Prosecuting Core International Crimes In Ad Hoc International Criminal Tribunals: Assessment Of The End Of An Era In International Criminal Justice

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ABSTRACT
The twentieth Century witnessed some of the worst atrocities committed in the history of humanity. There have been more than eighty-six million civilian deaths in over two hundred and fifty (250) conflicts in the past fifty years alone. In the last decade, the world's attitude to violations of Human Rights and International Humanitarian Law norms has shifted remarkably from one of appeasement to one of Justice. Most perpetrators of these crimes are now brought through criminal prosecutions. In 1992 and 1994 respectfully, the United Nations Security Council established the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in response to massive violations of Humans Rights and International Humanitarian Law norms in the territories of Yugoslavia and Rwanda. These Tribunals were established to bring violators to account for their deeds owing to the failure of states to prosecute them domestically. The International Criminal Tribunal for Yugoslavia concluded all trials and closed officially on 31 December, 2017 while the International Criminal Tribunal for Rwanda closed officially on 31 December, 2015. This paper critically examines the achievements, challenges and shortcomings of these ad hoc International Criminal Tribunals in a bid to fulfill their mission of ending impunity for mass atrocity crimes. The paper contends that these ad hoc International Criminal Tribunals did not achieve much in terms of the realization of their goals owing to several challenges ranging from lack of cooperation by nation states, difficulty in apprehending indicted perpetrators and distant location of the tribunals. These challenges impeded the effective functioning of these tribunals and made the realization of their mandate difficult. As the administration of International Criminal Justice enters a new phase, the paper recommends that the International Criminal Court should take on the central role of expressing the norms of international criminal justice and building the capacity of domestic court to be able to prosecute core international crimes.

Keywords: Prosecuting, Core International Crimes, International Criminal Tribunals, International Criminal Justice.

1. INTRODUCTION
The struggle against impunity has become a matter of International concern for quite some time now. International Criminal Tribunals and Courts are established in response to demands by the International Community for accountability from those responsible for Human Rights violation through perpetration of mass atrocities. The aim of the International Community for setting up these courts and tribunals is to close all impunity gaps. Impunity connotes the unredressed, reckless or deliberate activities of top state officials, war commanders and foot soldiers that inflict unnecessary torture, pain or death on innocent civilians, or on the sick, wounded or captured enemy soldiers. ¹ It represents the experience of millions of

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people who have been massacred or subjected to untold sufferings in different parts of the globe, both in war situations and under tyrannical regimes. In the opinion of the United Nations, impunity covers those situations and practices whereby states fail in their obligation to investigate, try and sentence those responsible for the systematic practice of gross violations of human rights, and thereby impede the enjoyment by victims and their families of the rights to know the truth and have their rights restored. Impunity entails absence of punishment, investigation, or justice for the victims.

Apart from the horrible experiences of the first and second world wars, massive and systematic atrocities in and outside armed conflicts occurred in places like Cambodia, Chile, Iraq, Afghanistan, Palestine, Yugoslavia, Rwanda, Sierra Leone, East Timor, Democratic Republic of Congo, Darfur region of Sudan and most recently North Eastern part of Nigeria to mention just a few. Authoritarian regimes and some states engage in armed conflicts and have continued to use or allow the use of state powers to perpetrate Human Rights violations to the level that shocks the conscience of mankind. It was as if the International Community was helpless in preventing these atrocities or punishing those involved in committing them. An estimated Two Million people were killed by the Khmer Rouge regime in Cambodia in the 1970s. Approximately, One Million civilians were slaughtered within three months in Rwanda in 1994 in a genocide that engulfed that tiny nation. Currently, the dreaded Janjaweed militia is engaged in an orgy of killing and raping, a strategy of ethnic cleansing in the western Sudanese regions in Darfur, while the Boko Haram insurgents are on rampage in North Eastern part of Nigeria. Between 1992 and 2000, Child soldiers were used to wipe out villages in a ferocious campaign of killing, amputations, arson and rape masterminded by Charles Taylor and a few other persons whose only goal was Diamond heisting in Sierra Leone. This wanton destruction of lives and property were carried out in an atmosphere of impunity, because the perpetrators were either backed by state powers or believed that the law will never catch up with them. The law against impunity is thus premised on the notion that offenders must be called to account for their crimes in the interest of Justice.

Looking back at the history of atrocities from Nuremberg, the International Community recognized the need to set up effective mechanism to bring perpetrators of such atrocities to account for their deeds. This necessitated the creation of Ad hoc International Criminal Tribunals, Hybrid Tribunals and more recently a permanent International Criminal Court. The two Ad hoc International Criminal Tribunals established by the United Nations Security Council in response to the conflicts in Yugoslavia and Rwanda have all rounded off with pending cases not dealt with by the tribunals handed over to the Mechanism for International Criminal Tribunals (MICT) to handle. The United Nations Security Council in recent time has not responded to any other new conflict by establishing Ad hoc tribunals. It rather prefer referring conflicts now to the International Criminal Court. The United Nations Security Council Resolution 1593 referred the situation in Darfur, Sudan to the ICC on 31 March, 2005. It did the same in the case of Libya.

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5 Ibid P. 1
6 Ibid
7 Ibid
8 Ibid
9 Ibid
10 Ibid
11 Ibid
12 Ibid
13 Ibid
via Resolution 1970 adopted on 26 February, 2011. This development shows that the era of Ad hoc International Criminal Tribunal as a mechanism for prosecuting perpetrators of mass atrocity crimes is over. This paper is therefore an assessment of the two Ad hoc International Criminal Tribunals, that is, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), haven completed their respective assignments.

2. History of International Criminal Justice

The idea of prosecution for International crimes is an old one, actual prosecutions have been relatively rare. History is replete with acts of brutality by persons in position of leadership politically and militarily, against fellow human beings. The history of International Criminal Justice can be said to have its first precedent with the 1474 Breisach trial, where 28 judges of the Holy Roman Empire presided over the case of Peter Von Hagenbach who was accused of committing crimes against the laws of nature and God in the sacking and pillaging of the city of Breisach. Although Von Hagenbach, acted on the orders of the Duke of Burgundy, to whom Breisach had been given by the Holy Roman Empire for his services, the accused was precluded from raising the defence of ‘obedience to superior orders’, the Empire did not want one of its sovereigns to be held accountable for such crimes. Von Hagenbach was drawn and quartered, and the Duke of Burgundy benefited from impunity, thus political consideration prevailed over justice. It was not until 1918 that International Criminal Justice emerged again when the victorious Allies of World War 1 in the Treaty of Versailles announced their intention to prosecute Kaiser Wilhelm II of Hohenzollern for the supreme of offence against international morality and the sanctity of treaties’ contained in Article 227 of that treaty. But the Kaiser sought and obtained asylum in the Netherlands, in part based on the language of Article 227, which did not reflect the existence of a recognized international crime.

It was not until after the World War II that the Allied powers made concerted efforts to outlaw atrocities in Europe and the Far East, following the unprecedented and unimaginable atrocities of the Nazi regime in Germany and the Japanese forces in the pacific region. Prominent among these atrocities was the Holocaust during which an estimated six million Jews were exterminated. Equally prosecuted during the era were gypsies, suspected homosexuals and the disabled. The atrocities committed through the perversions of Nazism were too serious to be treated lightly after the defeat of Germany and the eventual surrender of Japan to the Allied forces. It was the inability of the International Community in the past to institutionalize a global human rights regime and/or ensure an effective mechanism for punishment of perpetrators of atrocities that resulted in these barbaric acts which outraged the conscience of mankind. In 1943, the Allies in the Moscow Declaration affirmed their intentions to prosecute the Axis powers

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15 M. O. Uneegbu., (n4) P.1
17 M. C. Bassiouni., International Criminal Justice in Historical perspective: The tension between states interest and the pursuit of International Justice in Antonio Cassese (ed), The oxford companion to International Criminal Justice, (Oxford University press, 2009)
18 Ibid
19 Ibid
20 Q. Wright., ‘The legality of the Kaiser’ 13 American Political Science Review (1919) P. 121
21 G. Robertson., (n 1) P. 219
22 Ibid
23 Ibid
24 Ibid
25 Declaration on Security (The Moscow Declaration), 9 Dep’t. Bull. 308 (1943), reprinted in 38 American Journal of International Law (1944) P. 5
for War crimes, and in 1945, the four major Allies in the European theatre started to draft the charter of the IMT.\textsuperscript{26} On 6 August 1945, the four major Allies signed a treaty to which other states adhered to establishing the International Military Tribunal which ultimately prosecuted 22 major War criminals.\textsuperscript{27} The International Military Tribunal at Nuremberg which was set up by USA, USSR, France and Britain was given jurisdiction over war crimes, crimes against humanity and crimes against peace.\textsuperscript{28} A number of prominent Nazi leaders were tried and convicted at Nuremberg. While some received various jail sentences, others were sentenced to death and executed for various atrocities. Effective International Judicial actions against man’s Inhumanity to man can therefore be said to have commenced with the Nuremberg trials.\textsuperscript{29} Unfortunately however, the Nuremberg trials which laid the solid foundation for the fight against impunity suffered credibility problem on a number of grounds. It was severely criticized as a victor’s court which failed to take into consideration a number of fundamental issues.\textsuperscript{30} The IMT prosecutions were followed by the enactment of council control law No. 10, adopted by the four major Allies exercising sovereignty over Germany which allowed the Allies to prosecute German violators of War crimes and crimes against humanity.\textsuperscript{31} Also, the US Military Government ordinance No. 7 established a tribunal at Nuremberg and began proceedings against perpetrators of crimes against American Military personnel.\textsuperscript{32} The Allies in the Far East, who differed from those in the European theatre, proceeded in 1947 to prosecute the defeated Japanese.\textsuperscript{33} Unlike the IMT, the International Military Tribunal for the Far East was not established by a treaty.\textsuperscript{34} Instead, it was promulgated by an order issued by the supreme Allied commander for the Far East, General Douglas Mac Arthur.\textsuperscript{35} As a result of the credibility problem of these trials and the cold War, impunity flourished in many parts of the world, until the early 1990s when the former Yugoslavia disintegrated in vicious civil wars that unleashed brutal ethnic cleansing policy of the Serbs and reprisal measures against them.\textsuperscript{36} Similarly, Rwanda erupted in one of the world’s worst genocide in which nearly one million ethnic Tutsis and moderate Hutus were massacred by their Hutu neighbours within three months.\textsuperscript{37} These events took place at a time the cold war came to an end following the dismantling of the Soviet Union which made it easy for the international community to quickly come together and respond to the torture and killings in Yugoslavia and Rwanda by setting up \textit{ad hoc} tribunals to try persons responsible for these massacres.\textsuperscript{38} The modest successes recorded by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda encouraged the setting up of another \textit{ad hoc} tribunal for the Sierra Leone decade long civil war which also witnessed atrocities of immense proportions.\textsuperscript{39} The special court for Sierra Leone hereinafter referred to as ‘ScSL’ also sent a clear message to the World that the era of impunity was coming to an end.\textsuperscript{40} It was against this background and on the basis of the foregoing that the International Community derived the confidence to re-visit the issue of the permanent International

\textsuperscript{26} M. C. Bassiouni., (n 17) P. 134.  
\textsuperscript{27} Ibid  
\textsuperscript{28} M. O. Unegbu., (n4) P.2  
\textsuperscript{29} Ibid  
\textsuperscript{30} Ibid  
\textsuperscript{31} M. C. Bassiouni., (n17) P. 3  
\textsuperscript{32} Ibid  
\textsuperscript{33} Ibid  
\textsuperscript{34} Ibid  
\textsuperscript{35} M. O. Unegbu., (n4) P. 3  
\textsuperscript{36} Ibid  
\textsuperscript{37} Ibid  
\textsuperscript{38} Ibid  
\textsuperscript{39} Unlike ICTY and ICTR, the ScSL was established by a special agreement between Sierra Leone and the United Nations  
\textsuperscript{40} M. O. Unegbu., (n4) P. 4
Criminal Court to take over the function of prosecuting and punishing impunity worldwide.\textsuperscript{41} Hence, the International Criminal Court (ICC) was established under the Rome Treaty of 1998 with the global mandate of punishing acts of impunity.\textsuperscript{42}

3. Event leading to the Setting up of Ad hoc International Criminal Tribunals for Yugoslavia and Rwanda.

William Schabas\textsuperscript{43} opined that as the idea of an International Court was gaining momentum after decades of atrophy, armed conflict erupted when Yugoslavia began to disintegrate. The country was created in 1919 from a patchwork of states following the collapse of the Austrian and Ottoman Empires during the First World War. Tensions among the ethnic groups that made up the new state never disappeared, and were particularly acute during the Second World War.\textsuperscript{44} When President Tito died in 1981; a new generation of leaders began tearing the country apart.\textsuperscript{45} Josip Broz Tito was the founder of the Modern Socialist State of Yugoslavia. Tito founded and held the federation together with an iron fist.\textsuperscript{46}

In 1991, first Slovenia and then Croatia declared independence from what they considered to be a Serb-dominated federation.\textsuperscript{47} Reacting to what looked increasingly to be an inevitable break-up, the Belgrade regime sought to carve off areas from the seceding states in which there was a large Serb population. With the borders up for grabs, especially in Bosnia and Herzegovina, all sides indulged in ‘ethnic cleansing’ in order to strengthen their territorial ambitions.\textsuperscript{48} When Slovenia Seceded, there were only but minor skirmishes. But when the other constituent units like Bosnia-Herzegovina, Croatia and Macedonia began to declare their independence, armed conflicts of immense brutality and widespread humanitarian atrocities reminiscent of World War II followed.\textsuperscript{49} The Serbian population in certain territories with the active support of the state of Serbia allegedly sought to expel or annihilate other ethnic groups. In some other areas, other ethnic groups also attempted to wipe out or expel the Serbian population. Media reports emanating from Yugoslavia depicted scenes of horrific violation of human rights and humanitarian law.\textsuperscript{50}

The World was daily fed with reports of media films of civilians selectively murdered and thrown into mass graves, civilians being starved and brutally assaulted in concentration camps, widespread and systematic rapes; all aimed at ethnic cleansing of territories. Public rape, sex slavery and other forms of sexual abuses were rampant. Muslim women were being massively gang-raped by the Serbs in public, a deliberate scheme to humiliate them in front of witnesses, their village neighbours and fellow camp inmates. The systematic rape was intended to increase the population of the Serbs in the various territories through the offspring of these forced rapes while at the same time depleting the population of other ethnic groups in order to force them to flee. In retaliation, other ethnic groups equally meted out such treatments to ethnic Serbs in territory where such groups had the upper hand.

Militant groups were formed by various parties to the conflict. These militants who committed most of the atrocities were nothing more than untrained soldiers of necessity who knew nothing about the rules of law in wars or armed conflicts. In 1991 and 1992, negotiations took place between the various interested

\textsuperscript{41} Ibid
\textsuperscript{42} Ibid
\textsuperscript{43} W. A. Schabas, An Introduction to the International Criminal Court, 4th edn. (Cambridge University press, 2011) P. 13.
\textsuperscript{44} Ibid
\textsuperscript{45} Ibid
\textsuperscript{46} M. O. Unegbu., (n4) P. 136
\textsuperscript{47} W. A. Schabas., (n43)
\textsuperscript{48} Ibid.
\textsuperscript{49} M. O. Unegbu., ‘ The International Criminal Court-Anteecedents and prospects’ in E. S. Nwauche & F. I. Asogwah (eds), Essays in Honour of Prof. C. O. Okonwo, (Port Harcourt, Jite Books, 2000) P. 20
parties to reach a peaceful settlement but to no avail.\textsuperscript{51} Europe in particular struggled with how to tame the conflict.\textsuperscript{52} Criminal accountability and prosecution was an idea whose time had come and it was not long before proposals began to be circulated.\textsuperscript{53}

The ICTY was not even fully operational when reports hit the international media of terrible atrocities being committed within the context of a civil war in Rwanda, a former Belgian mandate in Central Africa. The backdrop was an historic conflict between two ethnic groups, the majority Hutu who had governed the country since independence and the minority Tutsi, who had dominated it during the Colonial period.\textsuperscript{54} The Republic of Rwanda otherwise nationally called ‘Republic Y’u Rwanda’ is an east-central African Country covering in area, 26, 338 Square Kilomete...
adopted unanimously by the Security Council in Resolution 827, which created the ICTY.\textsuperscript{65} As an enforcement measure under chapter vii, the lifespan of the ICTY was linked to the restoration of international peace and security in the territory of the former Yugoslavia. Temporally, the jurisdiction of the tribunal extends to the period beginning on 1\textsuperscript{st} January 1991.\textsuperscript{66} While territorially, it extended to the territorial bounds of the former Yugoslavia.\textsuperscript{67} The scope of the tribunal’s jurisdiction was limited in time and location.\textsuperscript{68} The tribunal was to prosecute only serious violations of International Humanitarian Law to the extent that they were committed in the territory of the former Yugoslavia since January 1, 1991.\textsuperscript{69} The territory of former socialist Federal Republic of Yugoslavia including its land surface, airspace and territorial waters.\textsuperscript{70} The tribunal retained concurrent jurisdiction with national courts of states that had emerged from the former socialist Federal Republic of Yugoslavia since its collapse.\textsuperscript{71} While individual states might try a person accused of war crimes under their own law, the tribunal had the power to declare a national judicial proceeding null and void and to institute an independent trial. The ICTY has primacy over national courts.\textsuperscript{72} Pursuant to this principle, the tribunal may require states to defer to it any proceedings they were contemplating or undertaking. The situations when deferral is justified are provided in Rule 9 of the Rules of procedure and Evidence. Those situations are when the conduct is not charged as an international crime, where proceedings are not fair or impartial, or what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecution before the tribunal.\textsuperscript{73} The subject matter jurisdiction of ICTY consists of four core offences: grave breaches of the 1949 Geneva conventions,\textsuperscript{74} violations of the laws and customs of War,\textsuperscript{75} genocide \textsuperscript{76} and crimes against humanity.\textsuperscript{77} Article 2, entitled ‘Grave Breaches of the Geneva conventions of 12 August, 1949’ embodies the core of the Customary Law applicable in international armed conflicts. It provides that the International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva conventions of 12 August, 1949. The conflict in Yugoslavia had elements of both international and internal conflicts.\textsuperscript{78} The statute attributes individual criminal responsibility to any person accused of planning, instigating, ordering or committing a crime falling within the jurisdiction of the tribunal whether as a principal or as an accomplice.\textsuperscript{79} This is designed to embrace all perpetrators along the chain of command, from the level of policy decision makers to the rank and file level of soldiers, paramilitary or civilians. The tribunal indicted a total of One Hundred and Sixty-one (161) persons.\textsuperscript{80} Ninety Four of them were Serbs, twenty-nine were Croats, Nine were Bosniaks, two were Macedonians, two were Montenegrins, while the others

\textsuperscript{65} UN Doc. S/RES/ 827
\textsuperscript{66} Art. 8 of the ICTY statute
\textsuperscript{67} Ibid.
\textsuperscript{68} E. Oji., Responsibility for crimes under International law, (odade publishers Lagos, 2013) P. 180
\textsuperscript{69} Art 1 of the ICTY statute
\textsuperscript{70} E. Oji., (n68) P. 180
\textsuperscript{71} Art 9 of the ICTY statute.
\textsuperscript{72} Art 9 of the ICTY Statute
\textsuperscript{73} Rule 9(1) – (ii) ICTY RPE
\textsuperscript{74} Art. 2 of the ICTY Statute
\textsuperscript{75} Art 3 of the ICTY Statute
\textsuperscript{76} Art 4 of the ICTY Statute
\textsuperscript{77} Art 5 of the ICTY Statute
\textsuperscript{79} Art. 7 of the ICTY Statute
\textsuperscript{80} See Wikipedia., the Free Encyclopedia, list of people indicted in the International Criminal Tribunal for Yugoslavia available at\url{http://en.Wikipedia.org/wiki/Internationalcriminaltribunal-for-the-former-Yugoslavia} accessed on 4 march 2020
were of unknown ethnicity. The ICTY delivered its final judgment on November 27, 2017. The Tribunal concluded proceedings against 155 persons out of the 161 persons indicted. Eighty-four (84) persons were sentenced, 19 acquitted and 13 referred to national jurisdictions. The indictment of 37 persons was withdrawn, with two retrials to be undertaken by the residual mechanism. The ICTY concluded all trials and closed officially by 31 December, 2017. The ICTY existed for Twenty-five (25) years.

5. The International Criminal Tribunal for Rwanda (ICTR)
The International Criminal Tribunal for Rwanda (ICTR) was set up by UN Security Council Resolution 955 of November, 8 1994, in response to genocide along with other systematic, widespread, and blatant violations of International Humanitarian Law which had been committed in Rwanda. The territorial and temporal jurisdiction of the ICTR is clearly spelt out in the statute of the tribunal. Article 7 states: ‘the territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring states in respect of serious violations of International Humanitarian Law committed by Rwandan citizens.’ The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994. The ICTR differs in this regard from the ICTY in that the statute of the ICTR defines the end of its temporal jurisdiction.
The ICTR has subject matter jurisdiction over War crimes, crimes against humanity and genocide, although, the definition of the last two crimes are different from those of the ICTY. In particular, the definition of crimes against humanity has an additional requirement of discrimination for all crimes against humanity (Article 3), and the jurisdiction of the ICTR over War Crimes is limited to those in non-international armed conflicts, (Article 4). In contrast to that of the ICTY, the statute of the ICTR was drafted on the assumption that the conflict in Rwanda was non-international. Thus, it explicitly gives the tribunal jurisdiction over serious violation of common Article 3 of the Geneva conventions and of Additional Protocol II.
The ICTR indicted a total of 95 persons. Eight persons are still at large as fugitive and if captured; three will be tried before the Mechanism for International Criminal Tribunals (MICT), while five (5) will be transferred to national jurisdictions. The ICTR convicted a total of Sixty-one (61) persons. The tribunal acquitted 14 persons and transferred the cases against 10 persons to national jurisdictions. The ICTR closed officially on 31 December 2015. The ICTR existed for Twenty-two (22) years.

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81 Ibid.
83 Ibid.
85 Art. 7 of the ICTR Statute
86 Art. 2, 3 and 4 of the ICTR Statute
89 See Wikipedia; (n80)
90 Ibid
91 Ibid.
6. **Major Contributions of the ICTY and ICTR to the Development of International Criminal Justice**

Inspite of the numerous shortcomings of these tribunals, they also recorded some major achievements that have contributed to the development of International Criminal Justice. They are:

(a) **Development of legal doctrines and standards**

The tribunals developed legal doctrines and standards specific to International Criminal Tribunals. One worthy example includes the development of the doctrine of ‘Common purpose’ or ‘Joint Criminal Enterprise’ (JCE) in relation to international criminal responsibility. Under this doctrine, a person can be found individually responsible for the commission of a crime, as part of a plurality of co-perpetrators who act pursuant to a common purpose involving the commission of a crime in the statute.\(^92\) In the course of the *Tadic* proceedings, in which the theory was first articulated, the Appeals chamber reasoned that the very nature of many international crimes committed in wartime situation do not result from the criminal propensity of single individuals, but constitute manifestation of collective criminality.\(^93\) Although only some members of the group materially carry out the criminal act, the participation and contribution of other members of the group is often vital to facilitating the commission of the offence, while the moral gravity of that participation would not be adequately captured by applying the mode of responsibility of ‘aiding and abetting.’

(b) **A catalyst for other criminal jurisdiction**

The creation of the tribunals marked an increase interest within the global community in the administration of International Criminal Justice.\(^94\) There is no doubt that the *ad hoc* tribunals for the former Yugoslavia and Rwanda accelerated the elaboration of the statute of a universal Criminal court, culminating in the adoption of the Rome statute in 1988.\(^95\)

(c) **Developing the element of crimes**

The ICTY has also extensively contributed to specifying the elements of crimes under it statute. Such contributions include delineating the concept of grave breaches, the objective and subjective elements of crimes against humanity and the notion of war crimes, in particular, the possibility of their commission during an internal armed conflict.\(^96\) The ICTY has further substantiated the definitions of specific offences, including those of extermination, enslavement, deportation, and has identified in international law a general, non-derogable prohibition against torture.\(^97\)

(d) **Recognizing Gender Crimes**

The ICTY has also made notable advances in redressing gender crimes by advancing International Law pertaining to the legal treatment and punishment of sexual violence during armed conflict.\(^98\) This development is seen as particularly positive since gender crimes were not addressed during the Nuremberg and Tokyo proceedings.\(^99\) The ICTY along with the International Criminal Tribunal for Rwanda (ICTR) have rendered judgments recognizing rape and other forms of sexual violence as crimes against humanity, War Crimes, underlying acts of genocide and persecutions, and enslavement as a form of torture.\(^100\)

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\(^93\) *Prosecutor v. Dusko Tadic* (15-94-1A), Judgment, Appeals chambers, 15 July 1999, para 91

\(^94\) F. Pocar., (n92) P.72

\(^95\) Ibid.


\(^97\) With particular reference to Torture, see *Prosecutor v. Brdamin*, (IT-99-36-A), Judgment, Appeals chamber, 3 April 2007, paras 244-252, where the issue of the severity of the pain inflicted is explored, rejecting the position adopted by certain states.

\(^98\) See F. Pocar., (n92) P.71.

\(^99\) Ibid.

\(^100\) See, *Prosecutor v. Furundzija*, Supra. (n96)
e) Establishing the Features of Armed conflict and the scope of related protections.
With the exception of the crime of genocide, a prerequisite to triggering the tribunals’ jurisdiction is, of course, the existence of an armed conflict. Through its jurisprudence, the ICTY has defined the features of armed conflicts, as well as the conditions necessary to conclude whether an armed conflict of an international character has arisen.\(^ {101} \) In a related development the tribunal’s decision in *Prosecutor v. Aleksovski* \(^ {102} \) clarified the meaning of “Protected persons under Article 4 of the Geneva Convention relative to the protection of civilians in time of War (Fourth Geneva Convention), a further prerequisite for the tribunal to have jurisdiction over grave breaches. The decision concluded that the phrase in Article 3 of the ICTY Statute (act against persons or property protected) under the provisions of the relevant Geneva Convention) should be interpreted broadly to afford as much protection as possible to the civilian population and, accordingly, recognized the victimization of Bosnian Muslims by Bosnian Serbs, despite the same nationality.\(^ {103} \)

f) Challenge to impunity
Following the historic precedent set by the Nuremberg and Tokyo trials, the ICTY has sought to fight impunity and establish individual accountability under international law for perpetrators of War Crimes, genocide and crimes against humanity.\(^ {104} \) This is an essential contribution of the ICTY to the international community. Individuals committing what could be termed as the most heinous crimes, regardless of the rank and status, are no longer able to even suggest that the law does not bind them and that they are not criminally responsible for their conduct. Past failures to punish perpetrators, especially persons in position of authority, only signaled to future leaders that they would also enjoy impunity. Now, the tribunal’s continued insistence on accountability has irrevocably altered a culture of impunity and has help to prevent a recurrence of armed criminal conducts on a massive scale.\(^ {105} \) There is no doubt that the tribunal’s proceedings relating to persons in very high positions have sent a strong signal to the world, more particularly, the African continent, that the international Community will not accept impunity for serious crimes.

7. Obstacles to the Effective Prosecution of Core International Crimes in *Ad Hoc* International Criminal Tribunals
The International Criminal Tribunals for Yugoslavia and Rwanda were faced with certain obstacles that affected the effective prosecution of core international crimes and impeded the realization of their mandate and mission. These challenges or obstacles are: lack of cooperation by states with the tribunals, difficulty in apprehending indicted perpetrators and distant location of the courts.

   a) Lack of cooperation by states with the tribunals
The statutes of the ICTY and ICTR are enactments of the Security Council annexed to resolutions adopted pursuant to chapter vii of the charter of the United Nations.\(^ {106} \) The two institutions are deemed to be subsidiary ‘Organs’ of the Security Council, in accordance with Article 29 of the charter of the United Nations, which authorizes the Council to establish such subsidiary organs as it deems necessary for the performance of its functions. Under Article 25 of the charter, all member states of the United Nations agree to accept and carry out decisions of the council. Consequently, the statutes declare that states shall cooperate with the international tribunal in the investigation and prosecution of persons accused of committing serious violations of International Humanitarian Law, and moreover that states shall comply without undue delay with any request for assistance or an order issued by a trial chamber.\(^ {107} \) Specific

\(^ {101} \) F. Pocar, (n92) P. 69
\(^ {103} \) F. Pocar, (n92) P. 69
\(^ {104} \) Ibid.
\(^ {105} \) UN Doc. S/RES/827/ (1993), annex; UN Doc.s/RES/955, annex.
\(^ {106} \) Art. 29(1) of the ICTY Statute, Art. 28 (1) of the ICTR Statute.
\(^ {107} \) R Cryer *et al.*, (n87) P. 510
areas requiring state cooperation and judicial assistance as spelt out in the statutes include but not limited to:
1) The identification and location of person;
2) The taking of testimony and production of evidence;
3) The service of documents;
4) The arrest and detention of persons;
5) The surrender or the transfer of the accused to the International Criminal Tribunal

So, the duty to cooperate is explicitly laid down in the statutes and corresponds to the general principle that the tribunals have primacy over national courts. The tribunals have a very broad competence to issue orders. Rule of Procedure 54 provides that at the request of either party, or proprio Motu, a Judge or Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or for the conduct of the trial. This is an open-ended provision granting very wide discretion to the tribunal to require cooperation, which has been used for orders on various subjects, including evidence gathering. This does not mean that there are no limits to the tribunals’ authority to issue orders. One particularly important limit is that they are not permitted to issue subpoenas or binding orders to state officials in relation to their official duties.

In spite of the strong obligations, the tribunals had a mixed record of compliance from states. The challenges of non-compliance with the orders of the tribunals by states have impacted negatively on the effective functioning of the tribunals. Suffice to say that the statutes of these tribunals do not provide for any clear cut measures for the enforcement of the duty to cooperate. The successful operation of these ad hoc tribunals is completely dependent upon cooperation of states. The tribunals cannot implement their decisions such as an arrest warrant on the territory of a state. The Tribunals do not have any enforcement mechanism (police) of its own. In the absence of any enforcement mechanism, cooperation from states in the area of execution of arrest warrant, seizing and transferring of evidence, logistics in bringing witnesses to trial is quite vital to the survival of the tribunals. The non provision of any clear cut measures in the statute of the tribunals to enforce cooperation is a major setback to the tribunals in the quest to achieving their mandates.

b) Difficulty in apprehending indicted perpetrators

Another major obstacle that confronted the ICTY and ICTR was their inability to apprehend indicted perpetrators who commit mass atrocity crimes in the territories for which the tribunal were set up. This development is as a result of the fact that international Criminal Tribunals do not have any enforcement mechanism of its own. Criminal law is by its nature coercive. It imposes responsibilities directly on individuals and punishes violations through the imposition of sanctions. Enforcement of Criminal law necessitates the power of arrest and detention of suspects, to investigate alleged violations, to obtain the testimony of witnesses and victims, to protect witnesses and to punish those found guilty.

The experience of the ICTY and ICTR in relation to securing indicted suspects was not palatable. They have serious difficulty in apprehending indicted perpetrators. For instance, Dragon Nikolic was the first person to be indicted by the ICTY and a warrant of arrest issued against him in 1994 but he was not arrested until six years later, precisely in 2000. General Ratko Mladic was arrested on the 26 May

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109 See for example, Prosecutor v. Kršmanovic and Đakic, (case No: It-96-20), Order for provisional detention.
110 R. Cryer etal, (n87) P. 135
2011, sixteen clear years after being indicted. Radovan Karadzic one of the most prominent indictees was a fugitive for more than a decade and was finally arrested in Serbian in July 2008. Ante Gotovina evaded arrest for years before he was finally arrested in Tenerife (Spain). In the case of the ICTR, the tribunal indicted a total of ninety-five persons (95) and as at December 2015 when the tribunal closed formally, eight persons were still at large as fugitives. The tribunal was set up in 1994. So for 22 years, it could not arrest some indicted perpetrators. This is the pitiable plight of International Criminal Tribunals. The inability of the Courts to apprehend indicted perpetrators has affected in no small way the effective functioning of the courts. The fact that the courts have no mechanism of enforcement impedes on their ability to apprehend perpetrators of atrocious crimes and also limit the deferent effect of the courts.

c) Distant location of the Tribunals
The International Criminal Tribunals are located in places far away from the scenes of the crimes. The ICTY sat in the Hague, Netherlands while the ICTR sat in Tanzania. The locations of these courts undermine their aim of deterrence, diminish their legitimacy and at a practical level, make their operation inefficient. These tribunals are far removed from the people whose behaviour it is intended to influence. Locating the tribunals in another country often result in a feeling of alienation and even resentment. Citizens do not feel vested in the accountability process and consequently, are mostly oblivious of the relevance of the tribunal. Again, locating the seats of these tribunals from the scene of the crime creates logistic and financial challenges for the effective conduct of trials. The conduct of investigation activities and evidence gathering in relation to cases are hindered, transporting of witnesses to attend trials is difficult etc. All these culminate into making the tribunals only able to try or prosecute a handful of perpetrators.

8. CONCLUSION
International Criminal Law has probably reached the end of an era. That era is the era of Ad hoc International Criminal Tribunal. The referral of the situation in Darfur to the International Criminal Court rather than setting up an ad hoc tribunal at the global or local level is a pointer to the new direction of International Criminal Justice. The Ad hoc tribunals were set up with the goal of achieving peace and reconciliation in the Balkans and Rwanda. The tribunals have help to develop the jurisprudence of the International Criminal Court.

International Criminal Law is a relatively new discipline and it does not pretend to be a complete system of criminal law. It is not intended to be a replacement for the totality of domestic criminal law; and there is no reason why it ought to be so. International Tribunals have arisen because of the failure or absence of national justice efforts, but they are not meant to replace them. One of the major roles which International Judicial mechanisms have is the promotion of the effective use of national criminal justice systems. Evolving effective domestic criminal legislation and strengthening the capacity of criminal Justice systems to enable countries prosecute offenders themselves is, therefore, key to closing the impunity gap. As the administration of International Criminal Justice is entering into a new phase as the ad hoc tribunals cease to exist leaving the ICC as the torch-bearer for the cause of International Criminal Justice, this paper recommends that the ICC should take on the central role of expressing the norms of International Criminal Justice and building the capacity of domestic courts of nations to be able to persecute core International crimes.

113 G. Wearle., Principles of International Law, (Tmc Asser, the Hague, 2009) P. 99
115 R. Cryer etal., (n 87) p. 587.
116 Ibid p. 580
117 Ibid.