations ICTY, Available at, https://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction#:~:text=In%20accordance%20with%20its%20Statute,entities%20or%20other%20legal%20subjects.,

The Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949 and Additional Protocols of 1977, the Geneva Conventions of 1949, and the development of customary international law all contributed to the introduction of the laws or customs of war as a body of international law.

Crime Against Humanity

Over many years, the idea of crimes against humanity has changed.

Article 5 of the ICTY Statute defines them as "the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- rape;
- persecutions on political, racial and religious grounds;
- other inhumane acts."[7]

The ICTY has primacy over national courts. Pursuant to this principle, the Tribunal may require states to defer to it any proceedings they were contemplating or undertaking. The situations when deferral is justified are given in Rule 9 of the rules of procedure and evidence. Those situations are when the conduct is not charged as an international crime, where the proceedings are not fair or impartial, or what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the tribunal. The last is a very broad provision, effectively allowing the ICTY to demand transfer of cases at will. As the tribunal winds up its work, however, it has gone from taking cases from domestic jurisdictions to referring them back.

National courts had no precedence over the ICTY. According to this concept, the tribunal may order states to halt any legal action they were planning or starting. In accordance with Rule 9 of the Rules of Procedure and Evidence, the circumstances are justified.

***Dusco Tadic Case*[8]**

The first significant development happened in April 1995 when Germany postponed its own procedures against Dusko Tadic, a Bosnian Serb convicted of several international crimes, and sent him to the ICTY for trial.Tadic contested the ICTY's authority to try him. He had argued that the Security Council lacked the authority to establish a criminal court, that the ICTY's pre-eminence over national courts was illegal, and that the tribunal in any case lacked jurisdiction over the alleged crimes.

[7]ibid
[8]*The Prosecutor* vs*Dusco Tadic* 15 july 1999

After the takeover of Prijedor (Bosnia and Herzegovina) and the attack launched against the town of Kozarac (Bosnia and Herzegovina) in 1992, the non-Serb civilians were detained in several prison facilities, where they were beaten, sexually assaulted, tortured, killed and otherwise mistreated. DuškoTadić was the President of the Local Board of the Serb Democratic Party in Kozarac (Bosnia and Herzegovina). Trial Chamber II found DuškoTadić guilty of crimes against humanity and war crimes and, in a separate sentencing judgment, sentenced him to 20 years of imprisonment.
The Appeals Chamber denied DuškoTadić's appeal on all grounds. It did allow, however, the Prosecution's appeal, reversing the judgment of Trial Chamber II and entering convictions for war crimes and crimes against humanity.
The Appeals Chamber also held that an act carried out for the purely personal motives of the perpetrator can constitute a crime against humanity. Furthermore, Trial Chamber II erred in finding that all crimes against humanity require discriminatory intent.
The issue of sentencing was referred to a Trial Chamber.

In contrast, the Appeals Chamber determined that it had the power to judge the legitimacy of its own formation.[9]

Enforcement Capacity of ICTY

Article 29 of the ICTY Statute obliges Member State of the UN to cooperate and offerjudicial assistance to the Yugoslavia Tribunal without undue delay. Such calls for cooperation are to be addressed in the form of binding orders or requests, including, but not limited to:

a) the identification and location of a person;
b) the taking of testimony and production of evidence;
c) the service of documents;
d) the arrest or detention of person;
e) the surrender of the transfer of accused to the international tribunal.

Appraisal

- Along with leaders, it has pushed for accountability rather than impunity.
- Identified the crime's facts in the former Yugoslavia.
- brought victims' rights to justice and gave them a voice. Although its actions haven't always been up to the standards set by advocates for victims' rights, it has spent a lot of time and money trying to bring justice to victims.
- enhanced the rule of law and developed international law.

Criticism

- Tribunal has been too expensive and bureaucratic.

[9]Greenwood Cristopher, "International Humanitarian Law and the Tadic Case" Available at, http://www.ejil.org/pdfs/7/2/1365.pdf

- Its trials are characterized by delay.
- Its trials are far removed from the populations of the former Yugoslavia.

ICTR (International Criminal Tribunal for Rwanda)

In reaction to the genocide in Rwanda, the UN Security Council established the ICTR under Chapter VII of the UN Charter. Long-standing ethnic and political tensions between Hutu and Tutsi groups, which were intensified under Belgian colonial rule and persisted after Rwanda attained independence in 1962, served as the catalyst for the 1994 genocide in Rwanda.Numerous Tutsis were driven out of the country in the years after Rwanda's independence as a result of Hutu discrimination, intimidation, and violence, notably to the neighbouring country of Uganda, where they established the Rwandan Patriotic Front (RPF) in 1990. The Arusha Peace Agreement, which called for the establishment of multiparty democracy in Rwanda, was accepted by Rwandan president Habyarimana in 1993 after a three-year civil war fought between the RPF and government troops.

Extremist Hutus criticised the Arusha Peace Accord and stepped up their anti-Tutsi propaganda, especially through the media and RadioTelevision Libredes Mille Collines (RTLMC).

Around 800,000 Rwandans were killed between April and mid-July 1994, when the RPF took over the nation and essentially put a stop to the genocide. Countless others were raped, mutilated, and tortured. The international world did very little to stop the escalating carnage in Rwanda, much to its enormous discredit. The United Nations had established the United Nations Assistance Mission for Rwanda (UNAMIR), led by Canadian General Romeo Dallaire, as a result of the 1993 Arusha Peace Agreement to aid in Rwanda's transition. The UN mainly disregarded General Dallaire's warnings of a coming campaign of extermination in the months before the genocide.The UN then lowered its UNAMIR deployment in Rwanda from 2,539 to 270 personnel once the genocide had started, effectively abandoning any armed action to stop the killing. Any meaningful international aid to Rwanda wasn't supplied until the RPF stopped the most of the atrocities and drove Hutu genocidaires into the Congolese border in July 1994. The UN Security Council formed the ICTR in November 1994 in response to this state of inactivity and the ICTY's recent creation.

Structure of ICTR

The organisation resembles the ICTY. The prosecutor's office, the registry, and those chambers are all present (Article 10).They shared a joint appeals chamber in Hague to ensure that the ICTY and ICTR followed the same legal principles. Judges from the ICTY originally manned the appeals chambers.[10] This led to the perception that the ICTR was the ICTY's impoverished cousin, but in 2000, two ICTR judges were appointed to that chamber, erasing that perception. The ICTY andICTR once had the same prosecutor. But in 2003, the position was divided, and an independent prosecutor for the ICTR was chosen. The ICTR has always had a president of its own.

[10] Scharf P. Michael "Statute of the International Criminal Tribunal for Rwanda" Available at, https://legal.un.org/avl/ha/ictr/ictr.html#:~:text=The%20ICTR%20consists%20of%20three,Chambers%20and%20one%20Appeals%20Chamber.

Composition of Chambers

- The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine ad litem independent judges, no two of whom may be nationals of the same State.
- Three permanent judges and a maximum at any one time of six ad litem judges shall be members of each Trial Chamber.
- Seven of the permanent judges shall be members of the Appeals Chamber.

Jurisdiction of ICTR

According to Article 1 of the statute, the ICTR has the authority to prosecute anyone found guilty of grave international humanitarian law violations that occurred on Rwandan soil between January 1, 1994, and December 31, 1994, as well as any Rwandan nationals found guilty of violations that occurred on the soil of neighbouring states. Thus, the ICTR's jurisdiction is limited by geography, nationality, and time.

Genocide (Article 2), crimes against humanity (Article 3), and war crimes (Article 4) are the three types of crimes that the ICTR prosecutes. Each of these offences has resulted in convictions from the ICTR.[11]

Genocide is defined in Article 2 in the conventional way: as one of a number of crimes carried out with the purpose of eradicating, completely or partially, a national, ethnical, racial, or religious group. Article 2(2) lists the following acts as prohibited: (a) killing group members; (b) inflicting serious physical or mental harm on group members; (c) purposefully subjecting the group to conditions of life that are intended to cause its physical destruction in whole or in part; (d) enacting policies designed to prevent births within the group; and (e) forcibly transferring group members' children to another group.Genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide are all crimes that can be prosecuted by the ICTR (Article 2[3]).[12]

According to Article 3, certain crimes are considered crimes against humanity if they are carried out as part of a widespread or organised assault against any civilian community on the basis of national, political, ethnic, racial, or religious considerations. Murder, extermination, enslavement, deportation, imprisonment, torture, rape, and political, racial, or religious persecution are examples of specific crimes.

According to Article 5, the ICTR only has authority over persons. The planning, instigation, ordering, commission, or other aiding and abetting of the planning, preparation, or execution of a crime constitutes criminal responsibility (Article 6[1]). The law abolishes official immunity, stating that an accused person's

[11]Security Council Resolution 955(1994) "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", *United Nations Human Rights Office of the High Commissioner*, Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-criminal-tribunal-prosecution-persons,

[12]"International Criminal Tribunal for Rawanda", *Encyclopedia.com*Available at, https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/international-criminal-tribunal-rwanda

status (even that of a head of state) does not exempt them from criminal prosecution or lessen the severity of their penalty (Article 6[2]).[13]

According to Article 8[1], the ICTR and national courts have concurrent jurisdiction. However, according to Article 8[2], the ICTR has the right to take precedence over all national courts, including those of Rwanda, at any point in the process. The overall impact of Article 9 of the legislation likewise supports the ICTR's primacy. This rule states, on the one hand, that no person shall be tried before a national court for actions for which they have already been tried by the ICTR, but, on the other hand, it also states that a person who has already been tried before a national court for actions that constitute serious violations of international humanitarian law may be tried by the ICTR in the future if one of two circumstances apply.

These are: (a) the act for which he was prosecuted was classified as a common crime; or (b) the national court proceedings were not fair or independent, were intended to exempt the defendant from international criminal responsibility, or were not actively pursued.

Appraisal

- High-level accused were successfully tried (taking into legal consideration that there was a genocide in Rwanda in 1994).
- The tribunal has contributed to the growth of international criminal law, probably most notably through its handling of sexual offences, but also in regards to the accountability of mass media gatekeepers for inciting genocide.

Criticism

- Trials at the ICTR have dragged on for a very long time and have had several delays. These are brought on by the challenges of translation.
- Following the 2004 genocide, it had failed to bring charges against the Rwandian Patriotic Front for alleged crimes.
- Geographically and metaphorically, the ICTR is removed from Rwanda's citizens, who continue to be mostly untouched by the court and wearing uniforms.

Conclusion

The ad hoc tribunals' chambers, prosecutors, and registries immediately began considering finishing strategies. Naturally, their continued implementation has already had an impact on both International Tribunals and will probably continue to do so even after they have finished carrying out their respective missions. Although the plans' articulation was a crucial first step in ensuring that the International Tribunals' work would be completed successfully and the rights of the accused would be upheld during this time, one could argue that the timing of their announcement may not have been ideal for a number of reasons.The laws, practises, and principles of international criminal law also cover concerns involving mutual legal assistance, cooperation, modes of liability, defences, evidence, court procedure, sentence, victim

[13] ibid

participation, and witness protection. These materials will cover each of these subjects.This assignment also highlights some of the praise and criticism that have accompanied the Tribunals' up to this point in operation, despite the fact that it is still too early to draw any firm conclusions regarding the Tribunals.