Ad hoc International Criminal Tribunals : A Case Study of International Criminal Tribunals For Former Yugoslavia and Rwanda

Dissertation submitted to the Jawaharlal Nehru University
in partial fulfilment of the requirements
for the award of the Degree of

MASTER OF PHILOSOPHY

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2002

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Date : 4.01.2002

This is to certify that the dissertation entitled **"Ad Hoc International Criminal Tribunals : A Case Study of International Criminal Tribunals For Former Yugoslavia and Rwanda"**, Submitted by Niraj Gautam, in partial fulfillment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY**, is his own work and has not been previously submitted for any other degree of this or any other university.

We therefore, recommend that this dissertation be placed before the examiners for evaluation.

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ACKNOWLEDGEMENT

I cannot find enough words to express my gratitude to my supervisor Prof. V. S. Mani, for his scholarly guidance, inexhaustible patience and constant encouragement. I am deeply indebted to him for helping in channelizing my thoughts and in giving a definite form and shape to my ideas. He also stood by me during crucial times.

I am deeply obliged to Dr. B.S. Chimni, Prof. Y. K. Tyagi and Dr. Bharat Desai for their valuable guidance and suggestions and providing me good academic environment in the School.

I am greatly indebted to Brajendra Pandey and Chandra Jeet who gave me inspiration, guidance, cooperation and encouragement to finish this work.

I wish to express my sincere thanks to my friends Ajay Upadhyay, Vikas Chandra, Sudhir Singh, Santosh Gupta and Vijay Mishra who extended their immense help in completing this work.

My thanks are also due to my friends Akhilesh, Amit, Mansoor, Vijay, Gaurav and Onkar who extended their immense support in completing this work.

I am very grateful to my Parents and younger brothers Rishie, Rama Shankar, Dhiraj and Neeraj for their great and constant support in fulfilling my endeavor, all through .

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CONTENTS

PREFACE

The present study seeks to examine the legal aspects of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). There has been a marked reluctance to prosecute the violators of the international humanitarian haw. But the whole scenario has undergone a radical change with the creation of two *ad hoc* international criminal tribunals for Former Yugoslavia and Rwanda. In recent years, much concern has grown against serious violations of humanitarian law in international as well as non-international armed conflicts. That is why United Nations Security Council acting under Chapter VII of the UN Charter decided to establish in May 1993, an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991. In the same manner, in November 1994, the Security Council, on the Request of the government of Rwanda, decided to establish International Criminal Tribunal for Rwanda. In contrast to the Statute of the Yugoslav Tribunal, which treats the conflict in former Yugoslavia as international armed conflict, the Rwandan Statute is predicated on the assumption that the conflict in Rwanda is a non-international armed conflict.

The objective of this study is to analyze the statutes of the Yugoslav and Rwandan tribunals, their Rules of Procedure and Evidence and their decisions on various procedural and substantive issues. Their statutes and judgements have been analyzed in the context of individual criminal responsibility under international law and international criminalisation of the internal atrocities.

The chapter scheme attempts to be thematic and sequential in approach. The first chapter traces the emergence of criminal aspects of the international humanitarian law. It traces the historical precedents of the prosecutions of war criminals. This chapter has also dealt with evolution of individual criminal responsibility under international humanitarian law.

The second chapter describes the situation leading to the establishment of the International Criminal Tribunal for Former Yugoslavia and the International Criminal Tribunal for Rwanda. This chapter also examines the statutes and Rules of Procedure and Evidence of the Rwandan and Yugoslav tribunals. It also deals with structural aspects of both tribunals.

The third chapter focusses on the jurisprudence of ICTY and ICTR. It analyzes various judicial pronouncements having precedential value, delivered by the both tribunals.

The fourth and final chapter describes the normative impact of the ICTY and ICTR on the international criminal justice system. It highlights the overall assessment of the functioning of these tribunals.

The descriptive and analytical methods characterize the present study. Much of the information have been collected from the UN documents, International Legal Materials, Case laws and Websites. In addition, secondary sources like books and articles in journals have been consulted. A list of select bibliography appears as part of the dissertation.

CHAPTER I

Introduction

The laws and customs of war can be traced back to antiquity. From time immemorial, these customary norms have meant to regulate the conduct of belligerents during hostilities and prohibited inhuman means and methods of warfare. However, the international criminalisation of certain acts in violation of established norms during hostilities is a relatively new phenomenon.

Ordinances and decrees were issued by various Kings and Emperors at different periods of time to regulate the conduct of combatants during armed conflicts. The purpose of these decrees and rules have been to mitigate the horrors of war such as the ill-treatment of civilians and prisoners of war, wanton destruction of cities and prohibition of the acts of violence against women, children and priests. In this regard, one of the earliest war crimes trials in Europe concerning *Landvogt Peter Von Hagenbach* in 1474 deserves special mention. Hagenbach was made governor of Breisach by Duke of Burgundy. After becoming governor, Peter Von Hagenbach unleashed a reign of terror over the population of the occupied territory. The atrocities committed at his command included rape, murder, illegal taxation and seizure of property. Ultimately, he was defeated by a large coalition comprising the forces of Austria, France and Bern with the help of local citizens. Subsequently, an *ad-hoc* tribunal consisting of twenty-eight judges was constituted for his trial. The defendant contended

before the tribunal that his acts were done at the orders of his master, the Duke of Burgundy and that he owed absolute obedience to him. However, the tribunal dismissed his plea. It convicted him of charges of murder, rape, perjury and other inhuman acts and ordered his execution. Considering the state of Europe at that period of time, it may be said, that the tribunal was a real international court[1]. However, parallels could be drawn from this case with contemporary state of international humanitarian law. First, the accused was punished for crimes, which later came to be known as crimes against humanity. And second, the defendant used the defence of superior orders, which later evolved as a crucial legal concept during the Nuremberg and Tokyo Trials.

Another significant development in this field took place in America during the Civil War (1861-65) when President Abraham Lincoln issued the Lieber Code[2] . Lieber Code codified the laws of war and criminalized acts like robbery, pillage, rape, wounding, maiming or killing of inhabitants committed by American soldiers in enemy territory. Though it was binding only for American soldiers, it had an important influence in defining military regulations elsewhere.

However, in order to regulate the hostilities and mitigate the cruelties of war, the international community initiated the process of codification of

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1.G. Schwarzenberger, *The Law of Armed Conflicts* (London, 1968), vol.II, p.464.

2. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, of 24 April 1863 reprinted in D. Schindler and J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents* (Geneva, 1988), 3rd edn.,p.5.

law of armed conflict. This process began with the adoption of the first Geneva Convention of 1864 for Amelioration of the Condition of the Wounded Armies in the Field[3]. Thereafter, the Hague Conventions of 1899 and 1907 and the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War gave impetus to the process of codification of the international humanitarian law. These Conventions did not contain any penal provision for individual who violates their rules. Only a somewhat weak provision appeared in Article 30 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. At this moment, the penal element of humanitarian law was nascent. Its development was triggered by broad concepts of Martens clause[4], general principles of law recognized by civilized nations and general principles of penal law.

In the aftermath of the First World War, a significant step was taken to punish persons responsible for violations of laws and customs of war. The Treaty of Versailles of 28 June, 1919 in its Article 228 mentioned that the German Government recognized the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. The treaty required the German Government to hand over the suspects before an allied military tribunal. Articles 228-230 provided for the creations of international

3. Signed at Geneva, August 22, 1864, 129 CONSOC. T.S. 365.

4. Preamble, Hague Convention No. IV, Oct. 18, 1907, 118 LNTS 343.

war crimes tribunal [5]. The Allied Power agreed to establish a special tribunal composed of judges appointed by the United States, the Great Britan, France, Italy and Japan to prosecute Kaiser Wilhelm II accused of the "supreme offence against international morality and sanctity of treaties." Although this effort failed, because Netherlands granted the Kaiser political asylum. Yet such legal provisions significantly contributed in conducting international criminal proceedings after the Second World War.

Thereafter, the end of the Second World War witnessed the establishment of the Nuremberg[6] and the Tokyo international military tribunals for the prosecution of horrible atrocities committed by the Nazis, Fascists and Japanese. The Allied Powers were quick to conclude an agreement paving way for the prosecution of those accused for most egregious crimes[7]. Individuals were tried for crimes against peace, war crimes and crimes against humanity. Crimes against peace dealt with initiating or waging war in violation of international treaties.

Besides this, the planning and preparation of war was also criminalized. War crimes were defined as violations of laws and customs of

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5.Treaty of Versailles (1919) reprinted in *The Treaties of Peace,1919-1923*,vol.1 Carnegie Endowment for International Peace, (New York 1924) p.121.

6.Trial of Major War Criminals before The International Military Tribunal, Nuremberg, 14 November to 1 October 1946, 1 Official Documents 223(1947).

7.London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, of 8 August 1945, 82 U.N TS 279.

war and included acts committed against civilians and prisoners of war, killing of hostages and pillage. Crimes against humanity specially dealt with persecutions on the basis of political, racial or religious grounds. It included acts such as enslavement, deportation, extermination and other inhuman acts. The Nuremberg Tribunal found various persons guilty of war crimes, crimes against peace and crimes against humanity. Twelve persons were given death sentence, three the sentence of life imprisonment, four sentence of imprisonment of various terms and three were acquitted[8]. Similarly, the Tokyo Tribunal awarded death sentence to seven persons who were found guilty of conducting or organizing war, life imprisonment to sixteen persons and awarded imprisonment for different terms to two persons who were accused for crime against peace and war crimes[9].

The judgements and decisions by the Nuremberg and Tokyo tribunals greatly contributed to the development of concept of individual criminal responsibility under international law. The Nuremberg Tribunal observed that "crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced[10]". These tribunals considered

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8.Nuremberg Trial, n.6.

9.Internationl Military Tribunal for the Far East, cited in W.Michael Reisman and Chris T.Antoniou eds., *The Laws of War*(New York, 1994). pp.337-341

10.Nuremberg Trial, n.6, p.223.

those provisions of Hague and Geneva Conventions that were declaratory of customary law as having created an adequate basis for individual criminal responsibility.

Their importance was immediately recognized by the UN General Assembly which on 11 December 1946 adopted the Resolution 95(I)[11] on "Affirmation of the Principles of International law Recognized by the Charter of the Nuremberg Tribunal" by a unanimous vote. Through this resolution the General Assembly affirmed the principles of international law as defined by the Charter and Judgement of the Nuremberg Tribunal and it also asked the International Law Commission (ILC) to codify these principles.

The ILC drafted the content of these principles and in 1950 presented its report entitled "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal[12]". These principles codify the same three categories of crimes as established by the Nuremberg Charter. Principle I provides that "any person who commits an act which constitutes a crime under international law is responsible therefore and liable for punishment". Principle II clarifies that even if the act is not considered as crime under domestic law any person committing these acts may be held internationally responsible. Principle III further states that no person shall be relieved of responsibility even if he acts on the orders of his superior or government, or in his capacity as head of State or government

11.General Assembly Resolution. 95 (I), 1946.

12.Report of the International Law Commission Covering its Second Session, 1950, U.N. Doc.A/1316, pp.11-14.

official. Principle IV provides that the individual is not relieved of responsibility if "a moral choice was in fact possible to him". Principle V ensures the right to a fair trial for the person charged with a crime under international law. The affirmation of the Nuremberg Principles by the 1946 General Assembly resolution and their formulation by the International Law Commission signified that the Nuremberg Charter and Judgement had recognized a number of customary rules of international law.

Apart from the Nuremberg and Tokyo Trials, various national prosecutions e.g. *Eichmann* trial, *Mai Lai* trial and *Yamashita* trial have also led to the criminalization of atrocities committed during the armed conflict. General Yamashita, the commander of the Japanese forces in the Philippines in 1944-45, was prosecuted and sentenced to death by a U.S. Court for failing to control his subordinates from violating the laws of war[13]. The US Supreme Court held that commanders must be held responsible for the actions of the subordinate officers or persons under their command, even if they did not directly commit or order acts of brutality. Another example of national prosecution was the prosecution of Eichmann[14] by Israeli courts for the murder of thousands of Jews during the Second World War. He was abducted by Israeli agents from Argentina and brought to Israel to face charges. It was contended by him that the Israeli courts did not possess jurisdiction to try him because when crimes were committed, Israel as a state

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13. *U.S.A.v. Yamashita*, (1948) 4 LRTWC 1.

14. *A. Eichmann Attorney- General of the Government of Israel*, Supreme Court of Israel, ILR 136 (1962) P. 277.

did not exist. But the Supreme Court of Israel rejected his contention and held that the universal character of the crime authorizes every state to try and punish offenders irrespective of where the crime has taken place and who is the victim.

The *Mai Lai* Trial[15] is an example of national prosecution where a state tried and punished its own national for crimes committed in the enemy territory. In this case, during Vietnam war, the whole population of a village, Mai Lai, was eliminated by military personals of the US. This received worldwide condemnation and adverse domestic public opinion within America, which compelled the US government to prosecute the officer, Lt. Calley responsible for massacre. The court found him guilty and awarded punishment.

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly in December 1948, which came into force on 12 January 1951[16]. The definition of the genocide was based on the crimes against humanity as mentioned in the Nuremberg Charter. Article II defines genocide as acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group such as killing members of the group, causing bodily or mental harm to them, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group. The Convention clearly mentions that nexus

15. 22 US C.M.A. 534 (1973),48 C.M.R. 19 (1973).

16.Genocide Convention, 78 U.N.T.S 277.

between armed conflict and genocide is not required for invoking penal provisions. Article VI obligates states to prosecute offenders in both domestic and international tribunals. The Convention also declares conspiracy, incitement, attempts and complicity in genocide as punishable acts. The customary nature of the principles which forms the basis of the Convention has been recognized by the International Court of Justice[17]. The Court in the Yugoslavia case observed –"the Convention applies to acts of genocide which states must prevent and punish independently of the context of peace or war in which it takes place". The court notes that the Convention is applicable, without reference to the circumstances linked to the domestic or international nature of the conflict[18].

The Genocide Convention was soon followed by the four Geneva Conventions of 12 August 1949-Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (No.1), Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (No. 2), Convention Relative to the Treatment of Prisoners of War (No. 3) and Convention Relative to the Protection of Civilian Persons in Time of War (No.4)[19].Article 1 common to the four Conventions requires state parties "to respect and to ensure respect"

17.*Advidory Opinion* of 18 May 1951,*I.C.J. Reports*, 1951,p.23.

18.*Yugoslavia case (Preliminary Objections) I.C.J. Reports 1996*,para31,p.615.

19. Geneva Convention No. 1- 1949, 75 UNTS 31.
Geneva Convention No. 2- 1949, 75 UNTS 85.
Geneva Convention No. 3- 1949, 75 UNTS 135.
Geneva Convention No. 4- 1949, 75 UNTS 287.

for rules "in all circumstances". Further, each of the Geneva Conventions defines "grave breaches" regarding acts against 'protected persons'. These acts are defined in Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention and Article 147 of the Fourth Convention, and include crimes such as willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, extensive destruction or appropriation of property, unlawful deportation, the transfer of confinement of a protected person, and taking of hostages "not justified by military necessity and carried out unlawfully and wantonly". The conventions establish individual criminal accountability for those directly responsible for grave breaches as well as their superiors for giving orders. The grave breaches system of the conventions require the states parties to criminalize certain acts and to prosecute or extradite the perpetrator. In the *Nicaragua* case, the International Court of Justice observed that Article 1 of the 1949 Geneva Conventions imposes on states an obligation to not only respect the conventions but also to ensure respect for them in all circumstances. The Court stressed that "such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the conventions merely give specific expression"[20]. Several rules of Geneva Conventions have attained the status of customary rules and constitute *jus cogens*. The Geneva Conventions and the Hague Conventions of 1899 and 1907 together constitute the historical core of international humanitarian law.

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20. *ICJ Reports*, 1986, para 220, p.114

The Geneva Conventions have been further strengthened by the adoption of two Additional Protocols of Geneva Conventions in 1977[21] . Additional Protocol II in conjunction with Article 3 common to the four Geneva Conventions extends `minimum yardstick` of international humanitarian law to the internal armed conflicts. Article 3 common to the Geneva Conventions and Additional Protocol II constitutes a kind of human rights provision since these provisions regulate the relationship between the governments and their own nationals in the event of an internal armed conflict. In this way, International Humanitarian Law has been influenced by human rights law. The fact that most contemporary armed conflicts are internal conflicts has accentuated this development, since in these conflicts both human rights law and humanitarian law play equally important roles.

Another treaty, the Hague Convention of 14 May 1954 for the protection of Cultural Property in the Event of Armed Conflict[22] obligates state parties to take all necessary measures to prosecute persons who commit or give orders to commit breaches of the Convention in order to protect the "cultural heritage of mankind".

21. Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS3. Protocol II Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non- International Armed Conflicts, June8, 1973 1125 UNTS 609.

22. May 14, 1954 , 249 UNTS 240.

Despite a growing body of international humanitarian law, the post-Nuremberg era has witnessed the gross violations of international humanitarian law in Vietnam, Arab-Israel Conflict, heinous crimes of the Pol Pot regime in Cambodia, atrocities against Kurdish Population in Iraq and Turkey and crimes against religious or racial groups in Somalia, Rwanda, Yugoslavia, Sierra Leone and Afghanistan. The massive and systematic atrocities committed in the former Yugoslavia and Rwanda have led to the establishment of two *ad hoc* international criminal tribunals by the Security Council acting under Chapter VII of the UN Charter. The International Criminal Tribunal for former Yugoslavia(ICTY) established in May 1993 and International Criminal Tribunal for Rwanda(ICTR) established in November 1994 have played a significant role in applying rules and principles on individual criminal responsibility under international law. The institutional arrangements as provided in the statutes of Yugoslav and Rwandan Tribunals regarding investigations, prosecutions and punishment of offenders helped in building a momentum towards establishment of a permanent International Criminal Court (ICC). The judicial pronouncements on substantive and procedural issues, institutional mechanism and substantive and procedural laws as developed by the ICTY and ICTR have contributed in negotiating a treaty during the Rome Diplomatic Conference, 1998 convened by the UN for the establishment of International Criminal Court[23]. The ICTY has jurisdiction over grave breaches of Geneva Conventions, violation of laws or customs of war,

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23. Rome Statute of International Criminal Court, 17 July 1998, UN Doc. A/ Conf 183/9.

genocide and crimes against humanity committed in the territory of former Yugoslavia since 1991. The ICTR has jurisdiction over genocide, crimes against humanity and violations of Article 3 common to Geneva Conventions and Additional Protocol II. On the other hand, the Rome Statue defines four core crimes (genocide, crimes against humanity, war crimes and crimes of aggression) over which the ICC will exercise jurisdiction. Regarding armed conflicts, the Court will exercise jurisdiction on both international and internal conflicts[24].

Thus since World War II, international law has taken significant steps away from its state- centric moorings. Right now, international humanitarian law entails individual criminal responsibility for the gross violations of humanitarian norms. The notion of moving beyond state-centrism is implicit in the idea of an international law of human rights, since the rights with which this law is concerned are those of individuals rather than those of states. That is why one of the most important results of the post- cold war developments is the gradual disappearance of the distinction between non-international and international armed conflicts. By establishing an *ad hoc* international tribunal for the atrocities committed during the internal conflict of Rwanda, the Security Council has paved the way for the convergence of law of international armed conflict and law of internal armed conflict.

24. Ibid., A Art. 8(2) (e)

CHAPTER II

Establishment of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda

This Chapter seeks to analyze the circumstances under which the *ad hoc* tribunals for former Yugoslavia and Rwanda were established. It also analyzes the legal basis for the establishment of *ad hoc* tribunals and the statutes as well as Rules of Procedure and Evidence of the Yugoslav and Rwandan Tribunal.

Legal Basis for the Establishment of the *Ad hoc* International Criminal Tribunals

In the post-cold war period, the atrocities committed in the former Yugoslavia on account of international armed conflict and in the Rwanda on account of non-international armed conflict shocked the conscience of the world community and triggered major legal developments in international law. On 25th May 1993, the UN Security Council acting under Chapter VII of the UN Charter decided to establish an *ad hoc* international criminal tribunal for the purpose of prosecuting persons responsible for serious violations of the international humanitarian law committed in the territory of

former Yugoslavia since 1991[1]. In the same manner, on the request of the government of Rwanda, the Security Council on 8th November 1994, acting under Chapter VII of the UN Charter, decided to establish the International Criminal Tribunal for Rwanda(ICTR)[2]. In both the cases, the Security Council determined that the breaches of the humanitarian law constituted a threat to international peace and security and that the prosecution of alleged offenders before an international court would contribute to the restoration of the international peace[3].

Under Chapter VII of the UN Charter and in conjunction with previous resolutions concerning the territory of former Yugoslavia and Rwanda, the Security Council has an adequate legal basis to establish *ad hoc* International Criminal. Tribunals to prosecute the perpetrators of humanitarian law as enforcement measures to restore and maintain international peace and security .The advantage of establishing *ad hoc* international tribunals by the Security Council is that this approach is expeditious and immediately effective since all member nations have a binding obligation to carry out Chapter VII enforcement measures.

The establishment of *ad hoc* tribunals by decisions of the Security Council is justified as a response to the international threat posed by the Yugoslav and Rwandan crisis. This approach is expedient for the observance of rule of law on international plane by punishing the violators of

1.U.N. Security Council Resolution 827 (1993).

2.U.N. Security Council Resolution 955 (1994).

3. Dominic McGoldrick and Colin Warbick, "International Criminal Law," *International and Comparative Law Quarterly*, vol.44, Part2 (April 1996).

The international humanitarian law as well as advancing and serving the peacekeeping function of the Security Council under UN Charter (Article 24 of Chapter V and Article 39 of Chapter VII). Chapter VII of the UN Charter empowers the Security Council to carry out its function of maintaining and restoring international peace and security. Article 39 authorizes the Security Council to decide about the measures to be taken in order to maintain international peace and security. Article 40 empowers the Security Council to take provisional measures. The Security Council resorted to provisional measures by calling upon the parties involved in former Yugoslavia to observe the international humanitarian law. Thereafter, in accordance with Article 41, the Security Council decided to establish an *ad hoc* international tribunal for former Yugoslavia as an enforcement measure. The UN Secretary-General has justified the establishment of international criminal tribunal by the Security Council by virtue of Article 29 of the UN Charter, which empowers the Security Council to establish such subsidiary organs as it deems necessary for the performance of its functions.

The report further states that decision to establish an international tribunal would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression. It further observes that the establishment of an international tribunal by means of Chapter VII decision would be legally justified, both in terms of the object and purposes of the decision[4].

4. UN Secretary-General's Report, UN Doc.S/25704 (1993), paras. 22,24 and 28, pp.7 – 8.

However, the establishment of the International Criminal Tribunal for former Yugoslavia (ICTY) by the Security Council has been criticized on account of the fact that as a subsidiary organ of the Security Council, the independence and impartiality of the Tribunal has been compromised. It has no power to question its own jurisdiction The executive and political responsibility to maintain international peace and security can not include a power to set up a judicial tribunal to punish violators of humanitarian law. Article 39 only applies to situations of threat to peace, breach of peace and act of aggression and the Security Council's action should be confined to that. Thus, the Security Council has no power to bring to book violators of the international humanitarian law. The establishment of the international tribunal by the Security Council has also been criticized on the ground that Article 95 of the UN Charter clearly indicates that the only way in which such a tribunal can be created is "by virtue of agreements ... in the future". However, the creation of the Rwandan Tribunal is justified as there was a request from the Rwandan government to set up a tribunal by the Security Council.

International Criminal Tribunal for the former Yugoslavia

The former Socialist Federal Republic of Yugoslavia consisted of six constituent republics – Serbia, Montenegro, Slovenia, Croatia, Macedonia and Bosnia-Herzegovina. In 1991, the Federal Republic of Yugoslavia(FRY) disintegrated and the constituent republics declared themselves independent. Thereafter these republics started fighting with each other for territorial

gains and other matters and in this process went to the extent of committing heinous crime of ethnic cleansing. Particularly the Muslims and Croats of Bosnia- Herzegovina, constituting 45% and 17% respectively of Bosnian population suffered the greatest humanitarian tragedy in Europe since the Second World War when Serbian troops declared war on Bosnia and Herzegovina after Muslims and Croats voted to secede from Yugoslavia. Consequently, the Bosnian conflict took a strong international dimension. Serbs consisting 35% of Bosnian population committed all sorts of atrocities and crimes against humanity including systematic rape of women and ethnic cleansing against Muslim population. In this tragedy of brutal aggression and violations of international humanitarian law, the role of the president of Federal Republic of Yugoslavia (Serbia and Montenegro) Mr. Slobodan Milosevic was very critical at whose behest the Serbian troops made Bosnia a matter of global shame.

Amidst continuing reports of the violations of the international humanitarian law and ethnic cleansing, the UN Security Council in December 1991 adopted a unanimous resolution[5] acting under Chapter VII of the UN Charter. Thereby it decided that all states shall for the purposes of establishing peace and stability in the Balkan area, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to former Yugoslavia until the Security Council decide otherwise. It supported the collective efforts of the European Community and its members with the support of the Organization of Security and Cooperation in Europe, to bring about peace and dialogue in Yugoslavia.

5.UN Security Council Resolution 713 (1991).

In the meantime, the situation in former Yugoslavia and particularly in Bosnia-Herzegovina continued to deteriorate. According to a report of the UN Secretary–General, the situation in Bosnia and Herzegovina had worsened and it concluded that "no party to the conflict is blameless and that all sides had to bear some of the responsibility for the outbreak of the conflict and its continuation"[6]. In order to establish peace and stability in the Balkan region, the UN Security Council passed as many as 13 resolutions between September 1991 to June 1992.

Notwithstanding several attempts to curb the escalation of the civil war through a U.N.-North Atlantic Treaty Organization-European Union brokered peace talks and cease-fire agreements, the consequences of the Bosnian conflict were disheartening and tragic. On 1st June 1993, President Alija Ijetbegoic of Bosnia-Herzegovina reported to the Security Council that two thirds of his country was occupied by Serbian troops, over 2,00000 civilians were killed and hundreds of towns and villages were destroyed. Attacks on civilian populations and artillery bombardments of Sarajevo, Gorazde, Zepmostaw, Brecko and other Bosnian towns and villages were continuously reported by the Bosnian government[7]. Another distressing factor was fighting between Bosnian Government forces and Bosnian Croats para-military units.

Meanwhile, in response to a case instituted by Bosnia and Herzegovina on 20th March 1993, the International Court of Justice on 8th April, 1993 issued an order calling upon the Federal Republic of Yugoslavia

6 UN Doc. S/23836 (1992).

7. *U.N.Chronicle*, vol. xxx, No.3 (Sept. 1993), p. 17.

(Serbia and Montenegro) to "immediately take all measures within its power to prevent commission of the crime of genocide... whether directed against Muslim population of Bosnia - Herzegovina or against any other national, ethnic, racial or religious group"[8]. On its parts, alarmed by the reports of genocide and other crimes against humanity in the former Yugoslavia, the Security Council asked the UN Secretary-General to establish an impartial Commission of Experts to examine the information and report on 'War Crimes' in the former Yugoslavia. Unanimously adopting resolution 780(1992), the Council also asked states, relevant UN bodies and other organizations to provide within 30 days any substantial information concerning violations of international humanitarian law[9].

As the next logical step when it became clear that the crisis in former Yugoslavia was continuously aggravating with no sign of abatement, the Security Council on 22 February 1993 decided that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991[10]. On 3rd May 1993, the Secretary–General reported that the tribunal would operate as a subsidiary organ of the Security Council performing its functions independently of political considerations and would " not be subject to authority and control" of the Council with regard to the performance of judicial functions[11]. Its life span was linked to

8. *I.C.J.Reports* 16 (1993), p. 3.

9. UN.Security Council Resolution 780 (1992).

10. UN.Security Council Resolution 808 (1993).

11. Secretary-General's Report, n. 4, para 28, p. 8.

the restoration and maintenance of international peace and security in former Yugoslavia. Subsequently, on 25th May 1993, the Security Council decided to establish an International Tribunal for the purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991[12]. The Council unanimously endorsed a 34-article draft Statue of the tribunal annexed to the Secretary-General's report. The establishment of International Criminal Tribunal for Yugoslavia is a landmark in the history of the UN because it is for the first time that the Security Council has established an International Criminal Tribunal with jurisdiction to prosecute crimes committed during armed conflict.

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However, as a result of the shuttle diplomacy of the U.S., the warring factions of the Bosnia succeeded in arriving at Dayton agreement on 9th Sept. 1995. It was decided to divide Bosnia internally into two entities – a)Areas inhabited by Serbs b)Areas inhabited by Muslims and Croats. In this way, the Dayton peace accord brought Bosnian civil war to an end and established peace in the Balkan region.

But once again in 1998,the Balkan region drew international attention, on account of gross abuse of human rights by the forces of Federal Republic of Yugoslavia (Serbia and Montenegro) against the Kosovar Albanians. The Serbian troops unleashed a reign of terror against the members of Kosovo Liberation Army, who were demanding autonomy for the Kosovo, which is a province situated in the southern part of the

12 UN.Security Council Resolution 827 (1993).

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Yugoslavia having the majority of Albanian Muslims. Historically, the province had under the earlier federal constitution enjoyed considerable autonomy. The UN Security Council in a series of resolutions (particularly 1199 and 1203) set out the obligations on the President Milosevic of Yugoslavia to avert a humanitarian catastrophe and withdraw his forces and enter into negotiations for peace in Kosovo. But when he failed to comply, the Yugoslav capital Belgrade was subjected to a series of air strikes sponsored by NATO since 24th March 1999.These air strikes continued for several weeks until President Milosevic agreed for negotiations. Because the ICTY had general jurisdiction over violations of humanitarian law in former Yugoslavia since 1991, the atrocities committed by Yugoslav forces in Kosovo is also under the purview of the ICTY.

Procedural law applicable before the ICTY

The principal texts governing the activities of the Tribunal are the Statute of the Tribunal and the Rules of Procedure and Evidence adopted by the Tribunal itself. Other texts concerning proceedings before the Tribunal include the Rules governing the Detention of Persons awaiting Trial and Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal (Rules of Detention)[13] and the Code of Professional Conduct for the Defense Counsel appearing before the International Tribunal [14]. The

13.UN Doc IT/38/Rev.7.

14.UN Doc IT/73/Rev.1.

above procedural rules, except for the Statute, have been adopted by the Tribunal and have been amended or revised on several occasions.

Substantive law applicable before the ICTY

The substantive law to be applied by the Tribunal is enumerated in Arts. 2-5 of its Statute, which includes the fundamental rules of international humanitarian law, the violation of which entails individual criminal responsibility (grave breaches of 1949 Geneva Conventions, war crimes, genocide and crimes against humanity).

JURISDICTION

Ratione personae – As per Article 6 of its Statute, the Tribunal has jurisdiction over natural persons accused of serious violations of the international humanitarian law committed in the territory of former Yugoslavia since 1991. However, the tribunal has no jurisdiction over states, legal persons and organizations.

Ratione materiae -- The UN Secretary–General's report on Aspects of International Criminal Tribunal for former Yugoslavia states that Tribunal's subject–matter jurisdiction must be defined to ensure adherence to the principle of *nullum crimen sine lege* which requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of

some but not all states to specific conventions does not arise[15]. Geneva Conventions of 1949, the 1907 Hague Convention IV and its annexed Regulations, the 1948 Genocide Convention and the pertinent provisions of the Nuremberg Charter and Judgement all of which have become part of customary international law. The jurisdiction of the Tribunal relates to following four categories of crimes: -

A. Grave breaches of the 1949 Geneva Conventions

The Geneva Conventions constitute "the core of customary law applicable in international armed conflicts"[16]. The list of the grave breaches under the 1949 Geneva Conventions is reproduced in the Article 2 of the ICTY Statute, which includes willful killing, torture, inhuman treatment and other specified acts against persons protected under the conventions. One of the elements necessary to prove grave breaches under the ICTY'S Jurisprudence is the existence of an international armed conflict[17].

In the Rule 61 hearing in the *Rajic* case, the Prosecutor succeeded *ex parte* in satisfying the trial chamber that an international armed conflict existed between the Republic of Bosnia-Herzegovina and the Republic of Croatia at the time and in the place that the alleged crimes were committed[18].

15.Secretary-General's Report, n. 4, para. 34, p. 9 .

16.Ibid., para. 37, p. 10 .

17.Sean D.Murphy, "Progress and Jurisprudence of the ICTY", *American Journal of International Law*,vol.19 (1999), pp. 57-97, at p. 66 .

18.Ibid., p. 66.

Similarly, in the Rule 61 hearing in the *Nikolic* case, the Prosecutor succeeded *ex parte* in satisfying the trial chamber that there existed an international armed conflict between the Republic of Bosnia-Herzegovina and the Federal Republic of Yugoslavia during 1992 in the area relevant to the charges against Dragon Nikolic, because of the presence of military forces under Belgrade's control[19]. In the same manner, in the *Celibici Camp* case, the trial chamber held on 16th November that there was an international armed conflict in Bosnia throughout 1992 and decided that the persons detained at the camp were protected by the fourth Geneva Convention. Hence, given the scope of armed activities in the former Yugoslavia, it seems likely that the Prosecutor will have little difficulty in establishing the existence of an armed conflict and in most of the cases the connection between alleged crimes and that conflict.

B. Other violations of the laws and customs of war

Article 3 of the ICTY Statute empowers the Tribunal to prosecute the persons responsible for the violations of the laws and customs of war. This Article was clearly designed to cover violations of the customary rules reflected in the Hague Convention of 1907 (No.IV) regarding the Laws and Customs of War on Land and the Regulation annexed thereto. According to the UN Secretary-General's report- "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the Hague Regulations also recognize that

19 Ibid., p. 77

the right of belligerents to conduct warfare is not unlimited and that resort to certain methods of waging war is prohibited under the rules of land warfare"[20].

Article 3 thus confers on the ICTY jurisdiction over any serious offence against international humanitarian law not covered by Articles 2,4 or 5. In the *Tadic* case[21], the Trial Chamber observed that Article 3 functions as residual clause and aims to make the jurisdiction of the ICTY water-tight and inescapable.

C. Genocide

Article 4 of the ICTY Statute empowers the Tribunal to prosecute persons committing genocide. The definition of genocide under the Statute has been taken from the Genocide Convention, 1948. It states that genocide means any of the following acts committed with intent to destroy, in whole or in part a national, ethnic, racial or religions group - a) killing members of the group, b) causing serious bodily injury or mental harm to members of the group, c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. Article 4 of the Statute has made punishable the following acts – genocide, complicity in genocide, conspiracy to commit genocide and attempt to commit genocide. The Secretary-General's report confirms that the crime of genocide has

20.Secretary-General's Report, n. 4, para. 43, p. 11.

21.*Prosecuter v.Tadic*, Case No. IT-94-1-T in *International Legal Materials*, vol.35,No.1 (1996), para.91, p. 61 .

passed into customary international law. In the *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia-Herzegovina V. Yugoslavia)* case, the International Court of Justice held that the crime of genocide may entail individual criminal liability as well as the responsibility of the state. Individual criminal liability does not exclude state responsibility and *vice versa*. The same act of genocide could be the subject of parallel and simultaneous legal proceedings before the International Court of Justice and the tribunal.

ICTY's jurisprudence has broadened the purview of crime of genocide and has declared in various cases that in extreme cases ethnic cleansing amounts to genocide. In the confirmation of the Srebrenica indictment (second indictment) in *Karadzic and Mlaldic* case, Judge Riad has referred to ethnic cleansing as a form of genocide[22]. A similar interpretation was adopted by Trial Chamber- I in its Rule 61 decision in *Nikolic* case by observing that in this instance, the policy of ' ethnic cleansing' took the form of discriminatory acts of extreme seriousness which tend to show its genocidal character[23]. However, in the *Tadic* case, the Tribunal spoke of the horror of ethnic cleansing but stopped short of using the word genocide.

As far as the mental element of the crime of genocide is concerned, the knowledge of the genocidal plan or policy or of the wider context in

22. Prosecutor *v. Karadzic and Mladic*, Case No. IT-95-18-I, http:// www. un.org/icty/indictment/english/kar-ii950724e.htm,visited on 1.10.2001.

23. cited in William A. Schabas, "The Physical Element of the Offence", in *Genocide in International Law*, (Cambridge, 2000), p.199.

which the act occurs, should not be confused with this knowledge that these amount to genocide as a question of law[24]. In order to meet the standard of knowledge required for *mens rea*, it may also be sufficient for the prosecution to demonstrate that the accused was reckless as to the consequences[25].

As far as proof of intent in the crime of genocide is concerned, the Trial Chamber of the ICTY in its Rule 61 hearing in the *Karadzic and Mlaldic* cases noted that genocidal intent need not be clearly expressed, but that it may be implied by various facts including the general political doctrine giving rise to the criminal acts or the repetition of destructive and discriminatory acts.

D. Crimes Against Humanity

Article 5 of the Statute empowers the Tribunal to prosecute persons responsible for crimes against humanity (e.g. murder , deportation ,torture, rape and persecution on political, racial or religious grounds) when committed as a part of widespread or systematic attack directed against any civilian population during armed conflict.

In order to sustain any charge based on a crime against humanity, the Prosecutor must show discriminatory intent on the part of the indictee such evidence that the attack on a civilian population was conducted against a

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24. Ibid., "The Mental Element of the Offence", p. 211.

25.*Prosecutor V. Delalic,* Case No. IT- 96- 21-T,
http: //www.un.org/icty/judgement.htm visited on 6.6.2001.

certain political or racial group only because of its affiliation. The Tadic Trial Chamber clarified the requirement that the crime be "directed against any civilian population". First, "directed" does not mean that the crime must be associated with a formal state policy against a civilian population, evidence of an informal policy by non-state actors will be sufficient. Second, the targeted population must be of a "predominantly civilian nature", but the term "civilian" is to be construed liberally and the presence of some non-civilians will not be disqualifying[26].

In this way, it is evident that in order to sustain charges of grave breaches of the Geneva Conventions (Article 2), violations of the laws or customs of war (Article 3) and the crimes against humanity (Article 5), the Prosecutor must establish the existence of an armed conflict while such proof is not necessary to sustain a charge of genocide.

Ratione temporis - The temporal jurisdiction of the Tribunal extends from the period beginning on 1 January 1991 and is limited to crimes that have been committed following that date in the territory of the former Yugoslavia.

Organization

As per Article 11 of the Statute, the Tribunal consists of three Trial Chambers, an Appeals Chamber, the Prosecutor's Office and a Registry serving both the Chambers and the Prosecutor. The Tribunal comprises 14 judges, three judges serving in each of the Trial Chambers and five judges in

26.Prosecutor *v. Tadic*, Case No. IT-94-1-T, *International Legal Materials*, vol. 36,No. 4(1997), paras. 653-656,pp.944-945

the Appeals Chamber. The judges are elected for a renewable term of four years by the UN General Assembly from a list of candidates prepared by the Security Council from the nominees of the states.

Appeals

A Trial Chamber's decision of acquittal or conviction, or a decision on the sentence can be challenged before the Appeals Chamber by the Prosecutor or the convicted person. According to Article 25(1) of the Statute, the grounds of challenge have been narrowly formulated - an appeal lies against the decision where an error of law invalidates the decision or an error of fact that has resulted in the miscarriage of justice .The Appeals Chamber may affirm, reverse or revise the decision of the Trial Chambers. The Appeals Chamber may also suspend the execution of the questioned decision. Under the aforesaid provisions, Tadic has challenged his conviction and sentence on various grounds including that his right to a fair trial was limited (such as by a limited ability to examine witnesses), that the charges against him were not specific enough, that the acts were made criminal *ex post facto* and that evidence was erroneously admitted.

ICTY Rule 72(B) allows interlocutory appeals of preliminary motions (e.g. motions relating to jurisdiction, defects in the form of indictment, exclusion of evidence, severance of crimes joined in one indictment, separate trials or denial of a request for assignment of counsel).

Individual Criminal Responsibility

Article 7(1) of the ICTY Statute provides that a person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" shall be individually responsible for the crime. However, the Statute leaves open the necessary degree of participation by the individual in the crime. Apart from this direct responsibility, Article 7(3) of the Statute provides for "superior responsibility" for the acts of a subordinate when the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Non Bis in Idem

Article 10 of the ICTY Statute states that national courts can not try a person for acts for which he was already tried by the ICTY and conversely that the ICTY can not try a person already tried by a national court for a violation of international humanitarian law, unless the national proceedings were not impartial or independent or were necessarily a charade.

Incorporation of the above mentioned principle of *Non Bis in Idem*[27] in the ICTY Statute empowered Tadic to challenge the ability of ICTY to prosecute him on the grounds that his prosecution before the ICTY would be against the principle of *Non bis in Idem*. However, the Trial Chamber rejected this contention essentially because he had not been tried in Germany

27. The principle of *Non Bis in Idem* prohibits the repeated prosecutions for the same offence in different legal systems.

prior to his transfer to the Hague and because once the ICTY completed its proceedings, he could not be tried in Germany for the same alleged crimes.

Relationship with National Courts

The power of Tribunal to prosecute crimes punishable under national laws has created a potential conflict between the jurisdiction of the Tribunal and that of national courts. Under Article 9(1) of the Statute, the national courts have concurrent jurisdiction, but this concurrent jurisdiction of national courts is subject to the primacy of the Tribunal. Article 9(2) of the Statute empowers the Tribunal to intervene at any stage of proceedings and request the national court to defer to the competence of the Tribunal. Request for deferral may be initiated by the Prosecutor if --

a) The act in question is characterized as an ordinary crime in the national proceedings,
b) There is lack of impartiality and independence or the proceedings are designed to shield the accused from international criminal liability or the case is not diligently prosecuted or
c) The matter involves factual or legal questions, which may have implications for proceedings before the Tribunal.

The state concerned is obliged to comply with a request for deferral issued by a Trial Chamber.

Indictments

Under Rule 47 of the ICTY, the Prosecutor prepares and forwards an indictment to the registrar for confirmation by an ICTY judge if there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal .The indictment sets forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime for which the suspect is charged.

If the indictment is confirmed, under ICTY Rule 55 the judge signs a warrant of arrest, which is then transmitted to the national authorities of the state, where the indictee is thought to reside. However, under Rule 50, the Trial Chamber is empowered to allow the Prosecutor to amend the indictments. This rule further provides that any amendment is considered by the same judge who originally confirmed the indictment or by another specially designated judge, but not by the Trial Chamber to which the case is assigned.

Withdrawal of Charges

Under ICTY Rule 51,the Trial Chamber may grant leave to the Prosecutor to withdraw charges against indictees. In *Kupreskic*(Dec. 19, 1997) and *Karadzic* and *Cerkez* (|Dec.19, 1997) the Prosecutor was permitted to withdraw charges against the three persons after they were taken into custody, having determined that the evidences against them were insufficient to proceed with a trial.

Warrant of Arrest

A warrant of arrest and any other orders, summons, subpoenas, warrants and transfer orders as may be necessary for the purposes of investigation or for the preparation of the trial are issued by a judge or Trial Chamber at the request of either the Prosecutor or the defence or *proprio motu* [28]. A state to which the warrant is transmitted must promptly comply therewith[29]. Once detained by the state concerned, the accused must be transferred to the seat of the Tribunal. However, the obligation of the state to transfer or surrender the accused prevails over restrictions of national extradition laws [30].

After being detained, the accused may be released by the Trial Chamber only in circumstances when the Trial Chamber is satisfied that the accused will appear for trial and if released will not pose a danger to any victim, witness or any other person. To that end, the Trial Chamber may impose conditions on release, including the execution of a bail bond [31].

Rule 61 Proceedings

Under normal circumstances, after confirmation of indictment, the judge signs a warrant of arrest directed to the state in which the indictee is thought to reside. But where a warrant of arrest, issued further to an indictment, has not been executed and there has been no service of the

28. Rules of Procedure and Evidence of the ICTY, UN Doc.IT /32(1993), Rule 54.

29. Ibid., Rule 56.

30. Ibid., Rule 58.

31. Ibid., Rule 65 (A)-(C).

indictment on the accused, Rule 61 of the ICTY provides that in open court witnesses would be called and evidence would be presented by the office of the Prosecutor. They are not trials *in absentia* but enable the Trial Chamber to confirm the indictment and issue an international arrest warrant if satisfied that there are reasonable grounds to believe that accused committed the crimes. Rule 61 decisions followed by international warrants of arrest have been made in various cases e.g. *Milan Martic* (March 8, 1995), *Dragan Nikolic* (Oct. 20, 1995), *Ivica Rajic* (Sept. 16, 1996), *Radovan Karadzic* and *Ratko Mladic* (July 11 1996). However, no state has arrested these individuals.

Amicus curiae

As per Rule 74, the Trial Chambers and the Appeals Chamber may, if it is considered desirable for the proper determination of the case, invite or grant leave to a state, organization or person to appear before it and make submissions on any issue specified by the chambers.

Principles of Fair Trial as Observed by the ICTY

The success and respect for criminal jurisdiction of any national and more even so international systems depend upon the premises of a fair trial[32]. Fair trial shall always ensure that the accused, witnesses, victims and Prosecutors receive all necessary procedural safeguards. That is why the ICTY has to take up the challenge of according full respect to the rights of

32. Bimal N. Patel, "Do the Rules of Evidence and Procedure of the ICTY Ensure a Fair Trial", *Indian Journal of International Law*, vol. 39(1999), pp.464-469, at p. 465.

an accused while at the same time ensuring due regard for the protection of victims and witnesses despite having several constraints, such as wide distance between the place of trial proceedings (The Hague) and actual site of events (former Yugoslavia),language inability of victims and witnesses and language of the Tribunal, relationship of victims and witnesses with the administration of the republics of former Yugoslavia and impediments caused by such administrative authorities to these victims and witnesses etc. The Appeals Chamber of the ICTY in the *Tadic* case faced with the challenge to the Tribunal's guarantees of fairness, justice and evenhandedness. To this effect, the Appeals chamber emphasized that Article 21 of the Statute corresponds to Article 14 of the International Covenant of the Civil and Political Rights, 1966 and that other fair trial guarantees are stipulated in the Statute and the Rules of Procedure and Evidence. The Appeals Chamber concluded that "the tribunal provides all the necessary safeguards of fair trial."

a. Rights of the Accused

Article 21(3) of the ICTY Statute declares that the accused shall be presumed to be innocent until proven guilty. The accused would not be compelled to testily against himself or confess his guilt[33]. Article 21(4)(a) of the Statute ensures that the accused shall be informed promptly and in detail in a language, which he understands of the nature and cause of the charge against him. An accused is entitled to be tried in his or her presence and to defend himself or herself in person or through legal assistance of his or her

33. Article 21(3)(g) of the ICTY Statute.

choosing or to have legal assistance assigned without payment if he or she does not have sufficient means[34]. When questioned, a suspect has the right to be assisted by counsel of his or her choice or to be assigned legal assistance without any payment if he or she doesn't have sufficient means [35].

b. Trials in absentia

The ICTY Statute does not expressly prohibit trials *in absentia.* Implicitly it does so in Articles 20 and 21, which provide that a trial will proceed once the defendant is "taken into custody" and that one of the defendant's rights is to be tried in his presence.

c. The Right to Remain Silent

Under Article 21 of the Statute and Rules 42 and 63, a suspect or indictee has the right to remain silent but can waive that right as well as the right to counsel.

d. Public Proceeding

In order to infuse the impartiality, fairness and reasonableness in the Tribunal's proceedings, the Rule 78 stipulates that all the proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, 'unless otherwise provided'. The qualification 'unless otherwise provided' is clarified in Rule 79, according to which the Trial Chamber may

34.Article 21(4)(d) of the ICTY Statute

35. n. 28, Rule 42

exclude press and public from all or part of the proceedings for reasons of public order or morality, safety, security or non-disclosure of the identity of a victim or witness or the protection of the interests of the justice.

e. Rights of theVictims and Witnesses

In order to ensure a fair trial, it is expedient to strike a balance between proper observance of rights of the accused on the one hand and victims and witnesses on the other. That is why Article 20 of the Statute requires that apart from giving full respect to the rights of an accused, there shall be due regard for the protection of victims and witnesses. Article 22 states that the Tribunal's rules shall provide for such protection, which shall include, but not be limited to the conduct of in camera proceedings and the protection of victim's identity. This becomes important in light of the fact that many witnesses for the prosecution will also be victims and thus this is a far- reaching requirement[36].

However, it is noteworthy that under Article 29 of the Statute, the state itself is under an obligation to assist the Tribunal, but no provision, so far considered, creates a direct relationship between the tribunal and a witness[37].

f. Matters of Evidence

In order to ensure the fairness in the trial process, the Trial Chambers

36. Patel, n.32,p. 465.

37. F. J. Hampson,"The ICTY and the Reluctant Witness", *International and Comparative law Quarterly*, vol.47 (Jan. 1998), pp. 51- 74, at p. 56.

of the ICTY are evolving a course somewhere between the common law tradition of carefully controlling the admission of evidence and the civil law tradition of allowing virtually any information to be presented. Despite this stated approach of charting a middle course, there is a heavy reliance on the oral testimony of the witnesses before the ICTY. This is consistent with the desire of the ICTY to represent the process of trial as publicly as possible [38]. That is why the Trial Chambers have shown little tendency to exclude evidence, including hearsay evidence.

Therefore, The trial Chambers have observed the rule that "admit any relevant evidence which it deems to have probative value"[39], unless there is a specific reason to question its reliability [40]. Furthermore, the Trial chambers have the option of ordering that a witness appear and testify even if he or she was not called by either the Prosecutor or the defence [41], as was ordered in the *Kupreskic* case with respect to an infirm witness (*Kupreskic,* Sep.30,1998).

However, from the experience of *Tadic*, *Blaskic* and several other cases, it is evident that the ICTY is increasingly allowing the introduction of expert evidence by expedited means.

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38. M. Findlay, "Synthesis in Trial Procedures", *International and Comparative Law Quarterly*, vol. 50 (January 2001), pp.26-51, at p.40.
39. n. 28, Rule 89 (c).
40. Ibid., Rule 95.
41. Ibid., Rule 98.

Sentencing

Article 24 of the Statute limits penalties to imprisonment, precluding the imposition of death penalty. In determining the term of imprisonment , the Trial Chamber must have recourse to the general practice regarding prison sentences in the courts of former Yugoslavia.

Enforcement of sentences

The imprisonment is served in a state designated by the Tribunal from a list of states which have indicated to the UN Security Council their willingness to accept convicted persons. The imprisonment must be in accordance with the applicable law of the state concerned. Transfer of the convicted person must take place as soon as possible. All sentences of imprisonment are supervised by the Tribunal. The Statute further provides that the state in which a person is imprisoned shall notify to the Tribunal if a prisoner becomes eligible for pardon or commutation of his or her sentence. Under Article 28 of the Statute, the President of the Tribunal in consultation with the judges would then decide the matter on the basis of the interest of justice and the general principles of law.

International Criminal Tribunal for Rwanda

The world's most recent genocide occurred in the small central African country of Rwanda, where from April 1994 to July 1994, members of the Hutu Tribe (ethnic majority) murdered over 800,000 members of the Tutsi tribe (ethnic minority). Massive violations of international

humanitarian law e.g. genocide, killing and causing with intent to destroy a national, ethnic, racial and religious group was triggered by an incident when on 6 April 1994 a plane carrying the President of Rwanda, Juvenal Habyarimana belonging to Hutu ethnic community was shot down on its approach into his country's capital Kigali. Immediately following the plane crash, an interim government that was predominantly Hutu took control and massacres commenced throughout the country. Thousands of Tutsi men, women and children were violently killed in these massacres, which were designed to wipe out the Tutsis of the country as a whole. The victims were killed primarily by state-sponsored militia and Hutu civilians and even churchmen, incited by local and national authorities who publicly blamed the minority Tutsis for the death of the President.

At that point of time, Rwanda, a central African country consisted of three principal ethnic groups-approximately 85% of the Rwandan population were Hutu, 10 to 15% were Tutsi and with less than 1% were members of the Twa-ethnicity. There is a long history of Hutu-Tutsi animosity fomented by their former colonial master. The Tutsi minority with the help and support of erstwhile colonialists Belgians have had all the power in their hand. The means of production and natural resources of the country were under the control of Tutsi minority. They have controlled the fertile land, the army has been pre-dominantly Tutsi and so was the position with bureaucracy. Against backdrop, the killing of President Habyarimana provoked the Hutus to unleash the reign of terror against the Tutsi minority.

It is disheartening to note that, while the massacres were going on, the international community did not respond adequately to the crisis and

failed to intervene to stop the Rwandan genocide. The Organization of African Unity and even the United Nations were criticized for not saving Rwandan Tutsi lives[42]. The UN efforts to respond to the crisis were reactionary, hesitant, disorganized, fragmentary and for the initial part a complete failure [43]. In the wake of the President Habyarimana's death, the UN Assistance Mission in Rwanda (UNAMIR) was unable to prevent the outbreak of widespread violence. Ten Belgian soldiers were killed in the immediate aftermath following Habyarimana's death, leading to the withdrawal of the entire Belgian contingent[44]. On April 21,1994, the Security Council adopted a decision to reduce UNAMIR forces from 2,000 to 270. The US heavily influenced this decision because eighteen of its soldiers had been killed in Somalia at that time. The UN Secretary-General strongly urged the Security Council on April 29 to deploy an African contingent, submitting a plan a few days later asking for the deployment of 5,500 soldiers at Kigali. Initially the Security Council could not agree on moving forward with this plan mainly due to resistance from the U.S., which pointed out that no state had made a firm offer to send their forces to Rwanda and that the Rwandan factions had not given unconditional assent to the UN operation[45]. Had the world community intervened in the Rwandan

42. Hari Sharan Chhabra – "International Criminal Tribunal for Rwanda", *World Focus*, 260 (August 2001), pp. 20-22,at p. 20.

43. Sushil Raj- "The Failure of Humanitarian Intervention in Rwanda", *Indian Journal of International Law*, vol. 59, No.1 (January - March 1999), pp.470-482, at p.476.

44. David Callahan, *Unwinnable Wars–American Power and Ethnic Conflict* (New York 1998), p.183.

45. Sean Murphy, *Humanitarian Intervention* (Pennsylvania, 1996), p.245.

civil war at the appropriate time, the humanitarian catastrophe could perhaps have been avoided.

However, on 8 June 1994, the Security Council passed Resolution 925 authorizing the deployment of 5,500 soldiers and specifically asked UNAMIR to provide security and protection for displaced persons and relief workers carrying out humanitarian relief operations. However, disagreement over logistics between the US and the UN severely impeded the deployment and thereby aggravated the problem by providing opportunity to the rebels of Rwandan Patriotic Front (RPF) to achieve substantial gains and capture northern and eastern Rwanda. Millions of Tutsis and Hutus were displaced, both within and outside the country. Hutu civilians in turn faced revenge killings as the Rwandan Patriotic Front, the Tusti-led rebel force invaded from Uganda and took control of the country. In this way, the Rwandan crisis took an international dimension and involved the neighbouring countries Burundi, Uganda, Zaire and Tanzania. There has been a historical interconnection between the political situation of Burundi and Rwanda and on account of this co-relation large numbers of Rwandan refugees went to Burundi, Zaire and Tanzania.

Subsequently the Security Council adopted the Resolution 935on 1st July 1994 in order to establish a Commission of Experts for the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda.

Ultimately after considering the report of the Secretary-General submitted pursuant to paragraph 3 of the resolution 935and his letter dated 29July 1994 the Security Council on 8th November 1994 adopted a resolution which determined that genocide and other systematic and flagrant violations of the international humanitarian law in Rwanda constituted a threat to international peace and security[46]. Through this resolution, acting under Chapter VII of the UN Charter, the Security Council on the request of the government of Rwanda decided to establish an international tribunal for the sole purpose of prosecuting persons responsible for the genocide and other serious violations of the international humanitarian law committed in the territory of Rwanda and Rwandan citizen responsible for the genocide and other such violations committed in the territory of neighbouring states between 1January 1994 to 31 December 1994 and to this end adopted the Statute of the International Criminal Tribunal for Rwanda (ICTR) annexed to the resolution. Subsequently after considering the report of the Secretary-General[47], the Security Council on 22 February 1995 adopted a resolution deciding that the seat of the International Tribunal of Rwanda will be Arusha in Tanzania[48]. The ICTR Statute constitutes an extremely important development of the humanitarian law with regard to the criminal character of internal atrocities in Rwanda. In contrast to the ICTY Statute, the ICTR Statute is predicated on the assumption that the conflict in Rwanda is non-international armed conflict.

46. n. 2 .

47. UN Doc. S/134(1995).

48. UN Security Council Resolution 977(1995)

Procedural Law

The principal text governing the activities of the Tribunal are the Statute of the International Tribunal, adopted by the Security Concil[49] and the Rules of Procedure and Evidence[50]. The Rules together with any other internal procedural regulation are adopted by the Tribunal itself. In accordance with the Statute, the Rules elaborated and used by the ICTY have been adapted by the ICTR[51] . Other texts concerning proceedings before the Tribunal include the Directive on the Assignment of Defense Counsel[52] and the Directive for the Registry of the ICTR.

Substantive Law

The substantive law to be applied by the ICTY is set forth in Articles 2 to 4 of the Statute. This includes genocide, crimes against humanity and violations of Article3 common to the Geneva Conventions and of Additional Protocol II, the violation of which entails individual criminal responsibility.

Individual Criminal Responsibility

Following the precedent of the Nuremberg Trials and the ICTY,

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49. UN Security Council Resolution 955(1998) as amended by UN Security Council Resolution 1165(1998).

50. http:// www.ictr.org/English/rules/index.htm, visited on 1-12-2001

51. Article 14 of the ICTR Statute.

52. http:// www.ictr.org/English/basic docs/directive adc.htm,visited on 25-10-2001.

Article 6(1) of the Statute of the ICTR states that a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 (genocide, crimes against humanity and violations of Article 3 of the Geneva Conventions), shall be individually responsible for the crime. Article 6 (2) further states that the official position of any accused person, whether as head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

However, Article 6(4) states that the fact that an accused person acted pursuant to on the order of a government or of a superior shall not relieve him or her of criminal responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Organization

The organizational structure of the ICTR is modeled on that of the ICTY. The Tribunal consists of three Trial Chambers and an Appeals Chamber, together with the Prosecutor and the Registry. The third chamber was approved by the Security Council on 30th April 1998[53] and three new judges were sworn in on 22 February 1999. For purposes of reducing cost and sharing experience, the same Office of the Prosecutor and the Appeals Chamber serves both the ICTR and ICTY.

Composition

The Tribunal comprises 14 judges, three judges serving in each Trial

53.UN Security Council Resolution 1165 (1998).

Chamber and five judges in the Appeals Chamber. The judges are elected for a renewable term of four years by the UN General Assembly from a list of candidates prepared by the Security Council from the nominees of the states. The judges must be persons of high moral character, impartiality and integrity.

JURISDICTION

Ratione Personae- The Tribunal has jurisdiction over natural persons accused of the crimes listed in Articles 2 to 4 of the Statute[54]. It has no jurisdiction over states, legal persons or organizations. The *ration personae* jurisdiction of the ICTR covers Rwandan citizens and non-citizens alike. Violations committed in states neighbouring Rwanda, however, may be prosecuted before the Tribunal only if the perpetrator was a Rwandan citizen[55].

Ratione temporis- The temporal scope of the jurisdiction of the Tribunal extends to the period between 1 January 1994 to 31 December 1994. The jurisdiction of the ICTR covers the above crimes committed throughout the entire territory of Rwanda as well as territories of the neighbouring states by Rwandan citizen.

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54. Article 5 of the ICTR Statute .

55. Article 1 of the ICTR Statute.

Ratione materiae - The Tribunal's competence is limited to the prosecution of the following group of crimes –

A. Genocide-

Like the ICTY Statute, the Rwandan Statute grants the power to prosecute persons who have committed genocide since genocide is a crime under both customary law and a treaty. It constitutes *jus cogens*.

The Rwandan Tribunal's Statute defines genocide in Article 2 which is identical with the definitions in the Genocide Convention and in the Statute of the ICTY. Article 2 stipulates that genocide means killing members of a group, causing serious bodily or mental harm to members of the group, imposing measures intended to prevent births within the group with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Article 2 further declares genocide, conspiracy to commit genocide, attempt to commit genocide and complicity in genocide as punishable. Following the jurisprudence of the ICTY and ICTR, the Statute of International Criminal Court (ICC) has incorporated the definition of genocide[56] and declares that the International Criminal Court has jurisdiction over crime of genocide[57].

In *Kayishema and Ruzindana* cases, the ICTR found there was some ambiguity in the definition of genocide and said that if doubt existed, for a matter of statutory interpretation, that doubt must be interpreted in

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56.Article 6 of the ICC Statute.

57. Article 5 of the ICC Statute.

favour of the accused[58]. However, in *Prosecutor v. Akayesu,* the ICTR indulged in judicial gap-filling in an effort to satisfy itself that the Tutsis were contemplated by Article II of the Genocide Convention. In *Prosecutor v. Kambanda*, condemning Kambanda to life imprisonment for genocide, conspiracy to commit genocide, complicity in genocide, the Tribunal described genocide as "crime of crimes".

B. Crimes Against Humanity –

Crimes against humanity are crimes under customary law whose core prohibitions constitute *jus cogens*. Apart from the Nuremberg Charter where they first appeared, no treaty has defined crimes against humanity .By making no distinction between the international or non-international character of the conflict, the broad language of Article 3 of the Rwandan Statute (entitled crimes against humanity) strengthens both the precedent set by commentary to the ICTY Statute and enhances the possibility of arguing in the future that the prohibitions of crimes against humanity (in addition to genocide) applies even in peacetime[59]. In this regard, it is noteworthy that Article 7 of the Statute of ICC enumerates more acts under the heading of crimes against humanity in comparison with the Statutes of ICTY and ICTR. These include sexually assaulting, sexual slavery, enforced prostitution,

58. Prosecutor *v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T-21 http://www.ictr.org/ENGLISH/cases/kayishema ruzindana/judgement/1.htm...,visited on 1-10-2001.

59. Theodor Meron, "International Criminalization of Internal Atrocities", *American Journal of International Law*, vol. 89 (1995), pp.554-577, at p.557.

forced pregnancy, enforced sterilization and apartheid. Like the ICTR Statute, the Statute of ICC has removed any nexus to armed conflict requirements. Furthermore, it has broadened of the protected group from political, ethnic, racial and religious group to all civilian populations.

Article 3 of the Rwandan Statute defines crimes against humanity as murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhuman acts when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The ICTY Statute prescribes that a nexus with armed conflict is required for invocation of ICTY's jurisdiction over crimes against humanity, but ICTR Statute does not prescribe any such requirement. The ICTR Statute, unlike the ICTY Statute prescribes that a discriminatory motive is required.

It is noteworthy that widespread or systematic attack against any civilian population is a requisite for crimes against humanity. The term 'systematic' requires a very high degree of organization or orchestration and has been interpreted by the ICTR as meaning, "thoroughly organized and following a regular pattern on the basis of common policy involving substantial public or private resources"[60]. In Prosecutor *v. Kambanda*,the ICTR convicted Kambanda of crimes against humanity apart from genocide. Pleading guilty to genocide, Kambanda admitted a widespread and

60.Prosecutor v. Akayesu, Case No. ICTR-96-4
htpp://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay 001.htm...,visited on 6-6-2001.

systematic attack against the civilian population of Tutsi, the purpose of which was to exterminate them[61].

C. Violation of Article 3 Common to Geneva Conventions and of Additional Protocol II-

Article 4 of the Rwandan Statute is its greatest innovation which states that ICTR shall have power to prosecute persons committing serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. These violations shall include violence to life, health and physical or mental well-being of persons, collective punishments, taking of hostages, acts of terrorism, pillage etc. However, this list is only illustrative and not exhaustive. The trend towards regarding common Article 3 and Additional Protocol II as bases for individual criminal responsibility was accentuated in reports concerning atrocities in Rwanda[62]. Having determined that conflict in Rwanda constitutes a non-international armed conflict, the Independent Commission of Experts on Rwanda asserted that common Article 3 and Additional Protocol II and the principle of individual criminal responsibility in international law are applicable to the Rwandan conflict. Hence, by extending the concept of crimes under international law to abuses committed in non-international armed conflict, the Rwandan

61. Prosecutor v. Kambanda, Case No.ICTR-97-23, http://www.ictr.org/ENGLISH/cases/kambanda/judgement/kambanda.htm..., visited on 6-6-2001.

62.Rene Degni-Sequi, Report on the Situation of Human Rights in Rwanda, UN Doc .E / CN.4 / 1995/7, para. 54.

Statute has remedied one of the most important weaknesses of the international law.

In his commentary on the ICTY Statute, the UN Secretary-General stated that the principle of *nullum crimen since lege*[63] requires that the tribunal "apply rules of international humanitarian law which are beyond any doubt part of customary law. Rwanda is a party to both the Geneva Conventions as well as Additional Protocols and the customary law character of common Article 3 of the Geneva Conventions, which has been explicitly recognized by the International Court of Justice in *Nicaragua* case[64]. Now the question is whether these treaty provisions, which prohibit certain enumerated acts, establish the individual criminal responsibility of the perpetrators, that is, whether the proscriptions applicable to non-international armed conflicts are criminal in character. In his report, the UN Secretary-General recognizes that the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statue of the ICTY. The Security Council has included within the jurisdiction of the ICTR international instruments regardless of whether they are considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly includes violation of the Additional Protocol II, which as a whole, has not yet been

63.Principle of *nullum crimen sine lege* means no crime without law and it prohibits *ex post facto* prosecution.

64. *Nicaragua* case, *I.C.J.Reports* 14 (1986),pp.113-114.

universally recognized as a part of customary international law and for the first time criminalizes common Article 3[65].

Inclusion of common Article 3 of the Geneva Conventions and the Additional Protocol II would have enormous normative importance on the international law on account of the fact that common Article 3 and Additional Protocol II cover areas also addressed by human right law, in some cases even by peremptory norms. The Statute thus enhances the prospects for treating egregious violations of human rights law as offences under international law[66].

Relationship with National Courts

Like the ICTY Statute, under Article 8 of the ICTR Statute, the ICTR and national courts have concurrent jurisdiction to prosecute persons for the violations of the international humanitarian law falling within the jurisdiction of the Tribunal. Such concurrence is, however, subject to the primacy of ICTR. Under certain conditions, a Trial Chamber at any stage of the proceeding may request a national court to defer to its competence. The grounds for intervention in national proceedings include --

i) the seriousness of the offence,

ii) the status of the accused at the time of the alleged offence,

iii) the general importance of the legal questions involved in the case.

Moreover, a Trial Chamber may request a national court to discontinue ongoing proceedings in case, if the crime in question is subject

65.UN Doc. S/1995/134,para.12(1995).

66.Meron, n. 59,p.568.

to investigation by the Prosecutor or is subject to indictment before the Tribunal.

Institution of Proceedings

As per Article 17 of the ICTR Statute, the investigation of crimes is initiated and carried out by the Prosecutor *ex officio* or on the basis of information from any source, in particular government, UN organs, intergovernmental and non-governmental organizations. The Prosecutor has broad powers to investigate matters, such as the power to question suspects, victims and witnesses, to collect evidence and to conduct onsite investigations.

Upon a determination that a *prima facie* case exists, the Prosecutor prepares the indictment and forwards it to the 'confirming' judge for confirmation. The indictment must contain a concise statement of facts and the crimes with which the accused is charged. If the judge is satisfied that a *prima facie* case has been established, e.g. sufficient evidence has been supplied by the Prosecutor to provide reasonable grounds for believing that a suspect has committed a crime, the judge confirms the indictment. However, the Prosecutor may amend the indictment -

i) at any time before its confirmation,

ii) thereafter with leave of judge who has confirmed the indictment.

The indictment may be withdrawn under similar circumstances[67].

67.n.50, Rule 50 and 51.

Written Pleadings

The charges raised by the Prosecutor must be presented to the Tribunal and to the accused in written form[68]. The indictment sets forth the name and particulars of the suspect and must contain a concise statement of facts of the case and of the crime with which the suspect is charged[69].

Warrant of Arrest

A warrant of arrest or any other orders, summons, subpoenas, warrants and transfer orders as may be necessary for the purposes of the investigation or for the conduct of the trial are issued by a judge or Trial Chamber at the request of either the Prosecutor or the defence or *proprio motu*[70]. A state to which the warrant is transmitted must promptly comply therewith. Once detained by the state concerned, the accused must be transferred to the seat of Tribunal[71].

Once detained, an accused may be released by the Trial Chamber only in exceptional circumstances if the Trial Chamber is satisfied that the accused will appear for trial and if released, will not pose a danger to any victim, witness or any other person, the accused might be released. To that end, the Trial Chamber may impose conditions on release, including the execution of a bail bond[72].

68. Ibid.,Rule-47 .

69. Ibid.,Rule 47(c).

70. Ibid.,Rule 54.

71. Ibid.,Rule 55(C) and 57.

72. Ibid., Rule 65(B) and (C).

Appeals

A Trial Chamber's decision on guilt or acquittal or on the terms of sentence can be appealed by the Prosecutor or the accused person on the grounds that

a) an error of law invalidates the decision,

b) an error of fact has occasioned a miscarriage of justice[73].

The Appeals Chamber reaches its decision by majority. It may reverse or revise the judgement of the Trial Chamber[74]. In appropriate circumstances the Appeals Chamber may order that the accused be re-tried before a Trial Chamber[75].

Enforcement of Sentences

Any sentence of imprisonment is served in Rwanda or any state designated by the ICTR from a list of states which have indicated to the Security Council their willingness to accept convicted persons. The transfer of a convict to the place of imprisonment must take place as soon as possible.

Amicus curiae

Like the ICTY, the Trial and Appeals Chambers may, if it is considered desirable for the proper determination of the case, invite or grant

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73. Article 24 (1) of the ICTR Statute.

74. Article 24 (2) of the ICTR Statute.

75. n.50,Rule 118 (c) .

leave to a state, organization or person to appear before it and make submissions on any issue specified by the Chamber[76]. Under this provision, *Amicus Curiae* briefs were submitted in the *Bagosora*, *Akayesu* and *Ntuy-ahaga* cases.

Rules of Fair Trial

Following the precedent of the ICTY, the Statute of ICTR and its Rules of Procedure and Evidence incorporates principles of fair trial. Article19 of the ICTR Statute states that the Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Art 20 (1) states that all persons shall be equal before the ICTR. Article 20 (2) states that in the determination of charges against him or her, the accused shall be entitled to a fair and public hearing.

However, the Trial Chamber may exclude the press and public for reasons of public order or morality, safety, security or non-disclosure of the identity of a victim or a witness or protection of the interest of justice[77].

Article 20 (3) further provides that the accused shall be presumed innocent until proven guilty. Article20 (4) (a) states that the accused will be informed promptly and in detail in a language, which he understands of the nature and cause of the charge against him or her. Article 20 (4) (d) states

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76. Ibid., Rule-74.

77. Ibid., Rule 79 (A) and (B).

that the accused will be tried in his presence and will defend himself in person or through legal assistance of his own choice. Article 20(4) (g) states that the accused will not be compelled to testify against himself to confess guilt. Article 21 of the ICTR Statute further states that the ICTR shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of proceedings in camera and the protection of the victim's identity.

CHAPTER III

JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

The preceding chapter has focussed on the humanitarian disaster witnessed by the former Yugoslavia and Rwanda, which led to the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). It has addressed the issue of expediency of establishment of *ad hoc* international criminal tribunals by the UN Security Council. Apart from this, it has described statutory provisions, Rules of Evidence and Procedure as well as institutional mechanism of the ICTY and ICTR. The present chapter portrays the jurisprudence being developed by the ICTY and ICTR through their judicial pronouncements on procedural and substantive issues.

Jurisprudence of the International Criminal Tribunal for Former Yugoslavia

Since its establishment, the ICTY is coming of age as a credible forum for the international prosecution of war crimes within its jurisdiction. It is developing an unprecedented international criminal jurisprudence. Prior to its establishment, the judicial precedents of the prosecution of the

perpetrators of international humanitarian law were Nuremberg and Tokyo trials and some other national prosecutions. The jurisprudence of the ICTY has added new dimensions to the growing corpus of international humanitarian Law. It has broadened the scope and further clarified the crimes against humanity, genocide, violations of laws or customs of war and grave breaches of the Geneva Conventions,1949. It has applied the non-derogable international humanitarian norms to internal conflict. It has further interpreted the treaty or customary sources of international humanitarian law. Similarly, the ICTY has defined the scope and nature of attribution of crimes to superiors pursuant to theories of command responsibility, the permissibility of defences to such crimes such as those based on reprisal or duress, the manner in which suspects may be apprehended, imprisoned, tried and punished, the rights of suspects to counsel, cross-examination of witnesses and exculpatory evidence and the treatment of victims and witnesses.

In arriving at their decisions, the Trials and Appeals Chambers of the ICTY has interpreted and further clarified the conventional and customary rules of the international law. Furthermore, the Tribunal has examined the criminal laws of various countries in order to determine whether a general principle of law exists. It has interpreted various human rights instruments e.g. the International Covenant on Civil and Political Rights, 1966 and the European Convention on Human Rights. In this way, the future interpretations of these instruments will take note of the ICTY's jurisprudence. The existence of the ICTY has been even marked by the

International Court of Justice into its pleadings and decision in its *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* case[1].

The commencement of trials and various proceedings before the ICTY have triggered a substantial and growing corpus of substantive and procedural judicial decisions, which will have tremendous significance for ICTY's future proceedings, proceedings before the ICTR and the permanent International Criminal Court (ICC). Hence in order to understand the jurisprudence emerging out of the ICTY's proceedings, it would be expedient to analyze the various procedural and substantive decisions of the ICTY.

ICTY's Decision on the Security Council's Competence to Establish *Ad hoc* International Criminal Tribunal

The report of the UN Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) has justified the legal basis of the establishment of an international tribunal for Yugoslavia by the UN Security Council[2].Subsequent to inception of the ICTY, the first indictee Dusko Tadic challenged the very legality of the Tribunal on the ground that the Security Council had exceeded its authority under Chapter VII of the UN charter when it established such a judicial institution and thereby claimed that the ICTY has not been established by law. The Trial Chamber found that it lacked authority to review its establishment by the Security Council

1. *Advisory Opinion*, in *International Legal Materials*, vol.35, No.4(1996), para 81, p.828.
2. UN Secretary-General's Report, UN Doc. S/25704 (1993), paras 18-30, pp.6-8.

and the matter was political and non-justiciable in nature. However, the Appeals Chamber found that the ability of a judicial or arbitral tribunal to determine its own competence is a major part of its 'incidental or inherent jurisdiction'. The Appeals Chamber determined that there had been a threat to peace in the former Yugoslavia justifying the Security Council's invocation of Chapter VII of the Charter and further held that Chapter VII served as an appropriate legal basis for establishing an international criminal tribunal. It held that the Tribunal has been established in accordance with the appropriate procedures under the UN Charter and thereby it was established by law[3].

Attribution of Crime to the Individual

An important step in the lengthy process of developing rules on individual criminal responsibility under international law was taken with the setting up of the two *ad hoc* tribunals for the crimes committed, respectively in the former Yugoslavia and in Rwanda[4]. These tribunals represent major progress towards the institution of a kind of permanent jurisdiction. Article 7 of the ICTY Statute gives a wide scope to "individual criminal responsibility", covering all persons who "planned, instigated, ordered, committed or otherwise aided and abetted" in the planning, preparation or

3. *Prosecutor v. Tadic*, Case No.IT-94-1-T,in *International Legal Materials*, vol. 35, No.1(1996), paras. 41-48, pp.46-48.
4. Edoardo Greppi, "The Evolution of Individual Criminal Responsibility Under International Law",*International Review of Red Cross*, vol.81 (September1999), pp.531-532, at p.543.

execution of a crime within the jurisdiction of the Tribunal. Article 2 of the Statute enumerates grave breaches of the Geneva Conventions, Article 3 enumerates violations of laws or customs of war, Article 4 enumerates acts of genocide and Article 5 enumerates crimes against humanity as crimes coming under the jurisdiction of the ICTY.

As far as degree and extent of participation by the individual in the crime is concerned, the Trial Chamber in the *Tadic* case observed that where the accused has not directly engaged in the alleged act, the person may still be held responsible if the prosecution proves –a) that he consciously participated by planning, instigating, ordering, committing or otherwise aiding and abetting the crime, and b) that such participation directly and substantially contributed to the commission of the crime. It further observed that actual physical presence when the crime is committed is not necessary. However the acts of the accused must be direct and substantial.

In the *Furundzija* case[5], the Trial Chamber determined the nature and scope of *actus reus* and *mens rea* necessary to sustain a charge of aiding and abetting in international criminal law. The Chamber held that "the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" while the "*mens rea* required the knowledge that these acts assist the commission of the offence".

In the *Celebici Camp*[6] case, the Trial Camber found that the doctrine of

5. *Prosecutor v. Furundzija*, Case No. IT-95-17/I-T http://www.un.org/icty/furundzija/trialc2/judgement/index.htm,visited on 10-6-2001.
6. *Prosecutor v. Delalic, Mucic and others*, Case No.IT-96-21, http://www.un.org/icty/celebici/trialc2/judgement/index.htm,visited on 15-6-2001 .

command responsibility encompasses not only military commanders but also civilians holding positions of authority and can have a *de facto* as well as *de jure* character. In that case, the Chamber convicted Zdravko Mucic on several counts of murder and torture on a theory of command responsibility emanating from his position as the commander of the Celebici camp.

Prosecution for the Grave Breaches of the Geneva Conventions

Grave breaches of the Geneva Conventions have a strong normative basis under international law since it has an international enforcement mechanism. Article 2 of the ICTY Statute empowers it to prosecute persons responsible for the grave breaches of the Geneva Conventions, 1949 which consist of willful killing, torture, inhuman treatment and other specified acts against persons protected under the Conventions. Requirements for conviction of a person responsible for grave breaches of the Geneva Conventions were discussed by the ICTY in the *Tadic* case. The ICTY's decision in the case of *Dusko Tadic* marks for the first time since the 1940s that an individual has been tried and convicted by an international tribunal for war crimes and other serious violations of the international humanitarian law. The judges agreed unanimously on the factual issues concerning Tadic's criminal conduct, both in finding the evidence insufficient to support the murder charges and in finding him responsible for torture, ethnic cleansing and other forms of persecution. They agreed that his acts fell within the legal definition of both crimes against humanity and violations of laws and customs of war . The judges, disagreed, however, on the issue of

whether these same acts could also be legally characterized as "grave breaches of the Geneva Conventions of 1949".

The two–judge majority acquitted Tadic on all charges of grave beaches. Under the terms of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, grave breaches can only occur against civilian victims when two essential jurisdictional conditions have been met. First, the acts alleged to be grave breaches must have occurred in the context of an international armed conflict. Second to qualify as 'protected persons' under that Convention, the victim must suffer at the hands of a party to the conflict with whom they do not share the same nationality . The majority concluded that Tadic's crime did not constitute grave breaches because his victims Bosnian Muslims and Bosnian Croats in the hands of Bosnian Serbs, were not protected persons for the purposes of the Geneva Convention[7]. They also found that his acts had not been committed in the context of international armed conflict because the Federal Republic of Yugoslavia (FRY) had formally withdrawn from Bosnia and Herzegovina several weeks before Tadic began to commit those acts. However, the third trial judge dissented on the issue, concluding that the grave breaches provisions were applicable. In her view, the Trial Chamber's unanimous conclusion that the FRY continued to support the Bosnian Serb army was sufficient to establish both that the armed conflict was international and that the victims of the accused were protected persons[8].

7. *Prosecutor v. Tadic*, Case No:IT-94-1-T, in *International Legal Materials*, vol.36, No.4(1997), paras.577-608, pp.924-933.
8. Ibid., paras.1,32 and 34, pp.971-979.

The Trial Chamber's above decision has been criticized on the ground that it erred first in ruling that the armed conflict within Bosnia and Herzegovina was immediately transformed from an international armed conflict to an internal one on May 19, 1992, when the Yugoslav National Army formally announced that it had withdrawn. It further erred in ruling that the Bosnian Serb political and military entities created by FRY (Serbia and Montenegro) when it 'withdrew' from Bosnia and Herzegovina, shared a common nationality with the Bosnian Muslims and Bosnian Croat victims whom they persecuted in pursuit of an ethnically pure Serb state[9]. Hence, it may be said that by rendering the Geneva Conventions inapplicable to the Bosnian crisis on the basis of strict and formalistic application of the criteria for nationality, the decision of the ICTY in the *Tadic* case has severely undermined the efficacy of international law.

However, in the *Celebici Camp* case, the Trial Chamber found that there was an international armed conflict in Bosnia throughout 1992. The Chamber determined that the FRY had attempted to create an appearance of withdrawing in May 1992 but that in fact its involvement in the hostilities had continued. Thus, the persons detained in the camp were protected by the fourth Geneva Convention[10]. Thus, in the *Celebici camp* case, the ICTY adopted a more functional and pragmatic approach in defining the nature of the Bosnian conflict and nationality for the purposes of international humanitarian law.

9.Bartram S.Brown,"Nationality and Internationality in International Humanitarian Law", *Stanford Journal of International law*, vol. 34(Summer 1998),pp.347-405, at p.351.

10.*Celebici Camp case*,n.6.

Prosecution for Violations of the Laws and Customs of War

Article 3 of the ICTY Statute provides the Tribunal with jurisdiction over "persons violating the laws or customs of war". Under the ICTY's jurisprudence, Article 3 is viewed even more broadly as a catchall clause- a residual basis of jurisdiction that may be invoked when more specialized bases (over grave breaches, genocide and crimes against humanity) do not apply[11].

It is easy for the prosecution to prove the violations of laws and customs of war in comparison with other offences within the jurisdiction of the ICTY since there is no need to prove the existence of any special requirement. There is no need to prove widespread or systematic action against a group, no need to prove specific intent to eliminate a group and no need to establish facts concerning the international nature of the conflict or the nationality of any victim or party. In the *Tadic* case, the Appeals Chamber held that in order to establish an Article 3 violation, the following conditions must be satisfied -

a) the violation must constitute an infringement of a rule of international humanitarian law,
b) the rule must be customary in nature or if it belongs to treaty law, the treaty must be binding on the parties at the time of the alleged offence and not be in conflict with peremptory norms of international law,
c) the violation must be serious ,

11.Sean D. Murphy, "Progress & Jurisprudence of the ICTY", *American Journal International Law*. vol. 93 (1999), pp.57-97,at p. 68 .

d) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule[12].

Moreover, the Appeals Chamber paved the way for the disappearance of the distinction between international and non-international armed conflicts by observing that many rules of the international humanitarian law have evolved so that they now govern non-international or internal conflict and can lead to individual criminal responsibility. The Chamber concluded that the rules in Article 3 common to the 1949 Geneva Conventions, which address the protection of victims of internal armed conflict, have passed into customary international law and can lead to the individual criminal responsibility under Article 3 of the ICTY Statute[13]. The Chamber's decision, however, is not limited to violations of common Article 3 but it opens the door for the Prosecutor to argue that a variety of rules of international humanitarian law including protection of civilian objects, in particular cultural property and protection of all those who do not take active part in hostilities now apply and can give rise to individual criminal responsibility in non-international conflicts. In this way, after giving the grave breaches of the Geneva Conventions under Article 2 of the Statute a narrow interpretation, the ICTY has attempted to fill the resulting normative gap through a broad and widest possible interpretation of Article 3 on the laws and customs of wars. This finding constitutes one of the most important

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12. *Prosecutor v. Tadic*, n.3,para. 94, p. 62.

13. Ibid.,paras.128-137,pp.70-71.

results of the post–cold war developments. It shows that non- international armed conflicts are regulated to a much greater extent by legal rules than had generally been assumed[14].

Prosecution for Genocide

Of more than seventy public indictments issued by the ICTY, only few suspects have been accused of genocide. The indictments focus on the Serb-run concentration camps–Omaraska, Luku, Keraterm- where Muslims and Serbs were incarcerated during the war. The Prosecutor has also qualified the mass executions of Muslims in the Srebrenica enclave in July 1995 as genocide[15]. In the *Dusko Tadic* case the Prosecutor confined his indictment to war crimes and crimes against humanity, dropping the charge of genocide. In another early case, that of *Nikolic*, the judges themselves invited the Prosecutor to add an indictment of genocide after hearing evidence of ethnic cleansing during a Rule 61 proceeding , a suggestion that was not taken up by the Prosecutor[16]. The office of the Prosecutor has been extremely cautious in laying charges of genocide. The Prosecutor addressed the acts of ethnic cleansing carried out by the Milosevic regime in Kosovo in early 1999 under the rubrics of 'deportation' and 'persecutions' both of

14. Dietrich Schindler, "Significance of the Geneva Conventions for the Contemporary World", *International Review of Red Cross*, vol. 81 (December 1999), pp. 715-728, at p.727.

15. 'William A. Schabas, "Prosecution for Genocide" in *Genocide in International law*, (Cambridge, 2000) pp. 378-379.

16. Ibid., "Prosecution of Genocide", p.379.

which belong to the general category of crimes against humanity[17]. However, on December 11,2001, the ICTY indicted Mr. Milosevic of charge of genocide committed in the Bosnian war. The indictment alleges that he presided over the deliberate destruction or expulsion of the Muslims and Croats in the 1992-95 Bosnian War.

In the cases concerning *Radovan Karadzic* and *Ratko Mladic*, both of whom were accused of genocide, the Prosecutor initiated a hearing to confirm the indictment pursuant to Rule 61 of the Tribunal's Rules of Procedure and Evidence after failure of the NATO forces to arrest the two. The Prosecutor's case tended to confirm that the Serb forces, led by Karadzic and Mladic, engaged in driving out Muslim and Croat population from previously mixed areas in order to create an ethnically cleansed Serb region. The Tribunal took the view that individual criminal responsibility for genocide had been established[18].

As far as requirement of element of *mens rea* is concerned, the Trial Chamber in the *Karadzic and Mlaldic case* concluded that genocidal intent can be deduced from the combined effect of speeches or projects laying the ground work for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.

On 2 August 2001, the ICTY has ruled that Bosnian Serbs committed genocide at the United Nations-protected enclave in Serbrenica in 1995. The

17. Prosecutor v. Milosevic, Case No. IT-99-37-I
http://www.un.org/icty/indictment/english/mil-2ai011029 e.htm, visited on 1-12-2001

18. n.15, "Prosecution of Genocide",pp.380-382

ruling came in the verdict on General *Radislav Krstic*, a commander of the Bosnian Serbs corps in Srebrenica[19]. The following day, 3 August 2001, Gen. Krstic was sentenced to 46 years in prison and thus became the first accused in the Bosnian conflict to be convicted of the charge of genocide. The significance of the ruling lies in the fact that this was the first time when the ICTY had ruled that genocide was committed in the Bosnian war. It held that in killing the Bosnian Muslims, the Bosnian Serbs must have known that the combined action of killing and expulsion would lead to the destruction of the Muslim population and therefore constituted genocide.

Prosecution for the Crimes Against Humanity

Article 5 of the ICTY Statute empowers the ICTY to prosecute the persons responsible for the crimes against humanity (e.g.murder, deportation, torture, rape and persecution on political, racial or religious grounds) committed as a part of the widespread or systematic attack directed against any civilian population when committed in armed conflict.

In establishing a violation under Article 5, the Appeals Chamber has observed in the *Tadic* case that an armed conflict must exit, but it makes no difference whether the armed conflict is international or non-international in character[20]. Futher, for sustaining any charge based on a crime against humanity, the Prosecutor must show discriminatory intent on the part of the

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19. http://www.un.org/icty/krstic/TrialC1/judgement/index.htm, visited on 1-10-2001

20. *Prosecutor v. Tadic*,n.3,para.141,p.72

indictee, such as evidence that the attack on a civilian population was conducted against a certain political or racial group only because of its affiliation.

Furthermore, in the *Erdemovic* case[21], the Trial Chamber observed– "crimes against humanity are serious acts of violence which harm human being by striking what is most essential to them- their life, liberty, physical welfare, health and dignity. They are inhuman acts that by their extent and gravity go beyond the limits tolerable to international community, which must perforce demand their punishment .But crimes against humanity also transcend the individual because when the individual is assaulted humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity". Thus the Tribunal has made no distinction between war and peace, international or internal armed conflicts for the purposes of proving the existence of crimes against humanity. What is identified as the core principle is the concept of humanity itself. The individual, the victim, becomes part of a much broader concept of mankind. Hence, by adopting a humanist approach, the ICTY has added a new dimension to the crimes against humanity.

Prosecution for Gender-based Crimes

Since the establishment of the ICTY, at least half of the public indictments in the ICTY have brought charges, either separately or in

21. *Prosecutor v. Erdemovic*, Case No. IT-96-22-T http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsi 980305e.htm, visited on 10-6-2001.

connection with other charges, alleging some form of gender-based violence. Three of these indictments resulted in judgements (Tadic, Furundzija and Celebici) which directly involved many crimes that were committed exclusively against women and girls—

Prosecution of Tadic - In the amended indictment[22], it was alleged that Dusko Tadic, a Serb who participated in the killing and maltreatment of Bosnian Muslims and Croats within and outside Omarska Camp. Count 1 of the indictment charged Tadic with a crime against humanity (persecution on political, racial or religious grounds) for taking part in campaign of terror which included killings, torture, sexual assault and other physical and psychological abuses as well as for his participation in the torture of more than 12 female detainees, including several gang rapes. Counts 2-4 alleged that Tadic had subjected 'F' to forcible sexual intercourse. For these acts, Tadic was charged with a grave breach (inhuman treatment, Count 2), violation of the laws or customs of war (cruel treatment, Count 3) and a crime against humanity (rape, count 4) .In trial proceedings, the Prosecutor was compelled to withdraw the rape charges contained in Counts 2-4 (including crimes against humanity) of the indictment, because witness 'F' was probably too frightened to testify.

The trial of Tadic was the first trial held by a UN Tribunal, which resulted in many decisions that could have a significant bearing on the future of gender-based crimes under international law that are of particular importance to women. The Trial Chamber found Tadic guilty of violations

22. *Indictments against Tadic and others* in *International Legal Materials*, vol.34, NO.4(1995), pp.1028-1044.

of laws or customs of war .Even though it was not proven that Tadic himself had committed sexual violence , the Chamber held him responsible for his participation in a general campaign of terror, manifested by murder, rape, torture and other forms of violence. Tadic was also found guilty of persecution including rape and other forms of sexual violence.

Prosecution of Furundzija- In this case, the allegations were based on Funundzija's presence or authority when sexual violence was committed against witness A, charging that he did nothing to prevent or stop the rape and that his acts or omission implicitly encouraged or endorsed the sexual violence, which amounted to aiding and abetting . For these acts of omissions, Furundzija was charged in Counts 13 and 14 with a violation of the laws or customs of war (torture and outrages upon personal dignity including rape). On December 10, 1998, the Trial Chamber rendered its judgement, finding Furundzija guilty of both charges alleging violations of the laws or customs of war and sentencing him ten years' imprisonment for torture and eight years' imprisonment for outrages upon personal dignity including rape[23].

Celebici Camp Case - In this case Delalic, Mucic, Delic and Landzo were charged with gave breaches and violations of laws and customs of war. In Celebici camp, detainees were subjected to physical and sexual violence and other forms of maltreatment. According to the indictment, Delic and others subjected Cecez to repeated incidents of forcible sexual intercourse. The Trial Chamber in its judgement on November 16, 1998 found three of the

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23. *Prosecutor v. Furundzija*, n.5.

four accused guilty of several of the counts against them. In this decision, the Trial Chamber proceeded on the principle of command responsibility for ascertaining the responsibility for gender-based crimes and specifically recognized rape as torture[24].

Karadzic and Mladic Rule 61 decision - In this decision, the Trial Chamber addressed crimes of sexual violence and inferred that forced impregnation may constitute evidence of genocidal intent. The Trial Chamber found the evidence of widespread sexual violence credible and concluded that the evidence suggested that sexual violence was intimately linked to the practice of 'ethnic cleansing' in the Yugoslav conflict[25].

Nikolic Rule 61 decision - In this case, the Trial Chamber observed that it considers that rape and other forms of sexual assault inflicted on women in circumstances such as those described by the witness may fall within the definition of torture submitted by the prosecution[26].

Apart from above–mentioned decisions, there are various indictments e.g. Meakoc and others, Sikirica and others, Karadzic and Mladic, Miljkovic and others, Jelisik and Cesik etc. which include gender-based crimes which have yet to be decided by the Tribunal.

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24. *Prosecutor v. Delalic and others*, n.6.

25. Kelly D. Askin", Sexual Violence in Decisions and Indictments of The Yugoslav and Rwandan Tribunals", *American Journal of International Law*. vol.93(1999), pp97-123,at p.115.

26. Ibid.

Fair Trial Issues Addressed by the ICTY

So far, the ICTY has tried to strike a balance between the international fair trial rights of the accused and the general jurisdictional limits applicable to humanitarian law. For that end, during the various trials and proceedings before it, the ICTY has addressed a host of issues pertaining to fair trial and thereby has strengthened the international criminal justice system.

a.) *The Nullum Crimen Principle-* The principle of *nullum crimen sine lege* mandates that courts convict only for acts that were criminal when committed. Observance of the principles *nullum crimen sine lege* (no crime without law) and *nulla ponea sine lege* (no penalty without law) requires that the Tribunal convict individuals only for violations of the international humanitarian law that entail individual criminal responsibly under customary or conventional law applicable to the parties at the time when the impugned acts were committed.

Individual criminal responsibility for grave breaches of the Geneva Conventions (Article 2 of the ICTY Statute) and for genocide (Article 4 of the Statute) are clearly and directly established by the terms of the Geneva Conventions of 1949 and the Genocide Convention respectively .Similarly the rule of customary international law establishing individual criminal responsibility for crimes against humanity (Article 5 of the ICTY Statute) is evidenced by the Nuremberg Charter[27] and by the 1946 resolution of the UN General assembly affirming the principles of the Nuremberg[28]. The issue of *nullum crimen sine lege* has been raised by the application of penal sanction

27. Article 6 of the Charter of the IMT, August 8, 1945, 82 UNTS 279.

28.G.A.Res.95, UN GAOR, UN Doc. A/64/Add. 1 (1946).

to the breach of common Article 3 of the Geneva Conventions that can qualify as violations of the laws and customs of war under Article 3 of the ICTY Statute.

In his report on the establishment of the Tribunal , the UN Secretary-General acknowledged that the issue of international criminal liability for the violations of the common Article 3 was a controversial one. The Tadic defence team argued that the unsettled status of Common Article 3 as a basis of criminal responsibility raised questions of fundamental fairness and compromised the *nullem crimen* principle . But, the Trial Chamber rejected this argument and held that violations of Common Article 3 could legitimately be prosecuted.[29]

b.) Overlapping Crimes - Another fair trial issue raised before the ICTY is the overlapping scope and application of the different categories of crimes under the international humanitarian law. At present the same criminal acts may be subject to prosecution as grave breaches of the Geneva Conventions of 1949 , as violations of the laws and customs of war and as crimes against humanity.

But, the Tribunal, in majority of cases has adhered to the Secretary-General's report, which assigned it the task of applying existing international law. It is the state of existing international law that creates overlapping international crimes and causes the overlapping blocks of charges found in the International Tribunal's indictments.

The Tadic's indictment is a suitable example of multiple charges. As per the indictment, Tadic beat prisoners and forced two of them to commit

29. Prosecutor V Tadic, n.7, paras.614-617, pp.934-935.

degrading sexual acts and mutilation. It charges him with two separate offences within the category of grave breaches, one for violations of the laws and customs of war and second for crimes against humanity. Similarly a host of ICTY's indictments contain multiple charges. However, in its ruling on a challenge to the form of the indictment in the *Tadic* case, the Trial Chamber agreed with the prosecution's submission that multiple convictions for the same acts would not be prejudicial, by ruling that any potential problem arising from multiple convictions can properly be dealt with during the sentencing phase. Consequently, after Tadic's conviction, his various sentences were set to run concurrently, thereby avoiding the possibility of his serving multiple sentences for the same illegal acts.

c.) Evidentiary Issue - In so far as the issue of admissibility of evidence is concerned, the ICTY is embarking on a middle path which is a blend of common law system and civil law system. The ICTY is increasingly allowing the admission of hearsay evidence as well as of expert evidence by expedited means during the trial proceedings.

The trial of Dusko Tadic before the ICTY provides a unique insight into the procedural integration of trial practice at an international level[30]. In the Tadic trial, the Prosecutor called seventy-six witnesses, of whom five were assigned pseudonyms. On the other hand, the defence was allowed to present eleven witnesses during October 1996 via satellite video-link from Bunja Luka in Bosnia pursuant to guidelines set be the Trial Chamber.

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30. Mark Findlay, "Synthesis in Trial Procedures" *International and Comparative Law Quarterly,* vol. 50 (January 2001),pp.27-50,at p.43.

During the proceedings, the defence contended that in civil law, as distinct from common law, some degree of independent causal corroboration of evidence is required. Further, it was argued that this approach should be applied in cases before the tribunal in order to meet what the defence asserted were fair and settled standards of proof, rather than developing what they described as "*ad hoc* standards to enable the tribunal to convict". In answering this submission, the Chamber reverted to the Rules enabling the application of any relevant evidence having probative value, unless this value is substantially outweighed by the need to ensure fair trial. Furthermore, the Tribunal identified several problematic evidentiary issues, e.g. access to evidence, lack of specificity in charge, corroboration, victims of the conflict as witnesses, testimony of hostile witnesses and hearsay evidence.

Regarding the admissibility of hearsay evidence, the Trial Chamber observed in the *Blaskic*[31] case – "Neither the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the general principle prevailing in the civil law systems, according to which, barring exception, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe it, are directly applicable before this tribunal. The ICTY is in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems".

Furthermore, the issue of disclosure of information including exculpatory information has been raised before the ICTY with respect to

31. http://www.un.org/icty/judgement.htm, visited on 10-7-2001.

both disclosing information about witnesses and disclosing exculpatory information to the defence. As far as disclosure of exculpatory information is concerned, the Trial Chamber in *Celebici Camp*[32] case rejected Delic's motion, saying that such requests must be specific and can not take the form of a blanket request for any evidence that would negate the accused's guilt.

Reprisal as a Defence

The ICTY has clarified the scope of admissibility of reprisal as a defence. In the Martic Rule 61 decision, the trial chamber held that reprisals against civilians are prohibited in all conflicts, international or internal.

Elements of Crimes

During the proceedings, before it, and when convicting or acquitting indictees, the ICTY has elaborated the elements of war crimes like willful killing or murder, cruel or inhuman treatment, unlawful confinement, persecution, torture and willfully causing great suffering or serious injury to body or health. As for example, in the *Furundzija* case, the Trial Chamber defined the war crime of torture and held that prohibition of torture imposes obligations *erga omnes* upon states and has acquired the status of *jus cogens*.

The Milosevic Trial

The trial of former Yugoslav President Mr. Slobodan Milosevic by the ICTY has triggered a debate on the selective approach of international criminal justice system. The initial indictment against Milosevic was

32. *Prosecutor v. Delalic and others*, n.6

confirmed on 29 June 1999, which was subsequently amended on 29 June 2001. It alleges that between 1 January 1999 and 20 June 1999, the 52nd corps of the Armed Forces of the FRY, the police forces of FRY, police forces of Serbia and paramilitary units acting at the directions, with the encouragement, or with the support of the accused, executed a campaign of terror and violence directed at the Kosovar Albanian civilians. It further alleges that the operations targeting the Kosovar Albanians were undertaken with the objective of removing a substantial portion of the Kosovar Albanian population from Kosovo in an effort to ensure continued Serbian control over the province. The indictment charges Milosevic on the basis of individual criminal responsibility (Article 7(1) of the statute) and superior criminal responsibility (Article 7(3) of the Statute) with–violations of laws and customs of war (Article 3) and crimes against humanity (Article 5 deportation, murder, persecutions on political, racial or religious grounds). The page indictment consists of four counts of murder, deportation and persecution on racial, political and religious grounds of Kosovar Albanians–mainly Muslims. Furthermore, in November 2001, the Tribunal has indicted him for offences in Croatia and Bosnia-Herzegovina[33]. On December 11, 2001, Mr. Milosevic has been indicted for genocide of Muslims and Croat people in the 1992-95 Bosnian war.

In October 2000, Milosevic lost elections and was subsequently forced to abdicate the Presidentship of the Republic of Yugoslavia. Thereafter, he was arrested in Yugoslavia on April 1, 2001 and was subsequently transferred to the UN custody by the democratic government of

33. http://www.un.org/icty/indictment/english/mil-ii011122e.htm,visited on 1-12-2001.

Yugoslavia's Republic of Serbia. Right now he is being held in a Dutch prison. When he was produced before the ICTY on July 3, 2001, he refused to enter any plea to war cries charges. Ultimately, the Chief Judge Mr. Richard May entered a plea of innocent to the four charges against Milosevic. Milosevic claimed that since the ICTY is not established by the UN General Assembly, it did not have mandate to try him. He claimed that this Tribunal was illegal under international law and thereby the indictments and other proceedings before it were illegal. He even refused to engage a counsel to defend him on the ground that there was no need to appoint a counsel to an illegal organ. According to him, this trial's aim was to produce false justification for the NATO's aggression against Yugoslavia as well as for the war crimes committed in Yugoslavia.

It is evident that ongoing trial of Milosevic will be a cumbersome and full of legal landmines. The Chief Prosecutor of the ICTY Carla del Ponte has said that apart from witness protection, the Tribunal is ensuring a fair trial for Mr. Milosevic. Furthermore, the prosecution has said that it does not have "firm and direct evidence" to link Mr. Milosevic with alleged war crimes and killing of ethnic minorities in Kosovo. But it claims that it has enough circumstantial evidence to ensure a life sentence for Milosevic. Hence, it is a challenging task for prosecution to prove a case against him on account of lack of direct evidence.

Jurisprudence of the International Criminal Tribunal for Rwanda

The establishment of the International Criminal Tribunal for Rwanda (ICTR) and the decisions delivered by it have substantially ensured the observance of rule of law on the international plane by giving impetus to international criminalisation of internal atrocities. The Statute of the ICTR, its Rules of Procedure and Evidence and practice have stimulated the application of the international humanitarian law into non-international armed conflicts. The practice and jurisprudence of the ICTR have established a credible and precedent making institution of the international criminal justice system.

Since its establishment, it has secured the arrest of over forty individuals accused of involvement in the 1994 genocide in Rwanda. It has convicted Jean-Pal Akayesu of genocide, which is first-ever judgement on genocide by an international tribunal. Similarly, it has convicted Jean Kambanda of genocide and crimes against humanity, which is first-ever conviction of a former interim prime minister for such crimes. Omar Serushago, another accused was sentenced to 15 years in prison on 5 February 1999 for genocide and crimes against humanity. In various indictments and trial proceedings, the ICTR has interpreted the international law concerning the individual criminal liability which will serve as precedent for other international criminal tribunals and for courts all over the world.

Thus the ICTR's jurisprudence has strengthened the individual criminal liability at the international level. Simultaneously, it has contributed

substantially in the process of national reconciliation in Rwanda. The corpus of ICTR's jurisprudence provides precedent and impetus for the International Criminal Court and other judicial tribunals. It would thereby be expedient to analyze the rulings and observations of the ICTR on various procedural and substantive issues.

ICTR'S Decision on the Legality of Its Establishment

In *Prosecutor v. Kanyabashi*[34], the Trial Chamber of the ICTR has ruled that under Chapter VII of the UN Charter, the Security Council is empowered to establish an *ad hoc* international criminal tribunal and thereby the ICTR has been established in accordance with law. Again on April 2, 2001, the accused Ntakirutimana challenged the legality of the ICTR's creation on the ground that the UN Charter does not empower the Security Council to establish any criminal court. Following the precedents of *Kanyabashi* case and *Tadic* (ICTY), the Trial Chamber held that the ICTR has been legally created by the Security Council and endorsed by the UN General Assembly[35]. Thus like the ICTY, the ICTR upheld the legality of its establishment by the UN Security Council.

Individual Criminal Responsibility

Article 6 (1) of the ICTR Statute attributes individual criminal responsibility for a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of

34.http://www.ictr.org, visited on 1-6-2001

35. Ibid., visited on 5-7-2001

genocide (Article 2), crimes against humanity (Article 3) and violations of common Article 3 of the Geneva Conventions (Article 4).

Thus in addition to responsibility as principal perpetrator, the accused can be held responsible for the criminal acts of others whether he plans with them, instigates them, orders them or aids and abets them to commit those acts. Article 6(1) covers various stages of the commission of a crime, ranging from its initial planning to its execution, through its organization, However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission. Indeed, the principle of individual criminal responsibility for an attempt to commit a crime obtained only in a case of genocide. Conversely, this would mean that with respect to any other form of criminal participation and in particular those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed[36].

As far as Article 6(3) of the Statute which deals with superior or command responsibility is concerned, the Trial Chamber observed that in the case of civilians, the application of the principle of individual criminal responsibility. It held that it is appropriate to assess on a case by case basis the power of authority actually devolved when the accused in order to determine whether or not he had power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the

36. *Prosecutor v. Akayesu*, Case No. ICTR- 96-4, http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm....visited on 6-6-2001

perpetrators thereof[37].

Furthermore, the Trial Chamber in the *Prosecutor v. Akayesu* said – "Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to states and parties to a conflict and they do not create crimes for which individuals may be tried''[38]. Thus ICTR's jurisprudence has further clarified the concept of individual criminal responsibility under international law as well as extended this concept to non-international armed conflicts. Its stand regarding the defence of superior orders for escaping the individual criminal responsibility is in accordance with the Nuremberg Charter.

Prosecution for the Crime of Genocide

Since the establishment of the ICTR many prominent suspects of the genocide have been apprehended in various parts of Africa and transferred to the seat of the Tribunal in Arusha. In contrast with the prosecutorial policy before the Yugoslav Tribunal, genocide was charged systematically in the Rwandan indictments. To date, the ICTR has convicted nine persons of genocide.

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37. Ibid.

38. Ibid.

The judgement in the trial of Jean-Paul Akayesu, former bourgmestre (Mayor) of Taba commune has practically enforced the Genocide Convection, 1948 by holding someone responsible for the crime of genocide for the first time ever. Furthermore, it defined rape in international law and held that rape is genocide to the extent that it is committed with intent to destroy a national, ethnic, racial or religious group. The trial of Akayesu began in early January 1997, and the judgement was delivered on September 2, 1998. He was found guilty of nine counts of genocide and crimes against humanity but not guilty of six counts of violations of the Geneva Conventions on the Treatment of War Victims. A school teacher by profession, Akayesu was appointed bourgmestre by President Habyarimana in April 1993, serving until June 1994. Akayesu attended a meeting on 18 April 1994 where Prime Minister Kambanda enlisted the participation of Rwanda's bourgmestres in genocide of Tutsis. Akayesu argued that henceforth, challenging genocide openly was impossible, although he pursued clandestine efforts to resist violence. The Tribunal, rejected Akayesu's defence, concluding that from 18 April, 1994 he engaged actively and enthusiastically in the massacres, ordering and in some cases directly perpetrating, killings, beatings and rapes. The Trial Chamber concluded that Akayesu participated in a public meeting on 19 April 1994 and urged the gathering to eliminate the accomplices of Rwandan Patriotic Front (RPF), associated with the Tutsi minority[39].

Two days after the Akayesu verdict, the same Trial Chamber sentenced Kambanda to life imprisonment for genocide, conspiracy to

39. Ibid.

commit genocide, direct and public incitement to commit genocide, complicity in genocide as well as crimes against humanity. Kambanda was acting Prime Minister of Rwanda between 8 April 1994 and 18 July 1994, the period when atrocities were taking place. Pleading guilty to genocide, Kambanda admitted causing a widespread and systematic attack against the civilian population of Tutsis, the purpose of which was to exterminate them, Kambanda pleaded guilty to six counts of genocide and crimes against humanity at his initial appearance before the Tribunal on May1, 1998.

Condemning Kambanda to life imprisonment, the Tribunal described genocide as the 'crime of crimes'. The defence urged the Tribunal to interpret the guilty plea of Kambanda as a sign of his remorse, repentance and acceptance of responsibility for his actions. But the Tribunal held the aggravating circumstances surrounding the crimes committed especially since Kambanda occupied a high ministerial post at the time he committed the said crimes[40].

Another accused, Omar Serushago, pleaded guilty on 14 December 1998 to genocide and three counts of crimes against humanity. The prosecution was authorized to withdraw a fifth count *interahamwe* of crimes against humanity (rape). Serushago was a local leader of the i racist militia affiliated with the ruling party. Serushago admitted personally killing four individuals and the responsibility for another thirty nine murders committed by militiamen under his authority. Serushago was sentenced to a term of

40. *Prosecutor v. Kambanda*, Case No.ICTR-97-23-S, http://www.ictr.org/ENGLISH/cases/Kambanda/judgement/kambanda.htm..., visited on 15-6-2001.

fifteen years. The Tribunal observed that 'exceptional circumstances of mitigation entitled him some clemency'[41].

Two more accused, Kayishema and Ruzindana were convicted on 21 may 1999. Both were tried together for charges relating to genocide in Kibuye prefecture, of which Kayishema was prefect until July 1994[42]. Another accused, Rutangada was one of the leaders of the racist militia *interahamwe*. Among the specific crimes for which he was found guilty was directing and participating in an attack on thousands of unarmed Tutsi men[43]. Akayesu, Kayishema, Ruzindana and Rutangada have appealed their convictions and all five have also appealed their sentences. Furthermore, in the *Prosecutor v. Ruggiu*, the Trial Chamber held that the accused Ruggiu was guilty of direct and public incitement to commit genocide and crimes against humanity [44].

The ICTR has also interpreted the concept of groups protected under the Genocide Convention. It is of the opinion that if the offender views the

41. *Prosecutor v. Serusago*, Case No.ICTR-98-39-S, http://www.ictr.org/ENGLISH/cases/Serushago/judgement/0s1.htm,visited on 25-6-2001 .

42. *Prosecutor v. Kayishema and Ruzindana,* Case No.ICTR-95-I-T, http://www.ictr.org/ENGLISH/cases/KayishemaRuzindana/judgement/1.htm..., visited on 25-10-2001.

43. *Prosecutor v. Rutangada*, Case No.ICTR-96-3-T, http://www.ictr.org/ENGLISH/cases/Rutangada/judgement/1.htm..., visited on 1-9-2001.

44.Prosecutor v. Ruggiu, Case No. ICTR-97-32-T, in *International Legal Materials*, vol.39, No.6(2000),pp.1338-1352.

group as being national, racial, ethnic or religious, then the offence comes under the purview of the Genocide Convention. The Trial Chamber has held that an ethnic group could be a group identified as such by others, including perpetrators of the crime. It concluded that the Tutsis were an ethnic group based on the existence of government-issued official identity cards describing them as such[45].

Prosecution for the Crimes Against Humanity

Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or national in character. Article 3 of the ICTR Statute confers on the Tribunal the jurisdiction to prosecute persons for various inhuman acts which constitute crimes against humanity, e.g. murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds and other inhuman acts. The category of acts which constitute crimes against humanity enumerated in Article 3 is not exhaustive. Any act which is inhuman in nature and character may constitute a crime against humanity ,if other ingredients are present. The other ingredients are following-

i) the act must be inhuman in nature and character, causing great suffering or serious injury to body or to mental element or physical health,

ii) the act must be committed as part of a widespread or systematic attack,

45. *Prosecutor v. Kayishema and Ruzindana*, n.42.

iii) the act must be committed against members of the civilian population,

iv) The act must be committed on one or more discriminatory grounds, e.g. national, political, ethnic, racial or religious grounds.

Through interpreting the various essential elements of crimes against humanity, the ICTR has given a new dimension to the developing jurisprudence of individual criminal responsibility for crimes against humanity on the international plane. The Trial Chamber has observed that it is a prerequisite that the act must be committed as part of widespread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be a part of both. The Chamber defined the concept of widespread as massive, frequent, large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims. It further defined the concept of systematic as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must, however, be some kind of preconceived plan or policy[46].

Moreover, the Chamber interpreted the civilian population as people who are not taking active part in hostilities including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. The Chamber is of the opinion that where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character. As far as discriminatory act

46. Prosecutor v. Akayesu,n.36.

on the racial, religious, national or ethnic grounds is concerned, the Chamber held that discrimination on the basis of a person's political ideology satisfies the requirement of political grounds as envisaged in Article 3 of the Statute[47].

Considering the extents to which rape constitutes crimes against humanity under Article 3(g) of the Statute, the Chamber has defined rape because there is no commonly accepted definition of this term under international law. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape can not be captured in a mechanical description of objects and body parts. The chamber defined rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive [48].

After interpreting the crimes against humanity under international law, the Trial Chamber of the ICTR has found beyond reasonable doubt that accused Akayesu, Kambanda[49], Serushago[50] and Ruggiu[51] were guilty of crimes against humanity and thereby convicted them.

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47. Ibid.

48. Ibid.

49. *Prosecutor v. Kambanda*, n.40.

50. *Prosecutor v. Serushago*, n.41.

51. *Prosecutor v. Ruggiu*, n.44.

Prosecution for the Violation of Common Article 3 of Geneva Conventions and Additional Protocol II

Common Article 3 of the Geneva Conventions and Additional Protocol II ensure the observance of minimum yardstick of the international humanitarian law as well as the non-derogable human rights law in the internal armed conflicts. Article 4 of the ICTR Statute has given a new amplitude to the international humanitarian law by empowering the ICTR to prosecute persons committing or ordering to commit serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II . Thus Article 4 of the ICTR Statute has brought internal conflict under the purview of international humanitarian law. In the context of the ICTR, the Security Council has taken a more expansive approach to the choice of applicable law than the one underlying the Statute of the Yugoslav Tribunal and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they are considered part of customary international law or whether they have customarily entailed individual criminal responsibility of the perpetrator of the crime. This was because the internal character of the Rwandan conflict. Article 4 of the ICTR Statute accordingly, includes violations of Additional Protocol II, which as a whole, has not yet been universally recognized as part of customary international law, for the first time criminalizes Common Article 3 of the Geneva Conventions. In this regard, the jurisprudence of the ICTR has tremendously influenced the Statute of International Criminal Court, which under Article 8 of the Statute criminalizes the violations of common

Article 3.

In the *Akayesu* case, the Trial Chamber ruled that the norms of common Article 3 have acquired the status of customary law in that most states, by their domestic penal codes, have criminalised acts which if committed during internal armed conflict, would constitute violations of Common Article 3 . It further relied on the ICTY's Appeals Chamber ruling in the *Tadic* case stipulating that common Article 3 beyond doubt formed part of customary international law and further that there exists a corpus of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope[52].

Common Article 3 to the Geneva Conventions extends a minimum threshold of humanitarian protection to all persons affected by a non-international armed conflict. Common Article 3 applies to armed conflict not of an international character, whereas for a conflict to fall within the ambit of Additional Protocol II, it must take place in the territory of High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations .

After having determined the non-international character of the Rwandan conflict, the Chamber ruled that material conditions required for the applicability of Additional Protocol II to the Rwandan conflict have also been fulfilled. It held that it has been shown that there was a conflict between, on the one hand, the RPF, under the command of General Kagame

52. *Prosecutor v. Akayesu*, n.36.

and on the other, the governmental forces. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid-May 1994 and possessed a disciplined troop and a structured leadership which was answerable to authority. RPF had also stated that it was bound by the rules of international humanitarian law. Hence, the Chamber concluded that the Rwandan conflict was an internal armed conflict within the meaning of Additional Protocol II[53].

After making the above interpretations regarding the application of the Common Article 3 and Additional Protocol II, the Trial Chamber acquitted Akayesu for Counts 6,8,10 and 12 of the indictment charge (violations of Common Article 3 of the Geneva Conventions) and Count 15 (charges of violations of Common Article 3 and the Additional Protocol II thereto). The Chamber ruled that it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu in the commune of Taba at the time of events alleged in the indictment were committed in conjunction with the armed conflict. The Chamber further held that it has not been proved beyond reasonable doubt that Akayesu was a member of the armed forces or that he was legitimately mandated and expected as a public official or agent or persons otherwise holding public authority or *defacto* representing the government, to support or fulfil the war efforts[54].

Matters of Evidence

In relation to the evidence produced by the parties during various trial

53. Ibid.

54. Ibid.

proceedings, the ICTR has addressed various evidentiary matters, e.g. the assessment of the evidence, the impact of trauma on witnesses, questions of interpretation from Kinyarwanda into French and English and cultural factors which might affect understanding of the evidence presented. As far as assessment of evidence is concerned, it is evident from the practice of the ICTR that it has attached probative value to each testimony and each exhibit individually according to its credibility and relevance to the allegations at issue. In accordance with Rule 89 of its Rules of Procedure and Evidence, the ICTR has applied the rules of evidence which in its best view favour a fair determination of the matter before it and are consonant with the spirit and general principles of law.

Regarding the applicability of principle of civil law systems *Unus Testis, Nullum Testis* (one witness is no witness), the Trial Chamber has held that it can rule on the basis of single testimony, provided such testimony is relevant and credible. Where evidentiary matters are concerned, the Chamber is bound only by the application of the provisions of its Statute and Rules, in particular Rule 89 of the Rules which sets out the general principle of the admissibility of any relevant evidence which has probative value, provided that it is in accordance with the requisites of a fair trial[55].

The ICTR has taken note of the painful experience and the impact of trauma on the testimony of witnesses, who have seen the atrocities committed against their family members or close friends or have themselves been the victims of such atrocities. Similarly, having regard to cultural factors, the Tribunal has not drawn any adverse conclusions regarding the

55.Ibid.

credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions.

Cumulative Charges

Regarding the tenability of cumulative charges, the Trial Chamber concluded in the *Akayesu* Case after analyzing the national and international law and jurisprudence that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances—i) where the offences have different elements, or ii) where the provisions creating the offences protect different interests or iii)where it is necessary to record a conviction for both offences in order to fully describe what the accused did.

Having regard to the ICTR Statute, the Trial Chamber observed that the offences under the Statute–genocide, crimes against humanity and violations of common Article 3 to the Geneva Conventions have different elements and moreover are intended to protect different interests. These crimes have different purposes and are not co-extensive. Thus it is legitimate to charge these crimes in relation to same set of acts[56].

Gender-based Crimes

The various indictments and judgements of the ICTR have provided significant precedents in this recent area of international criminal law that are likely to have enduring and widespread implications. The jurisprudence of the ICTR has substantially contributed to international law on

56. Ibid.

gender-based international crimes. In this context, the *Akayesu* decision is of great significance, which authoritatively affirms the intricate linkage of sexual violence to the genocide committed during the Rwandan conflict. The Trial Chamber found the accused Akayesa guilty of crimes that included sexual violence. In the *Akayesu* case, the Trial Chamber went to the extent of holding that rape could be subsumed within paragraph (d) of the difinition of genocide– "For puposes of interpreting Article 2 (2) (d) of the Statute (and Article II (d) of the Genocide Convention), the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. Furthermore the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led through threats or trauma, not to procreate''. The Chamber further recognized rape and other forms of sexual violence as independent crimes constituting crimes against humanity.

The Trial Chamber emphasized the linkage between Akayesu's crimes and the pattern throughout the conflict in regard to rape and other forms of sexual violence– "Rape crimes constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such"[57]. In its decision, the Trial Chamber, for the first time in international law defined

57. Ibid.

rape and other forms of sexual violence. The *Akayesu* judgement is regarded most progressive case-law on gender ever pronounced by an international judicial body. Hence it is evident that ICTR'S Jurisprudence has given a new dimension to the individual criminal responsibility for gender-based crimes under the international humanitarian law.

Elements of Crimes

One of the significant contributions of the ICTR's jurisprudence to the international humanitarian law is its interpretation of elements of war crimes e.g. physical element of the offence and the mental element of the offence. The ICTR is in agreement with the view that physical element or *actus reus* of an offence maybe either an act of commission or an act of omission. The ICTR noted the act of omission in the *Kambanda* judgement in this way- "Jean Kambanda acknowledges that on 3 May 1994, he was personally asked to take steps to protect children who had survived the massacre at a hospital and he did not respond. On the same day, after the meeting, the children were killed .He acknowledges that he failed in his duty to ensure the safety of the children and the population of Rwanda"[58].

As regards the mental element or *mens rea,* the Trial Chamber observed in the *Akayesu* case– "special intent of a crime is the specific intention, required as a constitutive element to the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in the intent to destroy, in whole

58. *Prosecutor v. Kambanda*, n.40.

or in part, a national, ethnical, racial or religious group, as such"[59]. The Trial Chamber further observed "special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result, and the mental state of the perpetrator"[60].

Furthermore, the Trial Chamber in the *Kayishema* and *Ruzindana* case ruled that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organization. The existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide[61].

In the *Kambanda* case, the Trial Chamber held that the crime of genocide is unique because of its element of *dolus specials* (special intent) which requires that the crime be committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group[62]".

In order to prove the existence of *mens rea* on the part of the accused, the Prosecutor must prove that the plans or circumstances of crime was known to the offender. However, in order to meet the standard of knowledge required for *mens rea*, it may also be sufficient for the prosecution to demonstrate that the accused was reckless as to the consequences.

59. *Prosecutor v. Akayesu*, n.36.

60. Ibid.

61. *Prosecutor v. Kayishema and Ruzindana*, n.42.

62. *Prosecutor v. Kambanda*, n.40.

CHAPTER IV

Conclusions

The world today is confronted by a disturbing proliferation of international as well as internal armed conflicts. In order to mitigate the hardships of armed conflicts, the international legal provisions on war crimes, crimes against humanity and genocide have been developed and codified within the framework of international humanitarian law. The process of criminalization of violations of international humanitarian law began with the codification of the first Geneva Convention of 1864 for Amelioration of the Condition of the Wounded Armies in the Field and continued with the Hague Conventions of 1899 and 1907as well as Geneva Conventions of 1929. Subsequently, the Genocide Convention of 1948 and four Geneva Conventions of 1949 along with their Protocols strengthened individual criminal responsibility under international humanitarian law. Common Article 3 of the Geneva Conventions and Additional Protocol II has brought the non-international armed conflict under the purview of international humanitarian law.

There has been a marked reluctance on the part of the states to bring to justice the violators of international humanitarian law. One of the earliest war crimes trials is trial of *Peter von Hagenbach* in Europe in 1474. Since the end of World War II, the Nuremberg and Tokyo Tribunals and national

prosecution of the World War II cases have been major instances of prosecution of offenders accused of committing crimes against the fundamental norms of international humanitarian law. An international consensus on the principles propounded in the Nuremberg Trial have greatly influenced the development and the codification of international law pertaining to armed conflict. But since the Nuremberg and Tokyo trials, no international criminal tribunal for the prosecution of persons violating the international humanitarian law was established for more than forty years. Despite a growing body of international humanitarian law as well as international human rights law, the world community has witnessed gross violations of international humanitarian law in Vietnam, Cambodia, Arab-Israel conflict, Iraq, Yugoslavia, Rwanda, Sierra Leone and Afghanistan. But the United Nations did not establish another international criminal tribunal until atrocities in the Balkans continued unabated for several years.

Atrocities and gross violations of international humanitarian law in the former Yugoslavia and Rwanda shocked, the conscience of world community, which triggered major legal developments in the post-cold war era. With the disintegration of Socialist Federal Republic of Yugoslavia in 1991,the whole Balkan region and particularly the Republic of Bosnia-Herzegovina witnessed gross violations of international humanitarian law on account of armed conflict between Federal Republic of Yugoslavia (Serbia and Montenegro) and Bosnia-Herzegovina. Acting under Chapter VII of the UN charter, the UN Security Council in May, 1993 decided to establish the International Criminal Tribunal for former Yugoslavia (ICTY) for the purposes of prosecuting the persons responsible

for serious violations of the international humanitarian law committed in the territory of the former Yugoslavia since 1991.Similarly in 1994, the Hutu tribe of central African country unleashed a region of terror against Tutsi tribe. During April to July 1994, over 800,000 Tutsis were murdered by Hutus in Rwandan civil war. The Security Council in November 1994 acting under Chapter VII decided to establish International Criminal Tribunal for Rwanda (ICTR). These tribunals were established in response to a widespread international conviction that war crimes, genocide, crimes against humanity and other serious violations of international humanitarian law should not go unpunished. By determining that violations of humanitarian law in the former Yugoslavia and Rwanda constitute a threat to international peace and security, the Security Council has assumed the role of the custodian of international humanitarian law. Establishment of the ICTY and ICTR as enforcement measures under Chapter VII of the UN Charter is an effective international response to violations of humanitarian law and serves as and deterrent for the future violations of humanitarian law. The establishment of *ad hoc* tribunal by the Security Council have the advantages of being expeditious and more effective as compared to establishing such a tribunal after conclusion of a treaty. The UN Secretary-General's report states that the treaty approach incurs the disadvantage of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force.

Both the ICTY and the ICTR, like the Nuremberg and Tokyo Tribunals, are *ad hoc* international criminal tribunals with limited jurisdiction. The crimes under the jurisdiction of the ICTY includes grave

breaches of Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity whereas crimes under the jurisdiction of the ICTR is genocide, crimes against humanity and violations of Common Article 3 of the Geneva Conventions and Additional Protocol II. The ICTY and ICTR represents, a major step forward from the Nuremberg and Tokyo precedents in a number of ways. These *ad hoc* tribunals apply a broader corpus of substantive international humanitarian law e.g. Genocide Convention, 1948, Geneva Conventions of 1949 and Additional Protocol II of 1977 much of which has been codified and expanded since Nuremberg. Creation of the ICTY and ICTR by the UN Security Council confers on them status of international tribunal in the fullest sense, unlike the Nuremberg and Tokyo tribunals, which were international military tribunals created by the victorious powers of World War II. Similarly, the Security Council is now negotiating for the creation of mixed national-international tribunals for Cambodia and Sierra Leone.

The UN Security Council has mandated the ICTY and ICTR to investigate serious violations of international humanitarian law and prosecute those believed to be committing them. The ICTY has more than seventy public indictments as well as an undisclosed number of sealed indictments. Its decisions in *Prosecutor v. Tadic*, *Prosecutor v. Delalic and others* and *Prosecutor v. Furundzija* as well as in Rule 61 proceedings have been watershed in the development of international criminal justice system. The trial of Tadic is the first trial held by a UN Tribunal. In the *Celebici Camp* case, the Trial Chamber held that there was an international armed conflict in Bosnia throughout in 1992 and thereby the persons detained at the

camp where protected by the fourth Geneva Convention. The ICTY has convicted Bosnian Serb General Radislav Krstic of genocide. The Jorda Report (May 11, 2000) which is first internal review of the state of the ICTY states that current average arrest rate of one indictee per month will continue until they have all been arrested and predicted the trials of thirty indictees currently at large could be completed at the earliest in 2007. However, the ICTY has been criticized on account of the fact that the two most wanted Bosnian Serbs Radovan Karadzic the war time political leader and his senior military official Ratko Mladic , who have been indicted of charges of genocide and other serious violations of international humanitarian law remain unpunished . In so far as its main function of deterring war crimes is concerned, it could not prevent the commission of atrocities in the former Yugoslavia ,such as were seen after the fall of Srebrenica in the summer of 1995, or seen in Kosovo in 1998. Its critics allege that the establishment of the ICTY was simply a cost-free effort by some governments to assuage their guilt about not intervening meaningfully in the former Yugoslavia at the appropriate time. Furthermore, the ongoing trial of Milosevic by ICTY has triggered a controversy regarding the merits and credibility of international criminal justice system.

As far as ICTR is concerned, it has issued more than twenty-six indictments against forty-three individuals. A total of thirty indicted individuals and two suspects are in its custody. It has convicted nine persons for the crime of genocide. Its judgement and sentence in the Akayesu case, is first ever conviction by an international tribunal for the crime of genocide. Similarly, it has convicted former interim Prime Minister Jean Kambanda of

genocide and other crimes, which is first ever conviction of a former Prime Minister by an international tribunal for such crimes. In this way, the stakes are high for the success of the Rwanda Tribunal both for Rwanda and neighbouring countries of central Africa. Unlike the situation in the former Yugoslavia, the leading Rwandan perpetrators of genocide were defeated militarily, removed from position of leadership and forced to flee to refugee camps in neighboring African countries or take refuge in Europe. Consequently, the prospect of apprehending and trying the major perpetrators is arguably more feasible.Since 1994, more than half of Rwanda's population has been displaced by massacres or exile. There are 400,000 orphaned Rwandan children and 500,000 widowed women many of whom were the victims of rape and sexual abuse during the genocide. Bringing the perpetrators of above mentioned heinous crimes before justice is a challenging task for the ICTR. In this way, the Rwanda tribunal serves as the conscience of the international community. It is the manifestation of the moral outrage of humanity. However, the Rwandan Tribunal's march towards success has not been without drawbacks. It has been criticized on the basis that not a single administrative area of its Registry (Finance, Procurement, Personnel, General Services) are functioning properly. United Nations rules and regulations are widely disregarded by it and its lines of authority are not clearly defined. It has also been subjected to criticism on account of bureaucratic infighting and prosecutorial policy.

The biggest achievement of the ICTY and the ICTR is that when the world community failed to prevent the genocide and other violations of international humanitarian law in the territory of former Yugoslavia and

Rwanda, the ICTY and the ICTR has prosecuted the alleged perpetrators in a fair, just and reasonable manner. Proceedings of both two tribunals would have a considerable impact on national reconciliation and social stabilization as well as on deterrence of such crimes in future. By prosecuting the highest leaders of former Yugoslavia and Rwanda, the ICTY and the ICTR is developing an unprecedented jurisprudence of international humanitarian law. However, the greatest failure of the both *ad hoc* international tribunals have been the amount of time they have taken to bring those responsible of serious violations of humanitarian law in the territory of former Yugoslavia and Rwanda to justice.

Moreover, the establishment of the two *ad hoc* international criminal tribunals-ICTY and the ICTR, the Statute of the ICTY and the ICTR and proceedings before the ICTY and the ICTR have triggered institutional and normative developments in the field of international humanitarian law. The establishment of the ICTY and the ICTR has accelerated the institutionalization process of international criminal justice system. The ICTY and ICTR provided the impetus for the creation of permanent International Criminal Court (ICC) and consequently the Rome Statute of International Criminal Court was adopted on 17 July 1998 at the UN Diplomatic Conference. The ICC will have jurisdiction over four crimes-genocide, crimes against humanity, war crimes and crimes of aggression. Similarly, the Security Council has started, the process of establishment of 'Special Court' for Sierra Leone, which will have jurisdiction over crimes against humanity, violations of Common Article 3 of the Geneva Conventions and Additional Protocol II and crimes under Sierra Leonean

law. In this way, the establishment of the ICTY and ICTR has evolved an international consensus on accountability for international crimes.

Similarly, the jurisprudence of the ICTY and ICTR has exerted considerable influence on the institutionalization of individual criminal responsibility under international law. The jurisdictional experience of Nuremberg and Tokyo marked the start of a gradual process of precise formulation and consolidation of principles concerning individual criminal responsibility. The statutes of the ICTY and ICTR declare individual criminal responsibility for the persons committing the crimes within the subject-matter jurisdiction of these *ad hoc* tribunals. The judgments of the ICTY in the *Tadic case*, *Furundzija* case and *Celibici camp* case as well as the judgements of the ICTR in the *Akayesu* case, *Kambanda* case and *Ruzindana* case demonstrate that these *ad hoc* tribunals can successfully try and convict individuals irrespective of their official position for violations of international humanitarian law. The legal heritage of the ICTY and ICTR and corpus of principles and rules concerning individual criminal responsibility have been further clarified by the Rome Statute of International Criminal Court.

In the same manner, the practice of the ICTY and ICTR has accelerated the pace of international criminalization of internal atrocities. Although, the ICTY Statute does not explicitly grant the ICTY jurisdiction to prosecute for violations of Common Article 3 to Geneva Conventions applicable to internal armed conflict, the ICTY has in the *Tadic case* held that violations of Common Article 3 can be prosecuted as violations of laws or customs of war under the ICTY Statute. In this context, the ICTR Statute

is a watershed of humanitarian law, which provides the ICTR the jurisdiction to prosecute persons responsible for the violation of common Article 3 of Geneva Conventions and Additional Protocol II. Thus the jurisprudence of the ICTY and ICTR has applied the minimum yardstick of international humanitarian law to the internal conflicts.

Similarly, the creation and practice of the ICTY and ICTR has given impetus to the disappearance of the distinction between the international and non-international armed conflicts. These tribunals have radically shifted both the concept and value of state sovereignty, especially in relation to the concerns of world order. In the *Prosecutor v. Tadic*, the Appeals Chamber of the ICTY opened the door to a broader application of the grave breaches regime in the future noting what it referred to as the recent trend to blur the distinction between the international and non-international armed conflicts. Although the sovereignty of state remains an important international value, but the prerogative it entails have been limited and redefined by the ICTY and ICTR to accommodate the newly recognized value of international human rights.

Moreover, the trial proceedings before the ICTY and the ICTR have been in accordance with internationally recognized fair trial standards. Their proceedings are conducted as per their respective statutes and Rules of Procedure and Evidence. The due process protections in the statutes of the ICTY and ICTR exceeded those in the Charters of the Nuremberg and Tokyo tribunals. The ICTY and ICTR have been successful both in developing a set of rules of evidence and procedure that incorporate international standards and in implementing them fairly in practice. Both the

tribunals have analyzed the specific elements of the crimes charged which is an integral part of international fair trial standard.

Similarly, the statutes of the ICTY and ICTR have taken a abolitionist position by excluding the possibility of capital punishment, which is in accordance with the Second Optional Protocol to the International Covenant on Civil and Political Rights. Both statutes limit the penalty that may be imposed by the tribunals to that of imprisonment.

Furthermore, the principle of universal jurisdiction under international criminal law which stipulates that if crimes against international law are committed in such a state where the judiciary has collapsed, prosecution and punishment may be effected by any third party state including international organization such as the UN has been significantly strengthened through the establishment of the ICTY and ICTR.

Another normative impact of the ICTY and ICTR on international law is that unlike the Nuremberg and Tokyo trials, the gender-based crimes are being charged in the Yugoslav and Rwanda Tribunal as violations of the laws or customs of war, genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions and violations of Common Article 3 the Geneva Conventions. The decisions of the ICTY in the *Tadic* case, *Celebici camp* case etc and of the ICTR in the *Akayesu* case have given gender-based crimes a prime place under the international humanitarian law.

The statutes of the ICTY and the ICTR have contributed significantly to affirming certain, major components of international humanitarian law e.g. genocide, crimes against humanity, grave breaches of Geneva Conventions as customary rule of international law. The universal

acceptance of the statute of the tribunals is itself an indication of opinio juris in this regard. The ICTY and ICTR have further clarified that Common Article 3 of the Geneva Conventions are part of the customary law and thereby entails individual criminal responsibility. The widespread acceptance of the jurisprudence of the tribunals represents evidence that the punishment of perpetrators of offences against international humanitarian law in international as well as internal conflicts is nowadays permitted by a general principle of law.

In this way, it is evident that the ICTY and the ICTR are properly discharging their duties of prosecution of perpetrators of international humanitarian law as well as further rationalization of humanitarian law. But ultimate success of these tribunals would depend on the cooperation of states on three levels-voluntary contribution of funds, cooperation in the collection of evidence and the arrest and detention of persons indicted and modification of national legislations to allow for this kind of cooperation.

SELECT BIBLIOGRAPHY

PRIMARY SOURCES:

Statute of the International Tribunal, 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,adopted by Security Council Resolution 827, 25 May 1993,UN Doc. S/RES/827Annex(1993).

Rules of Procedure and Evidence, 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, UN Doc. IT/32 (1993).

Statute of the International Tribunal for Rwanda, UN Doc. S/RES/955 Annex (1994) .

Rome Statute of the International Criminal Court, 17July, 1998, UN Doc A/Conf 183/9 (1998).

The Establishment of the Commission of Experts on War Crimes in the Territory of Former Yugoslavia, UN Doc S/RES/780(1992).

Interim Report of the Commission of Experts on War Crimes in the Territory of Former Yugoslavia, UN Doc S/35 374 (1993).

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc S/1994/674 (1994).

Preliminary Report of the Commission of Experts on Rwanda Established Pursuant to Security Council Resolutions 935 (1994), UN Doc S/1994/1125.

Final Report of the Commission of Experts on Rwanda Established Pursuant to Security Council Resolution 935 (1994), UN Doc S/1994/1405 (1994).

General Assembly Resolution on 'The Situation in Bosnia and Herzegovina', UN Doc A/RES/49/10(1994).

General Assembly Resolution on 'The Situation in the Occupied Territories of Croatia', UN Doc A/RES/49/43 (1994).

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), UN Doc S/25704(1993).

Report of the Representative of the Secretary-General on the situation of Internally Displaced Persons in Rwanda pursuant to Commission on Human Rights Resolution 1993/95, E/CN.4/1995/50/Add.4.

SECONDARY SOURCES:

BOOKS:

Allen, Beverley, Rape Warfare, *The Hidden Genocide in Bosnia-Herzegovina and Croatia* (Minneapolis : University of Minnesota Press, 1996).

Andreopoulos, George J., ed., *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press, 1994).

Anzulovic, Branimar, *Heavenly Serbia: From Myth to Genocide* (New York: New York University Press 1998).

Askin, Kelly D., *War Crimies Against Women, Prosecution in International War Crimes Tribunals* (The Hague: Martinus Nijhoff Publishers,1997).

Balachandran, M.K. and Verghese, R., *An Introduction to International Humanitarian Law* (ICRC, Regional Delegation, New Delhi, 1999).

Bassiouni, M. Cherif, *Crimes Against Humanity* (Dordrecht, Boston and London : Martinus Nijhoff Publishers, 1999).

Bassiouni, M. Cherif and Manikas, Peter, *The Law of International Criminal Tribunal for the Former Yugoslavia* (Irvington-on – Hudson, NY: Transnational Publishers, 1995).

Beigbeder, Yves, *Judging War Criminals, The Politics of International Justice* (New York:St. Martin's Press,1999).

Clark, Roger S. and Sann, Madeleine, eds., *The Prosecution of International War Crimes* (New Brunswick, NJ: Transaction Publishers, 1996).

Coker, Christopher, *Human Warfare: The New Ethics of Postmodern War* (London: Routledge, 2001).

Cooper, Belinda, ed., *War Crimes, The Legacy of Nuremberg* (New York : TV Books, 1999).

Destexhe, Alain, *Rwanda and Genocide in Twentieth Century* (New York: New York University Press, 1995).

Dinstein, Yoram and Tabory, Mala, *War Crimes in International Law* (The Hague, Boston and London: Martinus Nijhoff Publishers,1996).

Fletcher, George P., *Basic Concepts of Criminal Law* (New York : Oxford University Press. 1998).

Gutman, Roy and Rieff, David, *Crimes of War* (New York, London: W.W. Norton and Company, 1999).

Kaldor, Mary, *New and Old Wars : Organised Violence in a Global Era* (Cambridge: Polity Press,1999).

Meron, Theodor, *War Crimes Law Comes of Age* (Oxford: Clarendon Press, 1998).

Lescure, Kraine and Trintigec, Florence, *International Justice for Former Yugoslavia, The Working of the International Criminal Tribunal of the Hague* (Kluwer Law International, 1996).

Makarczyk, Jerzy, ed. , *Theory of International law at the Threshold of the 21st Century* (The Hague, London and Boston : Kluwer Law International, 1997).

Morris, Virginia and Scharf, Michael P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia . A Documentary History and Analysis* (New York: Transnational Publishers, 1995).

Morris, Virginia and Scharf, Michael P., *An Insider's Guide to the International Criminal Tribunal for Rwanda: A Documentary History and Analysis* (New York : Transnational Publishers,1998).

Ratner, Steven R. and Abrams, Jason S., *Accountability for Human Rights Atrocites in International Law, Beyond the Nuremberg Legacy* (Oxford: Clarendor Press, 1997).

Reel, A. Framk, *The Case of General Yamashita* (Chicago: University of Chicago Press, 1949).

Redley Nigel, *The Treatment of Prisoners under International Law* (Oxford: Clarender Pres, 1999).

Roht- Arriaza, Naomi, ed., *Impunity and Human Rights in Internatnational Law and Practice* (New York and London: Oxford University Press 1995).

Schabas, William A, *Genocide in International Law* (Cambridge University Press, 2000).

Strozier, Charles B. and Flynn, Michael, *Genocide, War and Human Survival* (Lanham, MD: Rownan & Littlefield Publishers, 1996).

Sunga, Lyal S., Individual Responsibility in International Law for Serious Human Rights Violations (Dordrecht and Boston: Martinus Nijhoff Publishers, 1992).

ARTICLES:

Akhavan, Payam, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatism of Punishment", *American Journal of International Law*, vol.90, 1996,pp.501-515.

Aldrich, George H; - "Jurisdiction of the International Criminal Tribunal For Former Yugoslavia", *American Journal of International Law*, vol.90 , 1996, pp.66-67.

Askin, Kelly D; "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwanda Tribunals: Current Status", *American Journal of International Law*, vol. 93,1999, pp.97-123.

Barker, J. Craig, "State Immunity, Diplomatic Immunity and Act of State: A Triple Protection Against Legal Action", *International and Comparative Law Quarterly*, January 1998, pp.951-958.

Bassiouni, M. Cherif and Blakesley, Christopher L., "The Need for An International Criminal Court in the New International World Order", 25 *Vanderbilt Journal of Transnational Law*,1992, pp. 151-162.

Borchers, Patrick J., "International Criminal Tribunals: A Jurisprudential Thought" , 60 *Albany Law Review*, 1997 , pp. 653-660.

Brock, Peter, "The Hague: Experiment in Orwellian Justice", *Meditarrean Quarterly*, 1996, pp.1-16.

Brown, Bartram S., "Nationality and Internationality in International Humanitarian Law", *Stanford Journal of International Law*, Summer 1998,pp.347-406.

Brown, Bartram S., "Primacy or Complementarity : Reconciling the Jurisdiction of National Courts and International Criminal Tribunals", 23 *Yale Journal of International Law*,1998, pp. 383-390.

Bucyana, James, "The International Penal Tribunal for Rwanda and National Reconciliation" *International Journal of Refugee Law*, 1996, pp. 622-629.

Chhabra, Hari Sharan, " The International Criminal Tribunal for Rwanda", *World Focus*, August 2001,pp.20-22.

Cox, Marcus, "The Right to Return Home : International Intervention and Ethnic Cleansing in Bosnia and Herzegovina", *International and Comparative Law Quarterly*, 1998, pp. 599-610.

Cryer, Robert, "Special Court for Sierra Leone", *International and Comparative Law Quarterly*, April 2001,pp.435-466.

Dixon, Rod, "Developing International Rules of Evidence for the Yugoslav and Rwandan Tribunals", 7 *Transnational Law and Contemporary Problems,* 1997,pp.81-95.

Erasmus, Gerhard and Fourie, Nadine, "The International Criminal Tribunal for Rwanda : Are All Issuss Addressed ?" 321, *International Review of he Red Cross* ,1997, pp. 705-715.

Falk, Richards, "A Half Century of Human Rights", *Australian Journal of International Affairs* 1998,pp. 255-272.

Ferencz, Benjamin, "A Prosecutor's Personal Account, From Nuremberg to Rome", 52, *Journal of International Affairs*, Spring 1999,pp.456-469.

Ferstmen, Caral J., "Rwanda's Domestic Tribunal for Genocide and Crimes Against Humanity", 5 *Human Rights Brief*, 1997,pp.1-8.

Findlay, Mark , "Synthesis in Trial Procedure- The Experience of International Criminal Tribuanls", 5o *International and Comparative Law Quarterly*, 2001, pp. 27-53.

Goldston, R., "Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals", *New York University Journal of International Law and Politics*, 1996, pp. 485-503.

Gordon, Melissa, "Justice on Trial: The Efficacy of the International Tribunal for Rwanda", ILSA Journal of International and Comparative Law, 1995,pp.217-223.

Greppi, Edoardo, "The Evolution of Individual Criminal Responsibility under International Law", vol. 81, *International Review of Red Cross,* September 1999,pp.531-552.

Hadden, Tom and Harvey, Colin, " The Law of Internal Crisis", *International Review of Red Cross*, March 1999, pp. 119-133.

Hall, Christopher Keith, "The First Two Sessions of the UN-Preparatory Committee on the Establishment of an International Criminal Court", *American Journal of International Law*, vol. 91, 1997, pp.177-187.

Hampson, Francoise J., "The International Criminal Tribunal for the Former Yugoslavia and Reluctant Witness", 47, *International and Comparative Law Quarterly*, January 1998, pp.51-74.

Howland, Todd A. and Calathes, William, "The UN's International Criminal Tribunal , Is it Justice or Jingoism for Rwanda ?" 39*Virginia Journal of International Law*, 1998, pp. 134-140.

Jamison, Sandra, "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections", Denver Journal of International Law, 1995, pp.419-457.

King, Faiza Patel, and La Rosa, Anne- Marie, "The Jusiprudence of the Yugoslavia Tribunal: 1994-1996," 8, *European Journal of International Law*, 1997,pp. 123-132.

Leigh, Monroe, "The Yugoslav Tribunal : Use of Unnamed Witnesses Against Accused", *American Journal of International Law*,vol.9o, 1996, p. 235.

Mani, V.S., " The International Court And the Humanitarian Law of Armed Conflict," *Indian Journal of International Law*, vol. 309, pp. 33-45.

Mc Coubrey, Hilaire, "From Nuremberg to Rome: Restoring the Defence of Superior orders," 50, *International and Comparative Law Quarterly*, April 2001, p. 387-395.

Meron, Theodor, " International Criminalisation of Internal Atrocities," *American Journal of International Law*, vol.89, 1995, pp. 554-577.

Meron, Theodor, "Rape As a Crime Under International Humanitarian Law," *American Journal of International Law*,vol.87, 1999,pp.424-445.

Moir, Lindsay, "Historical Development of the Application of Humanitarian Law In Non-International Armed Conflicts", 47, *International and Comparative Law Quarterly*, 1998,pp.337-363 .

Morris, Madeline, " The Trials of Concurrent Jurisdiction : The Case of Rwanda", 7 *Duke Journal of Comparative and International Law,* 1997, p.349-360.

Murphy, Sean D: " Progress and Jurisprudence of the International Criminal Tribunal For the Former Yugoslavia", *American Journal of International Law*,vol.93, 1999, pp. 57-97.

Patel, Bimal N, "Do the Rules of Evidence and Procedure of the International Criminal Tribunal For Ex-Yugoslavia Ensure A Fair Trial", 39, *Indian Journal of International Law*, 1999, pp. 464-469.

Paust, Jordan J., " Applicability of International Criminal Laws to Events in the Former Yugoslavia", 9 *American University Journal of International Law and Policy*, 1994, pp.499-510.

Raj, Sushil, " The Failure of Humanitarian Intervention in Rwanda And The Need For Reconceptualisation", 39, *Indian Journal of International Law,* 1999,pp. 470-482.

Robinson, D., "Trials, Tribulations and Triumphs: Major Developments in 1997 at the International Criminal Tribunal for the Former Yugoslavia", *Canadian Year Book of International Criminal Law*, 1997,pp. 179-213.

Robinson, D., "Defining Crimes Against Humanity At The Rome Conference", *American Journal of International Law*, vol.93,1999, pp. 43-57.

Roht-Arriaza, Naomi, "Institutions of International Justice", 52 *Journal of International Affairs* ,Spring 1999, pp. 473-491.

Roth, Kenneth, "The Case for Universal Jurisdication," *Foreign Affairs*, vol.80,No.5, September/October 2001,pp.150-154.

Sarooshi, Danesh, "The Statute of the International Criminal Court", *International and Comparative Law Quarterly*, April 1999, pp. 387-404.

Schabas, William A., "Enforcing International Humanitarian Law :Catching the Accomplices", 83, *International Review of Red Cross*, June 2001, pp.439-456.

Scharf, Michael P., "Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide", 52, *Journal of International Affairs*, Spring 1999,pp.621-638.

Schindler, Dietrich, "Significance of the Geneva Conventions for the Contemporary World", 81, *International Review of Red Cross*, December 1999, pp. 715-728.

Thronton, Brenda Sue, " The International Criminal Tribunal For Rwanda: A Report From The Field," 52 *Journal of International Affairs,* Spring 1999, pp. 639-649.

Thurer, Daniel, "The Faild State and International law", 81, *International Review of Red Cross*, 1999,pp. 731-760.

Tochilovsky, V., "Trial in International Criminal Jurisdictions : Battle or Scrutiny", *European Journal of Crime, Criminal Law and Criminal Justice,* 1998, pp.55-59.

Von Sternberg, Mark R., "A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals, Universal Jurisdiction and The Elementary Dictates of Humanity", 22, *Brooklyn Journal of International Law*, 1996, p. 111.

Websites :

http:// www.ictr.org/ENGLISH/factshee.htm
http:// www. icty.org/ENGLISH/factshee. htm
http://Sun1. Spfo.Unibo.it/spolfo/CRIMLAW.htm
http://www.wcw.org
http://www.un.org/icty

LIST OF CASES:

Adolf Eichman v. Attorney- General of the Government of Israel, Supreme Court of Isral ILR 136 (1962).

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm...,visited on 6-6-2001.

Prosecutor v. Aleksovski, Case No. IT-95-14, http://www.un.org/icty, visited on 5-10-2001.

Prosecutor v. Delalic, Mucic and Others, Case No. IT-96-21, http://www.un.org/icty/celebicy/trialc2/judgement/index.htm,visited on 15-6-2001.

Prosecutor v. Dokmanovic, Case No. IT-95-13, http://www.un.org/icty,visited on 5-10-2001.

Prosecutor v. Erdemovic, Case No. IT-96-22, http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsi980305e.htm,visited on 10-6-2001.

Prosecutor v. Furundzija, Case No. IT-95-17, http://www.un.org/icty/furundzija/trialc2/judgement/index.htm,visited on 10-6-2001.

Prosecutor v. Jelisik, Case No. IT-95-10, http://www.un.org/icty,visited on 1-7-2001.

Prosecutor v. Kambanda, Case No. ICTR-97-23-S, http://www.ictr.org/ENGLISH/cases/Kambanda/judgement/kambanda.htm ..., visited on 15-6-2001.

Prosecutor v. Kupreskic, Case No. IT-95-16, http://www.un.org/icty,visited on 17-9-2001.

Prosecutor v. Milosevic, Case No. IT-99-37-I,

http://www.un.org/icty/indictment/english/mil-ii011122e.htm,visited on 1-12-2001.

Prosecutor v. Ruggiu, Case No.ICTR-97-32-T, in *International Legal Materials*, vol. 39, No. 6 (2000) pp.1338-1352.

Prosecutor v. Rutangada, Case No. ICTR-96-3-T, http://www.ictr.org/ENGLISH/cases/Rutangada/judgement/1.htm,visited on 1-9-2001.

Prosecutor v. Serushago, Case No. ICTR-98-39-S, http://www.ictr.org/ENGLISH/cases/Serushago/judgement/0s1.htm,visited on 25-6-2001.

Prosecutor v. Tadic, Case No. IT-94-1, in *International Legal Materials*, vol. 36, No. 4 (1997) pp.913-970.