ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD pdf

1: Former Presidents | International Criminal Tribunal for the former Yugoslavia

This collection of essays honours Gabrielle Kirk McDonald, the International Tribunal's second President and the presiding judge in the first international war crimes trial in modern times. Written by judges, legal advisers and practitioners, it is the first comprehensive overview of the procedural and evidentiary aspects of the International.

International Criminal Tribunal for the Former Yugoslavia The establishment of the International Criminal Tribunal for the Former Yugoslavia ICTY by the United Nations Security Council in is one of the most significant contemporary developments for the prevention and punishment of crimes against humanity and genocide. Born out of the horrors of ethnic cleansing in the former Yugoslavia, the ICTY successfully prosecuted perpetrators irrespective of rank and official status, and became the first tribunal to prosecute a sitting head of state, Slobodan Milosevic. Against a long-standing culture of impunity that countenanced the likes of Pol Pot , Idi Amin , and Mengistu, it represented a revolutionary precedent that led to the acceptance and proliferation of other international and mixed courts, national trials, and other accountability mechanisms. As a central element of post-conflict peace-building in former Yugoslavia, it also challenged the conventional wisdom of political "realists," who held that accountability and peace are incompatible. Furthermore, ICTY jurisprudence made significant contributions to the law of crimes against humanity and genocide. Creation of the ICTY The unfolding of the atrocities in former Yugoslavia coincided with the end of the cold war and the consequent transformation of international relations. Equally important was the rapid emergence of democratic governments in Eastern Europe , Latin America , and elsewhere in the world, giving human rights an unprecedented prominence. In the Security Council took the unprecedented step of creating a Commission of Experts to investigate humanitarian law violations in the former Yugoslavia. This was an unprecedented use of Chapter VII enforcement powers, and it directly linked accountability for humanitarian law violations with the maintenance of peace and security. This approach was necessary because Yugoslavia was unwilling to consent to an international criminal jurisdiction, because a treaty mechanism was too time-consuming in view of the need for expeditious action, and because the primary objective of the armed conflict was ethnic cleansing and other atrocities committed against civilians. The ICTY Statute is a relatively complex instrument that had to express developments in contemporary international humanitarian law that had evolved over the half-century since the Nuremberg trials. It also had to elaborate the composition and powers of a unique independent judicial organ created by the Security Council. Under the statute, the subject-matter jurisdiction of the ICTY is based on norms that had been fully established as a part of customary international law. Articles 2 and 3 of the statute define war crimes , including violations of the Geneva Conventions and the Hague Regulations respectively. Article 4 reproduces the definition of genocide as contained in the Genocide Convention, and Article 5 defines crimes against humanity based on the Charter of the International Military Tribunal at Nuremberg. Article 7 1 defines the basis for the attribution of individual criminal responsibility, encompassing persons who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" recognized under the statute. Article 7 2 expressly rejects any form of immunity for international crimes, stipulating that "[t]he 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. There is however, no outer temporal limit to jurisdiction. Article 10 provides, however, that the principle of double jeopardy must also be respected, which means that a person may not be tried before the ICTY for crimes already tried before a national court, unless the earlier proceedings were not impartial or independent, or were designed to shield the accused from criminal responsibility, or otherwise not diligently prosecuted. Since its early days, additional judges have been added to the tribunal. Unlike the Nuremberg Tribunal, the ICTY cannot rely on an army of occupation to conduct the investigation or to apprehend accused persons. Specifically, they are obliged to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber" in matters such as the identification and

location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or the transfer of an accused to the ICTY. Such extensive powers derive from the binding character of Chapter VII enforcement measures, and are unprecedented in the history of international tribunals. The judges were then elected by the UN General Assembly. Although the ICTY is a subsidiary judicial organ of the Security Council, the Council has no power to interfere in judicial matters such as prosecutorial decisions or trials. The ICTY Statute and its rules of procedure and evidence contain numerous procedural safeguards to ensure the independence and impartiality of the tribunal, and to guarantee the rights of the accused to a fair trial. In the early days, the Office of the Prosecutor OTP was understaffed and inexperienced; investigators and prosecutors who were familiar only with domestic law enforcement wasted scarce resources investigating low-ranking perpetrators for the direct commission of crimes such as murder, rather than focusing on leadership targets. Although he was a relatively low-profile defendant, his trial created the image of a court in action. Her major accomplishment was in enhancing international cooperation in obtaining intelligence and executing arrest warrants, particularly with NATO countries. Although peacekeeping forces in the former Yugoslavia were initially reluctant to make arrests, it soon became clear that the leaders responsible for inciting ethnic hatred and violence were an impediment to post-conflict peace- and nation-building. This move was initially controversial. In October , Milosevic was indicted for atrocities committed in Bosnia and Croatia. Arbour resigned as prosecutor in , to be replaced by Carla Del Ponte, a Swiss prosecutor renowned at home for prosecuting mobsters. Del Ponte focused heavily on the Milosevic case and on securing the arrest of other indicted leaders, from both Serbia and Croatia. By , the final wave of indictments was issued for atrocities committed in the Kosovo conflict. Many were against Serb military officers, but some were also issued against high-ranking members of the Kosovo Liberation Army for atrocities committed against ethnic Serbs in Kosovo. With the success of the ICTY and the mounting costs of time-consuming international trials, the Security Council called upon the prosecutor to complete all investigations by the end of and for the ICTY to complete trials by the end of As of early , the ICTY prosecutor was not only responsible for trials of crimes committed in the former Yugoslavia, but also for the International Criminal Tribunal for Rwanda. In August , the Security Council decided that the two spheres of responsibility should be split, and appointed a separate prosecutor for the ICTR. Jurisprudence and Legal Developments The jurisprudence of the ICTY has made significant contributions to international law , particularly in honing the definition of crimes against humanity and genocide. In an effort to effectively use its limited resources, ICTY trials were focused on the most serious crimes and on those most responsible for committing them. In practice, this focus was on crimes committed in execution of the ethnic cleansing campaign that amounted to crimes against humanity and, in certain important aspects, genocide. In order to ensure an appearance of impartiality, there were indictments not only against ethnic Serbs, but also against ethnic Croats, Muslims, and Kosovar Albanians. Furthermore, while focusing on those in leadership positions, certain prosecutions focused on issues of particular importance, such as the systematic use of rape as a weapon of war, and the destruction of cultural property. This prosecutorial strategy influenced and shaped the jurisprudence of the ICTY. This trial involved significant pronouncements on international humanitarian law, but the case is best known for its jurisprudence on the jurisdiction of the ICTY. Appeals chamber president Antonio Cassese heard these arguments, and held that the establishment of a judicial organ was a valid exercise of the powers of the Security Council, in accordance with Chapter VII of the Charter of the United Nations. He also found that the ICTY was duly established by law in the international context because its standards conformed with the rule of law, there being no analogue to a legislature in the UN system. The appeals chamber also rejected challenges to the primacy of ICTY over national courts, based on the overriding interest of the international community in the repression of serious humanitarian law violations. The case revolves around the refusal of the Croatian government to comply with orders for the production of evidence issued by an ICTY Trial Chamber. The Appeals Chamber also held that the failure of a state to comply with orders of the court could result in a charge of noncompliance against the state or its agent , which could then

be turned over to the UN Security Council for further action. Rule 55 obligates states to execute arrest warrants. The most significant cases on arrest powers were Prosecutor v. In both cases, the defendants alleged that they had been arrested through either abduction or duplicity in legal terms, the charge is called "irregular rendition". The defendants argued that the nature of their arrests should preclude the ICTY from exercizing jurisdiction over them. At least one of the arrests had, in fact, involved subterfuge. He based his appeal against his arrest on the grounds that the sovereignty of the Federal Republic of Yugoslavia was violated by his abduction, and that his rights were violated in a manner sufficiently serious to warrant discontinuance of proceedings. The Appeals Chamber held that state sovereignty does not generally outweigh the interests of bringing to justice a person accused of a universally condemned crime, especially when the state itself does not protest. Crimes Against Humanity The definition of crimes against humanity found in Article 5 of the ICTY Statute is based on the Nuremberg Charter, but it incorporates enumerated acts such as imprisonment, torture, and rape, which were not included in the charter. Furthermore, while the Charter required that crimes against humanity be linked to an international armed conflict, the ICTY Statute also includes internal armed conflicts. The defendant maintained that prosecution of crimes against humanity in the former Yugoslavia deviated from customary international law because the conflict was not international in character, as required by the Nuremberg Charter. Being that there was no existing law extending jurisdiction to the ICTY, the defense argued, there could be no legitimate charge of criminal action. The Appeals Chamber rejected this submission, however, commenting that customary law had evolved in the years since Nuremberg, and stating that the need for a connection to international armed conflict was no longer required. In fact, it argued that customary law might recognize crimes against humanity in the absence of any conflict at all. This precedent helped persuade the drafters of the Rome Statute of the International Criminal Court to omit a requirement of a connection with armed conflict in the definition of crimes against humanity under its Article 7. Thus, under contemporary international law, atrocities committed outside the context of armed conflict also qualify as crimes against humanity, and this has resulted in a significant expansion of the protection afforded by this norm. According to the ICTY, a crime against humanity is committed when an enumerated offence is committed as part of a widespread or systematic attack directed against a civilian population. ICTY jurisprudence has elaborated upon what is meant by a "widespread or systematic" attack. While it does not necessitate that the entire population of a given state must be targeted, it does refer to collective crimes rather than single or isolated acts. A finding either that the acts were committed on a large scale widespread , or were repeatedly carried out pursuant to a pattern or plan systematic , is sufficient to meet the requirement that they be committed against a population. It is the large number of victims, the exceptional gravity of the acts, and their commission as part of a deliberate attack against a civilian population, which elevate the acts from ordinary domestic crimes such as murder to crimes against humanity, and thus a matter of collective international concern. ICTY jurisprudence has also expanded the definition of potential victim groups vulnerable to crimes against humanity. This is done through its interpretation of the requirement that attacks must be "directed against any civilian population. ICTY jurisprudence has also affirmed that crimes against humanity may be committed by people who are not agents of any state, thus broadening the ambit of possible perpetrators to include insurgents and terrorists. This definition was adopted in Article 7 of the Rome Statute, which requires that an attack be "pursuant to or in furtherance of a State or organizational policy. For an act to be termed a crime against humanity, the perpetrator must not only meet the requisite criminal intent of the offence, but he must also have knowledge, constructive or actual, of the widespread or systematic attack on a civilian population. This requirement ensures that the crime is committed as part of a mass atrocity, and not a random crime that is unconnected to the policy of attacking civilians. ICTY jurisprudence has held that this requirement does not necessitate that the accused know all the precise details of the policy or even be identified with the principle perpetrators, but merely that he be aware of the risk that his act forms part of the attack. ICTY jurisprudence has also developed definitions of the enumerated offences included under the rubric of crimes against humanity. These include extermination, enslavement, forced deportation, arbitrary

imprisonment, torture, rape, persecution on political, racial, or religious grounds, and other inhumane acts. In addition, it has further sharpened the definition of genocide itself. Unlike genocide, however, extermination "may be retained when the crime is directed against an entire group of individuals even though no discriminatory intent nor intention to destroy the group as such on national, ethnical, racial or religious grounds" is present. Kunarac et al, the Trial Chamber similarly contributed to the definition of the elements that make up the crime of enslavement. It held, that the criminal act consisted of assuming the right of ownership over another human being, and that the mental element of the crime consisted of intentionally exercising the powers of ownership. The victim is not permitted consent or the exercise of free will. Threats, captivity, physical coercion, and deception, are but four such ways. Even psychological pressure is recognized as a means of enslavement. Enslavement also entails exploitation, sometimes but not necessarily always involving financial or other types of gain for the perpetrator. Forced labor is an element of enslavement, even if the victim is nominally remunerated for his or her efforts. Important to note is that simple imprisonment, without exploitation, can not constitute enslavement. The ICTY Statute lists deportation as a crime against humanity, but goes on to specify that such deportation must be achieved under coercion. According to the statute, deportation is the "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. Deportation requires a population transfer beyond state borders, whereas forcible transfer involves internal population displacements. Both types of forced population movements were nonetheless recognized as crimes against humanity under customary law. In other words, they must be driven by force or threats or coercion which go beyond a fear of discrimination, and that there be no lawful reason for ordering the transfer, such as for the protection of the population from hostilities. However, such imprisonment must be arbitrary, without the due process of law. Further, it must be directed at a civilian population, and the imprisonment must be part of a larger, systematic attack on that population. ICTY jurisprudence also redressed a long-standing omission in humanitarian law, because prior to its rulings, a clear, explicit definition of torture had yet to be formulated. Ultimately, the Trial Chamber determined that torture:

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2: Essays on ICTY Procedure and Evidence

This collection of essays honours Gabrielle Kirk McDonald, the International Tribunal's second President and the presiding judge in the first international war crimes trial in modern times. Written by judges, legal advisers and practitioners, it is a comprehensive overview of the procedural and evidentiary aspects of the International Tribunal.

Includes bibliographical references and index. A Biographical Note-- R. Is defective composition a matter of lack of jurisdiction within the meaning of Rule 72? When the Statute and Rules are silent: The Presidency and Judges. The Office of the President: La competence du President quant aux questions relatives au quartier penitentiaire et son role en matiere de controle et de detention-- J. Judicial independence -- impartiality and disqualification-- H. Legal requirements for indictments-- M. The right of the accused to an expeditious trial-- H. Provisional release at the ICTY: Rule 89 c and D: Ensuring a fair trial whilst protecting victims and witnesses -- balancing of interests? Resitution of property and compensation to victims-- S. Power of Chambers to control proceedings. Of misconduct, contempt, false testimony, Rule mutations and other interesting powers: Non-compliance with the Rules of Procedure and Evidence-- S. State co-operation and compliance issues. Additional evidence in the appeals proceedings and review of final judgement-- Y. Are administrative decisions from the Registry appealable? Review and enforcement of sentences. State request for review-- N. Enforcement of sentences-- D. The Outreach Programme-- L. These essays should be of assistance to all those who are following the work and development of the International Tribunal, particularly practitioners, academics, and students. This collection thus contributes to the literature on the International Tribunal and is a tribute to President McDonald and her work. Nielsen Book Data Subjects Subject.

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3: Florence Mumba | Ad Hoc Tribunals Oral History Project | Ethics Center | Brandeis University

Essays on ICTY procedure and evidence in honour of Gabrielle Kirk McDonald. of Procedure and Evidence of the ICTY: development of the `flexibility principle'; G.

A Biographical Note; R. Is defective composition a matter of lack of jurisdiction within the meaning of Rule 72? When the Statute and Rules are silent: The Presidency and Judges. The Office of the President: La competence du President quant aux questions relatives au quartier penitentiaire et son role en matiere de controle et de detention; J. Judicial independence -- impartiality and disqualification; H. Legal requirements for indictments; M. The right of the accused to an expeditious trial; H. Provisional release at the ICTY: Rule 89 c and D: Ensuring a fair trial whilst protecting victims and witnesses -- balancing of interests? Resitution of property and compensation to victims; S. Power of Chambers to control proceedings. Of misconduct, contempt, false testimony, Rule mutations and other interesting powers: Non-compliance with the Rules of Procedure and Evidence; S. State co-operation and compliance issues. Additional evidence in the appeals proceedings and review of final judgement; Y. Are administrative decisions from the Registry appealable? Review and enforcement of sentences. State request for review; N. Enforcement of sentences; D. The Outreach Programme; L.

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4: Extraordinary Chambers of the Courts of Cambodia | Human Rights Watch

This collection of essays honours Gabrielle Kirk McDonald, the International Tribunal's second President and the presiding judge in the first international war crimes trial in modern times.

November 17, 7: We hope that our views may assist in revising the rules in such a way that they will conform more closely to international fair trial standards. The three areas of concern we wish to address are: However, it also indicates a dispute over this provision exists between the national law judges and the international law judges. This is not meant to be a comprehensive analysis of the issues surrounding trials in absentia, but it does provide some background on the manner in which other legal systems treat the issue. We believe that allowing trials in absentia would seriously undermine the work of the Extraordinary Chambers by casting doubt upon the credibility of the process itself. Trials in absentia compromise the ability of an accused to exercise his or her rights under article 14 of the International Covenant on Civil and Political Rights ICCPR , a treaty which binds Cambodia. The potentially compromised rights include the right to be present during the trial, the right to defend his or her self through counsel of choice, and the right to examine witnesses. Moreover, since the creation of the ad hoc court for the former Yugoslavia, all international and mixed tribunals have rejected trials in absentia, making it clear there is an increasing international acceptance of a standard prohibiting these sorts of proceedings. International Criminal Tribunals The various international tribunals set up to prosecute violations of international criminal law have all dealt with the issue of trials in absentia. One can observe in their practices a definite trend toward disallowing trials in absentia. International Criminal Court "ICC" The Rome Statute of the International Criminal Court, adopted on July 17, , established international standards for the conduct of trials for international crimes such as genocide, war crimes, and crimes against humanity. Article 63 of the Rome Statute for the ICC prohibits trials in absentia except in the narrow circumstances described below. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required. These delegations believed that trials in absentia would degenerate into show trials and would quickly discredit the ICC. A second group believed trials in absentia were of little practical value because the accused would have the right to a new trial upon appearance before the court. A third group believed that due to the nature of the crimes in the statute, it would often be impossible to compel the appearance of the accused. Thus, for the court to promote peace, justice, and reconciliation, it would be necessary to hold trials in the absence of the defendants. The first view prevailed. Article 20 of the ICTR Statute provides that the accused has the right, "to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing. The drafters of the statute for the ICTY specifically rejected the French recommendation to allow proceedings in absentia with an automatic retrial when the accused is arrested. There is a widespread perception the trials in absentia should not be provided for in the statute [of the International Criminal Court for the former Yugoslavia] as this would not be consistent with Article 14 of the International Covenant of Civil and Political Rights, which provides that the accused should be tried in his presence. Delalic, the defendant was not present one morning for unknown reasons and also had not explicitly waived through his counsel his right to be present. In that case, there were multiple defendants, and the Office of the Prosecutor proposed tendering documents as a group and allowing the defense to object later. Rejecting that idea, the court adjourned finding that the right to be present at trial is virtually absolute in the absence of a clear waiver. Article 17 4 d of the Statute of the Special Court for Sierra Leone also provides that the accused shall have the right "to be tried in his or her presence. Interim Administrations In East Timor, the transitional courts operate under rules requiring the accused to be present at trial. Article 30 of the Transitional Rules of Criminal Procedure provides that the accused must be present during the trial. Article 5 1 states that "[n]o trial of a person shall be held in absentia, except in the circumstances defined in the present regulation. Article 14 3 d of the International Covenant on Civil and Political Rights states that everyone shall be entitled "[t]o be tried in

his presence, and to defend himself in person or through legal assistance of his own choosing. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defense is all the more necessary. Article 6 3 of the European Convention on Human Rights and Fundamental Freedoms specifies that everyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing On 1 July , a new Code of Criminal Procedure came into effect which-in contrast to previous law and practice-forbids any type of trial in absentia. According to Dmitri N. He or she could, among other things, challenge the conclusions of the expert witnesses and the depositions of the ordinary witnesses, call witnesses for the defense and request a confrontation with the victims. It held the "capital importance that a defendant should appear" applies to both criminal courts and assize courts. First, a defendant must have notification of his or her impending trial. Common Law Trials in absentia are generally not allowed in common law jurisdictions. For example, the United States Supreme Court has found that when a defendant is absent from the commencement of the trial, he or she cannot be tried in absentia because an accused has a right to be present at every stage in a proceeding. We believe the process by which alleged perpetrators of serious crimes are brought to justice will have a real impact on ending impunity for these crimes. If the process is viewed as unfair, this perception will create an additional obstacle to a society transitioning to one characterized by the rule of law and respect for human rights. Independence of the Defense Office and Victims Office Proposed rules 12 3 and 13 3 present alternative propositions for the registration of foreign attorneys who may appear as counsel for the defense or for victims. The first proposition is "Lawyers admitted to practice law in a foreign country shall register with the Bar Association of the Kingdom of Cambodia in a special list which recognizes the right to represent clients before the ECCC as co-lawyers. Human Rights Watch strongly favors allowing the Defense Office or Victims Unit to control the list of approved lawyers rather than involving the Bar Association. Our experience with other courts comprised of both national and international staff indicates that allowing the defense office and the victims office to control who is on the list of approve lawyers ensures independence and increases the likelihood that the lists will contain qualified lawyers. It also guards against the possibility that registration will be manipulated for political reasons by outside parties. Subject to verification by the Registrar, a counsel shall be considered qualified to represent a suspect or accused, provided that he has been admitted to the practice of law in a State and practiced criminal law for a minimum of five years. The Special Court for Sierra Leone was the first court Human Rights Watch examined in which it was contemplated that national and international lawyers would work together representing defendants. In our report on the court, we noted that the experience of the ad hoc tribunals demonstrated that investigating, prosecuting, and defending cases involving serious crimes present significant challenges due to the complex issues involved, the evolving nature of international criminal law and trial practice, the need for appropriate treatment of witnesses and victims, and the emotionally charged nature of the proceedings. Because some members of the defense team may not have any previous experience in international criminal law, we found that training for defense counsel and investigators was vital to ensuring quality representation. In our report we recommended that the Defense Office hold mandatory trainings regularly for defense counsel on issues including substantive international law and treatment of witnesses and victims. War Crimes Chamber in Bosnia and Herzegovina The War Crimes Chamber, which was established in early , provides an excellent example of the function of a defense counsel office. As at the ECCC, the Criminal Defense Unit in Bosnia is charged with the responsibility of providing training courses for advocates seeking to fulfill the criteria for inclusion on the list and continuing their professional training. Allowing the defense office this degree of control over the quality of defense counsel promotes effective representation of defendants in war crimes cases. Although article 19 4 d of the Iraqi High Tribunal Statute permits an accused to hire a non-Iraqi lawyer provided the principal lawyer is Iraqi, the pre-existing Iraqi Law of the Legal Profession required non-Arab lawyers seeking to appear before an Iraqi court to obtain approval from the Ministry of Justice. Indeed the Minister of Justice at one point repeatedly stated he would refuse to approve non-Arab foreign lawyers who sought to appear in the trial. Furthermore,

the confusion resulted in delays in the appointment of defense counsel. The negative experience at the Iraqi High Tribunal, in contrast to the positive experience at the Bosnian War Crimes Chamber, demonstrates the importance of allowing the Defense Office or the Victims Unit to retain control over the accreditation of lawyers appearing before the ECCC. Ceding that role to outside parties, who may have different agendas, has potentially disastrous implications. Public Hearings The ECCC draft internal rules should include more unambiguous language favoring public hearings, particularly in the pre-trial phase. The right to a public trial is a fundamental safeguard of criminal procedure well-established in international human rights law. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6 1 , namely a fair trial. However, it is also in the interest of judicial authorities to work in this manner so that they will retain popular confidence. The value of a public trial has been summarized as being to "ensure fairness to the defendant, maintain public confidence in the criminal justice system, provide an outlet for community reaction to crime, ensure that judges and prosecutors fulfill their duties responsibly, encourage witnesses to come forward, and discourage perjury. ICTY Appeals Chamber Judge Florence Mumba asserts that even though article 14 of the ICCPR allows for exceptions to the right of the accused to a public trial, public hearings have proven to be an important element of a legitimate judicial system. She finds that public hearings "ser ve an important educational purpose, by helping people understand how the law is applied to facts that constitute crimes, acting as a check on "framed" trials, and giving the public a chance to suggest changes to the law or justice system. First, even though rules 83 and provide a presumption of public hearings during the trial and appeal proceedings except where public order and victim protection might be prejudiced, there is no such presumption during the entire Pre-Trial phase. Rule 77 explicitly states that all pre-trial appeal and petition hearings shall occur in camera, while rule 18 states that hearings on disagreements between co-investigating judges will also be in camera, unless the disagreement related to a decision against which a party to the proceedings would have the right to appeal to the Pre-Trial Chamber under the rules. In the latter situation, the chamber could still reject the request, but no reasons are specified for why the chamber could be allowed to deny a public hearing. At a minimum, rule 18 should give specific instances of when the chamber might be able to deny a public hearing where the decision affects a party to the proceeding. In other rules the ECCC does not explicitly deny public hearings, but is unclear as to whether they would be allowed. For example, rule 7 on the recusal and disqualification of judges and rule 66 on the provisional detention of the accused are unclear as to whether they are open hearings. In both instances, the ECCC should consider unambiguously providing for a public hearing as these are issues that are of material interest to the public and affect the integrity of the process. The reforms adopted by the French Parliament, Loi of 15 June , exemplify the growing appreciation of the importance of the right of the accused to a fair and equitable criminal process within civil law systems. Influenced by the jurisprudence of the European Court of Human Rights, "notions of equality of arms and of open debate are increasingly cited as guarantees of fairness and incorporated into the various stages of criminal procedure" within the French legal system. Human Rights Watch believes the ECCC should revise the aforementioned rules and provide a presumption that hearings are public during the pre-trial phase, in the same way as it does for the trial and appeal phases. In a civil law system where many key decisions are decided during the pre-trial phase it is particularly important that the proceedings be accessible and transparent to the public wherever possible. The exclusion of the public should be strictly limited to the extent necessary to protect the interests of victims and justice. The ICTY has supported this, explicitly stating that the determination of how the balance is struck should be made on a case-by-case or individual basis for each witness, thus implying that "blanket" bans on non-public hearings are impermissible.

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5: School of Law, Tsinghua University

Essays on ICTY procedure and evidence in honour of Gabrielle Kirk McDonald. McDonald, Gabrielle Kirk. on ICTY procedure and evidence in honour of Gabrielle.

He was first elected to the Tribunal in and re-elected in He was also engaged in the initial appearance and pre-trial preparation and disposal of several other cases. Presently, he is presiding over multiple appeal matters. In and , on behalf of the Tribunal he has coordinated and brought to a conclusion the drafting of the Rules of Procedure and Evidence of the Mechanism for International Criminal Tribunals which were submitted to and accepted by the UN Security Council, and later adopted by the judges of the Mechanism. In he was elected a Judge of the Mechanism. He served another two consecutive terms as President of the Tribunal between 17 November and 16 November Judge Meron is currently serving as President of the Mechanism for International Criminal Tribunals Mechanism , a position to which he was first appointed by the United Nations Secretary-General effective 1 March He was appointed to a new term as President of the Mechanism effective 1 March A leading scholar of international humanitarian law, human rights, and international criminal law, Judge Meron wrote some of the books and articles that helped build the legal foundations for international criminal tribunals, and he has contributed to the development of international law, and especially international humanitarian and criminal law, in a variety of fora. Judge Meron received his legal education at the Universities of Jerusalem, Harvard where he received his doctorate , and Cambridge. He immigrated to the United States in In , he was named Charles L. In , he served as a member of the U. Delegation to the Rome Conference on the Establishment of an International Criminal Court ICC , where he was involved in the drafting of the provisions on crimes, including war crimes and crimes against humanity. He has also served on the Preparatory Commission for the Establishment of the ICC, with particular responsibilities for the definition of the crime of aggression. Since , Judge Meron has been a visiting professor of international criminal law at the University of Oxford. He donates his Oxford salary to the University, which has enabled the establishment of an internship fund for Oxford students at the Mechanism. A frequent contributor to the American Journal of International Law and other legal journals, Judge Meron is the author of more than articles in legal publications. The View from the Bench: In addition, he was assigned to sit on the Appeals Chamber in several cases, including the Appeals Chamber of the International Criminal Tribunal for Rwanda. A graduate teacher of English from to , Judge Robinson went on to begin a long and distinguished career in public service, working for the Jamaican government during three decades. He played a leadership role on several items in the Committee, including the definition of aggression and the draft statute for an international criminal court. Judge Robinson has been a member of numerous international bodies. As a member of the Inter-American Commission on Human Rights from to , and its Chairman in , he contributed to the development of a corpus of human rights laws for the Inter-American System. As a member of the International Law Commission from to , he served on the Working Group that elaborated the draft statute for an international criminal court. He represented Jamaica at all sessions of the Third United Nations Conference on the Law of the Sea and was accredited as an ambassador to that conference in He holds a B. He had previously served as the Vice-President between March and November Judge Pocar has been a Tribunal judge since 1 February Judge Pocar has a long standing experience in UN activities, in particular in the field of human rights and humanitarian law. He has served for 16 years as a member of the Human Rights Committee under the International Covenant on Civil and Political Rights and has been its Chairman and Rapporteur He has also chaired the informal working group that drafted, within the Commission on Human Rights, the Declaration on the rights of people belonging to national or ethnic, religious or linguistic minorities, that was adopted in by the General Assembly. Since his appointment to the ICTY, Judge Pocar has served as a Judge in a Trial Chamber, where he sat on the first case concerned with rape as a crime against humanity, and in the Appeals Chamber of the Tribunal, where he is still sitting. Originally appointed a Tribunal judge in January ,

he played an important role in the establishment and later the implementation of the entire spectrum of procedures at the ICTY. He joined the central Administration of the Ministry of Justice and, at the same time, taught at the School of Law at the University of Paris. At the ICC he served as presiding judge in the first confirmation of charges in a case before that court. In , he resigned from the ICC for reasons of permanent ill-health. Judge Jorda has contributed to various specialist legal publications on human rights and international humanitarian law and has written extensively on the role of victims and on the development of international criminal law. In , she set up a law firm in Houston, Texas with her then husband, and specialised in employment discrimination cases against major corporations and labor unions. She also taught law at the same time. In , Judge McDonald was nominated to serve on the U. District Court for the Southern District of Texas, as only the third African American woman to be appointed to the federal judiciary in the United States. In one of several high profile cases, despite death threats to herself and her family, she ruled in favor of Vietnamese fishermen who had sued the Ku Klux Klan for harassment and intimidation. She resigned from the court in to resume private practice and the teaching of law. In those uncharted early years he was one of the key persons who won the necessary political and financial support for the Tribunal and turned it from a court on paper to a functioning international judicial institution. After his tenure as President, Judge Cassese continued to sit as a Tribunal judge until February He participated in all the landmark judgements and decision rendered by the Appeals Chamber during his time at the ICTY. Professor of International Law at the University of Florence since , Judge Cassese has published extensively on issues of international human rights and international criminal law. He resigned on 9 October , on health grounds. Judge Cassese died on 22 October

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