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Introduction: Atrocity Crimes Litigation During 2007

David Scheffer*

¶1 The significant decisions and judgments produced by the international and hybrid criminal tribunals in recent years have been so voluminous and impressive that they merit an annual scholarly review. It has become quite difficult for any scholar or practitioner of the tribunals, much less the general public, to keep track of the developments in international criminal law—both substantive and procedural—that emerge from the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia (“ICTY”) and Rwanda (“ICTR”), the Special Court for Sierra Leone (“SCSL”), the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), and the permanent International Criminal Court (“ICC”)—to name only the most prominent of the international and hybrid tribunals. In an effort to better understand in real time the rapid developments in international criminal law, we have launched at Northwestern University School of Law an Annual Atrocity Crimes Litigation Year-in-Review Conference, the first being held in January 2008 to review the jurisprudence of the tribunals during 2007.¹ Arising from such conferences each year will

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¹ The Atrocity Crimes Litigation Year-in-Review (2007) Conference, held on January 25, 2008, at Northwestern University School of Law, benefited from the generous financial support of the international law firm, Baker & McKenzie, and from the further funding and leadership of Northwestern Law’s Center for International Human Rights and staff assistance from the *Northwestern University Journal of International Human Rights*. The speakers were Clint Williamson (U.S. Ambassador at Large for War Crimes Issues), Stephen Rapp (Prosecutor of the SCSL), David Tolbert (Deputy Prosecutor of the ICTY), Cherif Bassiouni (Professor, DePaul University College of Law), David Scheffer (Professor, Northwestern University School of Law), and the three individuals whose articles appear in this issue of the *Journal*. The entire video and audio record of the conference is available at www.law.northwestern.edu/humanrights/events.html.

be a series of articles written for the *Northwestern University Journal of International Human Rights* by some of the speakers at the conference (and perhaps others) discussing in greater depth the points they raised in their oral statements and during the conference discussions.

¶2 *Atrocity crimes* is a term I have been introducing since 2001 to describe the corpus of crimes being investigated and prosecuted by the international criminal tribunals, namely genocide, crimes against humanity, and war crimes.² The Northwestern Law annual conference and the *Journal's* associated edition commencing this year employ the term *atrocity crimes* both to simplify the description of what is being covered and to more accurately convey the totality of the crimes being investigated and prosecuted. In my writings I have described the law emerging from the jurisprudence of the tribunals to be *atrocity law*, which is its own unique amalgam of international criminal law, international humanitarian law, international human rights law, the law of war, and criminal law.³

¶3 For this inaugural issue of the *Journal's* coverage of the first such annual conference on atrocity crimes litigation in the United States, the editors solicited and received outstanding articles from three conference speakers: Professor William Schabas of the University of Ireland (Galway) and Director of its Irish Centre for Human Rights, Dr. George William Mugwanya, who is Senior Appeals Counsel of the ICTR, and Ms. Christine H. Chung, Senior Fellow at the Schell Center for International Human Rights at Yale Law School and former Senior Trial Attorney (and most senior American) in the Office of the Prosecutor at the ICC. A thorough reading of their three articles published in this special issue of the *Journal* will leave the reader with an excellent overview (often in considerable depth) of judicial developments in the ICTY, ICTR, SCSL, and ICC. Due to the minimal amount of litigation before the ECCC in 2007, we decided to leave a similar examination of the ECCC jurisprudence to the next annual review (for calendar year 2008, which for the ECCC also will include the Pre-Trial

² See David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389-432 (2002); David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229-50 (2006); David Scheffer, *The Merits of Unifying Terms: 'Atrocity Crimes' and 'Atrocity Law'*, 2 GENOCIDE STUD. & PREVENTION 91-96 (2007).

³ See *id.*

Chambers decisions in 2007).⁴ Further, as noted shortly, there was an important judgment in the International Court of Justice (“ICJ”) bearing upon the crime of genocide and of direct relevance to the ICTY and the future work of the ICC in particular.

¶4 Professor Schabas, who is a world-renowned scholar on the international criminal tribunals and the crime of genocide, sets forth in his article, *International Criminal Tribunals: A Review of 2007*, a highly readable summation of the jurisprudence of the ICTY, ICTR, SCSL, ICC, and the ICJ, which on February 27, 2007, rendered its long-awaited judgment in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.⁵ Schabas explains how dependent the ICJ was on the factual and legal findings of the ICTY, which actually led it to reject a finding of state responsibility for genocide, and yet he stresses the ICJ’s “ambitious interpretative approach to the duty to prevent genocide.”⁶ He finds an important connection between the ICJ’s finding that Serbia failed in its duty to prevent genocide in Bosnia and Herzegovina under the Convention for the Prevention and Punishment of the Crime of Genocide and the emerging doctrine of the responsibility to protect. In *Blagojevic*, the ICTY Appeals Chamber “cited the International Court’s recent ruling as support for the conclusion that ‘displacement is not equivalent to destruction,’ and that acts of ethnic cleansing perpetrated at Srebrenica could not necessarily be taken as evidence of genocidal intent, contrary to what the Trial Chamber had decided.”⁷ As possibly a further sign of the ICJ’s influence, Schabas notes that within days of the ICJ decision, “the ICTY Trial Chamber declined

⁴ For a compilation of the filings before and decisions rendered to date by the ECCC, see the *Cambodia Tribunal Monitor*, a web site managed by the Center for International Human Rights at Northwestern University School of Law and the Documentation Center of Cambodia, available at www.cambodiatribunal.org.

⁵ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, Judgment, 2007 I.C.J. General List No. 91 (Feb. 26).

⁶ William A. Schabas, *International Criminal Tribunals: A Review of 2007*, 6 NW. U. J. INT’L HUM. RTS. 382, 385 (2008). See also David Scheffer, *The World Court’s Fractured Ruling on Genocide*, 2 GENOCIDE STUD. & PREVENTION 123–36 (2007).

⁷ Schabas, *supra* note 6, at 385.

to take judicial notice of the fact that genocide had been committed in Bosnia in 1995.”⁸

¶5 At the SCSL, where historic decisions were rendered in 2007,⁹ Schabas acknowledges the strides made for a balanced approach to prosecutions, with each multiple-defendant trial focusing on one of the major warring parties in the 1990s civil war in Sierra Leone. But in 2007 it became clear that national political sympathies for the Civil Defence Forces in their struggle against the rebel militia were reflected in the sentencing decisions. Specifically, the defense of a democratically elected regime became a mitigating factor despite the commission of atrocity crimes as part of such a defense. Similar issues of balance linger at the ICTR, where the long-awaited prosecution of any of the Rwandese Patriotic Front leaders from 1994 continues unresolved and at the ICC, where there continues to be no interest shown “in pursuing Ugandan officials for crimes committed during the civil war or, for that matter, regarding its military activities in eastern Congo.”¹⁰ Schabas concludes, “Thus, to one extent or the other, it seems that all of the international criminal tribunals have been wrestling with a cluster of issues relating to the motivations of those who perpetrate atrocities. International humanitarian law takes the position that this issue is irrelevant, but it nevertheless rears its head in the exercise of prosecutorial discretion about targeting of investigations as well as in judicial determinations of appropriate sentences.”¹¹

¶6 One of the most significant judgments of 2007 before any of the tribunals was that before the ICTR Appeals Chamber in the so-called Media Trial concerning the use of broadcast and print media to stoke the embers of genocide and fuel the flames once mass killing had begun, as well as the use of political party machines to propagandize genocidal objectives.¹² Between them, Schabas and Dr. Mugwanya, in his article about the ICTR’s 2007 rulings, *Recent Trends in International Criminal Law: Perspectives from the U.N. International Criminal Tribunal for Rwanda*, examine the

⁸ *Id.* at 386.

⁹ See Prosecutor v. Brima (the AFRC Accused), Case No. SCSL-04-16-T, Judgment (Trial Chamber II, June 20, 2007); Prosecutor v. Fofana (the CDF Accused), Case No. SCSL-04-14-T, Judgment (Trial Chamber I, Aug. 2, 2007).

¹⁰ Schabas, *supra* note 6, at 391.

¹¹ *Id.*

¹² Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Appeals Judgment (Nov. 28, 2007).

ICTR Appeal Chamber's lengthy treatment in the Media Trial of the inchoate crime of incitement to genocide (and whether it can be of a continuous character), superior responsibility for genocide, conspiracy to commit genocide, and the crime against humanity of persecution by hate speech. The many reversals of the Trial Chamber's judgment did not liberate the three defendants,¹³ but the Appeals Chamber rulings stimulate a rich discussion by Schabas and Mugwanya about the manifold ways in which the substantive crimes and modes of participation were, one might conclude, radically adjusted by the Appeals Chamber and how dissenting judges provided more than enough to chew on for future litigation.

¶7 Mugwanya also presents a detailed critique of the ICTR's jurisprudence during 2007 on the crime of rape, particularly in the controversial *Muhimana* Appeals Judgment.¹⁴ He is strongly critical of that judgment, in which the defendant's culpability for committing rape was overturned. With respect to extermination as a crime against humanity, Mugwanya criticizes the judgment in *Ndindabahizi*.¹⁵ There, the Appeals Chamber overturned the Trial Chamber and rejected alternative modes of participation (such as instigation and aiding and abetting) for the crime of extermination when the ICTR already has determined the defendant committed extermination, even though he did not physically kill the victims. Mugwanya seeks in vain for a detailed elaboration by the Appeals Chamber of why the defendant's actions amounted to the commission of extermination. He pleads for a rigorous case-by-case examination "to determine whether in a given case, the accused's criminal conduct is inadequately captured by other modes of criminal participation other than commission, or whether his criminal conduct transcended those modes of criminal responsibility . . . so as to constitute commission."¹⁶

¶8 Finally, Ms. Chung doubtless will shake the hornet's nest with her article, *Victims' Participation at the International Crimi-*

¹³ The three defendants in the Media Trial were Ferdinand Nahimana, Jean-Bosco Barayagwize and Hassan Ngeze.

¹⁴ *Muhimana v. Prosecutor*, Case No. ICTR-95-1B-A, Appeals Judgment (May 21, 2007).

¹⁵ *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Appeals Judgment (Jan. 16, 2007).

¹⁶ George William Mugwanya, *Recent Trends in International Criminal Law: Perspectives from the U.N. International Criminal Tribunal for Rwanda*, 6 NW. U. J. INT'L HUM. RTS. 415, 435 (2008).

nal Court: Are Concessions of the Court Clouding the Promise?

There is an understandable but highly disruptive tendency among advocate groups and defense counsel for victims of atrocity crimes to exercise a growing body of presumptive rights before the ICC despite the limited framework for victim participation in judicial proceedings set forth in the Rome Statute and its Rules of Procedure and Evidence. Chung offers a comprehensive, compelling, and much-needed critique of the tendency of certain of the ICC Pre-Trial and Trial Chambers to expand the rights of victims before the Court, in ways that challenge the original intent of the negotiators. As one of those negotiators, I can attest (albeit from the perspective of the U.S. delegation) that Chung is right on target with her analysis of the constitutional framework of the ICC on this issue.

¶9 I will mention here only a few of Chung's points raised in her thorough review of the many issues erupting over the rights of victims before the ICC. She examines in great detail the ICC's decisions of 2006, 2007, and early 2008 on victims' rights and persuasively explains "the repeated disregard of fundamental balances [among the rights of the accused, the prosecution, and the victims] struck during the negotiation of the Rome Statute."¹⁷ She criticizes the overreaching exemplified by the decision to create a general right for victims to participate in the investigation. She reveals the alarming number of, and inability to keep pace with, victim applications to participate, as well as the proliferation of litigation relating to victims' participation which is sapping the talent and resources of the ICC's staff and judges. Chung writes that Trial Chamber I's "decision that an applicant could obtain the potential right to participate at trial, regardless of whether he or she suffered harm from any crime being prosecuted by the ICC, likewise went astray in disregarding a limit: the competence of the Court For Trial Chamber I to permit participation in a trial by victims of crimes other than the only crimes being tried, in essence, arrogated power to the Chamber that it does not possess."¹⁸

¶10 Chung offers a road map to exit the superhighway the ICC is paving for victims' rights, fully recognizing that the interests of the

¹⁷ Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?* 6 NW. U. J. INT'L HUM. RTS. 459, 514 (2008).

¹⁸ *Id.* at 516.

victims of atrocity crimes should remain a high priority for the international community to address. She would disallow victim participation in the investigation based solely on a general interest in investigation, define participation in a case to be limited to victims of charged crimes, enforce more rigorously the requirement that the “proceeding” in question have an effect on “personal interests,” implement a victims’ participation framework that achieves efficiency and promotes greater expression of views and concerns, and explore other important means of expressing victims’ views and concerns and obtaining justice for them.

¶11 It was during the year 2007 that victims’ participation at the ICC practically overwhelmed the judicial task at hand. Chung masterfully explains why that happened, the risks of the ICC continuing along the present evolution of victims’ rights, and how to chart a new course that remains faithful to the constitutional framework of the ICC and to its core mission of bringing the major perpetrators of atrocity crimes to justice.

¶12 Schabas, Mugwanya, and Chung deliver a feast of intellectual and highly pragmatic analyses of the atrocity crimes jurisprudence of 2007. There is more than enough room for reasoned debate about the views expressed in their articles, and that debate will be very well-informed thanks to their scholarship.