

**The United Nations *ad hoc* Tribunals’
effectiveness in prosecuting
international crimes**

by

Etienne Mutabazi

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Supervisor: **Professor André M B Mangu**

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Declaration

Student number: **35644567**

I declare that **The United Nations *ad hoc* Tribunals' effectiveness in prosecuting international crimes** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Mr. Etienne Mutabazi

DATE

Abstract

During the 1990s Yugoslavia and Rwanda were swept by wars accompanied by serious violations of international humanitarian law. Grave and severe crimes wiped away lives and destroyed properties. The United Nations Security Council determined that the violations committed constituted threats to international peace and security, declaring itself empowered to take action. It established international *ad hoc* criminal tribunals for Yugoslavia and Rwanda with the mandate of prosecuting individuals responsible for those crimes as an enforcement measure under Chapter VII of the United Nations Charter. Investigating the tribunals' effectiveness enables one to assess whether they achieved the anticipated outcomes based on the tribunals' mission, goals, and objectives without creating other problems.

The research relies on naturalism and positivism to put the tribunals in a moral and ethical perspective. By examining how the tribunals were established, their objectives, the investigation and prosecution processes, the reliance on guilty plea and judicial notice and the imputation of criminal responsibility by applying joint criminal enterprise and command responsibility doctrines; the study argues that prosecution has not been an effective tool as contemplated by the Security Council.

An analytical and comparative review of various domestic and international legal resources helped to provide an insightful approach for an effective prosecution of international crimes. Credible, legitimate and legal judicial institutions in which professional judges and prosecutors discharge their function independently, impartially and are accountable may achieve justice for the victims of international crimes. *Ad hoc* tribunals failed to thoroughly investigate and assume the dual role of prosecution. They conveniently used legal procedural tools that fit petty domestic crimes; unfortunately demeaning the magnitude of international crimes of concern. Criminal responsibility was mostly imputed without properly scrutinising the legality, extent, actual participation and guilty mind of the alleged perpetrators. Effectiveness should be a value assessment. Imposed and overburdened *ad hoc* tribunals are inappropriate and should be abandoned.

Key words

Command responsibility – Effectiveness – Ethics - Guilty plea – International crimes - International tribunal – Investigations - Joint criminal enterprise - Judicial notice - Prosecution

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List of acronyms

A	<i>Ad hoc</i> tribunals' case at Appeals level
ABA	American bar Association
AC	Appeals Chamber
B.C	Before Christ
DPP	Director of Public Prosecution
Dr.	Doctor
DRC	Democratic Republic of Congo
Ed.(s)	Editor(s)
ESM	Ecole Supérieure Militaire (Rwandan Military Academy)
et al.	And others
EU	European Union
FRY	Federal Republic of Yugoslavia
ICC	International Criminal Court
ICJ	International Court of Justice
ICT	International Criminal Tribunal
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
Id.	Idem
IDEA	International Institute for Democratic and Electoral Assistance
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
Iss.	Issue
JNA	Yugoslav People's Army (translated from Slav)
KLA	Kosovo Liberation Army

Mr.	Mister
MRND	Mouvement Révolutionnaire National pour le Développement (Rwandan Ruling party until 1994)
NADEL	National Association of Democratic Lawyers
NATO	North Atlantic Treaty Organisation
NGO	Non Governmental Organisation
No.	Number
Op.cit.	Opere citato
OSCE	Organisation for Security and Cooperation in Europe
OTP	Office of the Trial Prosecutor
p.	Page
Para(s).	Paragraph(s)
PDK	Party of Democratic Kampuchea
pp.	Pages
RAF	Rwandan Armed Forces
Res.	Resolution
RPA	Rwandan Patriotic Army
RPF	Rwandan Patriotic Front
SCCC	Special Chambers in the Courts of Cambodia
SCSL	Special Court for Sierra Leone
SFRY	Socialist and Federal Republic of Yugoslavia
ss.	And following
T	<i>Ad hoc</i> tribunals' case at Trial level
TC	Trial Chamber
TRC	Truth and Reconciliation Commission
UK	United Kingdom
UN	United Nations
UN/IFOR	United Nations Implementation Force
UNAMIR	United Nations Assistance Mission for Rwanda

UNDF	United Nations Detention Facilities
UNSC	United Nations Security Council
UNTAC	United Nations Transitional Authority in Cambodia
UNTATL	United Nations Transition Authority in Timor Leste
Ref.	Reference
US	United States (of America)
Vol.	Volume

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CHAPTER ONE: INTRODUCTION

1.1. Subject – matter and scope

The topic of this research is “The United Nations *ad hoc* Tribunals’ effectiveness in prosecuting international crimes.” The tribunals of concern are the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The major research problem is whether the two United Nations (UN) *ad hoc* tribunals have been effective in their task or whether they have failed. Questioning the effectiveness of the *ad hoc* tribunals becomes an exercise that contrasts the stated purposes for which the tribunals were established, the outcome results of their work, and their legacy. According to Julnes “an effective programme achieves the desired outcomes, which typically follow from the programme’s mission, goals, and objectives without creating other problems.”¹

Punishing individuals for international crimes is not a new phenomenon. Among previous undertakings, history reckons the establishment of the International Military Tribunal (IMT) by the Allies after the end of World War II to prosecute Nazi criminals of occupied Germany. Other prosecutions took place in the Far East under the International Military Tribunal for the Far East (IMTFE) and military commissions. These tribunals set legal precedents, some of which benefited the *ad hoc* tribunals. They were created by the victorious nations of World War II. The ICTY and ICTR were established by the UNSC binding resolutions as means, short of use of armed forces, to perform its primary mandate of restoring and maintaining international peace and security. For all purposes therefore the decision to establish *ad hoc* tribunals was a political one but with legal implications. The ICTY and ICTR were novel compared to their predecessors, namely the IMT and IMTFE, and military commissions.

In recent years, the world also witnessed the creation of hybrid tribunals like in East Timor by the UN Transition Authority in Timor Leste (UNTATL), the Special Court for Sierra Leone (SCSL), and the Special Chambers in the Courts of Cambodia (SCCC). National prosecutions

¹ Julnes Patricia de Lancer, “Productivity and Effectiveness”, in *Encyclopedia of Public Administration and Public Policy*, 2nd Edition, Taylor and Francis, New York, 2011, pp. 1575 – 1578, p. 1575

of an international character were also undertaken by the Special Tribunal for Lebanon. Finally the states assembled in Rome to establish a treaty-based permanent International Criminal Court (ICC).

The ICTY and ICTR are “extremely important cases to examine, especially when looking at the effectiveness of international courts, as their establishment is considered to be among the most important contributions to international criminal law.”² In fact the work of *ad hoc* tribunals is believed to have provided groundwork for the development of international criminal law. The tribunals’ work has now become a strong foundation for future international crimes institutions. The work also opens opportunities to fill the gaps that the tribunals left behind. The word “effectiveness” is therefore purposely chosen in the title of this research to cover all kinds of triumphs and tribulations encountered by the *ad hoc* tribunals. *Ad hoc* tribunals must be evaluated having in mind how and why they come into existence. The feasibility and clarity of the tribunals’ goals and objectives must be investigated. The goals may be dubious; yet the institution exists and works. Questioning the quality of the work is another exercise.

For the *ad hoc* tribunals, the question revolves around the way they investigate and prosecute the crimes that are material to their mandate. There are rules of procedure and evidence criminal courts use to discharge their prosecutorial functions. *Ad hoc* tribunals relied heavily or unwarrantedly on guilty pleas and judicial notices among many other techniques. Are these methods commensurate with the serious crimes the *ad hoc* tribunals had the responsibility to prosecute?

After some analysis, it will appear that these techniques are not appropriate methods to adjudicate grave crimes of international concern. In the same reasoning, the role of the individual in the commission of the crimes is misrepresented by the reliance on the doctrines of joint criminal enterprise and command responsibility. Joint criminal enterprise overstates the individual participation in a crime.

² Croket Sophie, “Are International Courts Effective?”, November 27, 2011, available at <http://www.e-ir.info/2011/11/27/are-international-courts-effective/>, accessed on 8 October 2012

Assessing the extent of an individual accused of the gravest crimes helps to take measures aimed at preventing such occurrences in the future. *Ad hoc* tribunals privileged the concept of command responsibility to attribute liability to offenders in positions of authority. Yet, some states have been reluctant to apply the concept to punish the crimes committed by their own troops. Though this reluctance may be politically motivated, it nevertheless bears serious implications in terms of the development of the doctrine of command responsibility internationally.

Carroll questions what is to be done in the aftermath of mass atrocities. She seeks to understand the most effective way of achieving justice for the victims and survivors, holding individuals accountable, deterring future mass atrocities, and establishing lasting peace.³ She suggests that given the scope of the problem, there are no easy solutions.⁴ Specifically *ad hoc* tribunals are not the solution. The degree to which the ICTR prosecuted genocide, crimes against humanity and violations of article 3 common to the Geneva Convention and Additional Protocol II, as provided for in Article 1 of its Statute⁵ is not satisfactory. The ICTY did not set a commendable jurisprudence to prosecute the grave breaches of the Geneva Conventions of 1949⁶, violations of the laws and customs of war,⁷ and genocide.⁸

In order to evaluate the effectiveness and impact of the *ad hoc* tribunals, it is important to consider what the UNSC had in mind when it passed resolutions 827(1993) and 955(1994). There are doubts that the Council had the power to take such a move. The Council advanced that it was a way of performing its own mandate of maintaining international peace and security. The objectives the Council had in mind are found in the introductory part of

³ Carroll M. Christina, “An assessment of the role and effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan national justice system in dealing with the mass atrocities of 1994”, *Boston University International Law Journal*, Vol. 18, 2000, pp. 163 – 200, p.164

⁴ *Idem*

⁵ Article 1 of the ICTR Statute says:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

⁶ Article 2 of the ICTY Statute

⁷ Article 3 of the ICTY Statute

⁸ Article 4 of the ICTY Statute

Resolution 827(1993) that established the ICTY and Resolution 955(1994) that created the ICTR. The first ICTY annual report also provides, under the principal objectives, that “the purposes of the Tribunal have been laid down in Security Council Resolution 808(1993) and, in even more detailed form, in Security Council resolution 827(1993). They are threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace.”⁹

According to Resolution 827(1993), the UNSC expressed a “grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring in the territory of the former Yugoslavia.”¹⁰ The Council then determined that the situation “continues to constitute a threat to international peace and security.”¹¹ In Rwanda likewise, the Council expressed “its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of [international humanitarian law] have been committed in Rwanda.”¹² It held that the situation also constituted a “threat to international peace and security.”¹³

By establishing an international criminal tribunal “in the particular circumstances of the former Yugoslavia”¹⁴, the Council aimed at putting “an end to such crimes and to take effective measures to bring to justice the persons who are responsible for [the crimes]”¹⁵, and that such a measure “would contribute to the restoration and maintenance of peace.”¹⁶ On Rwanda, the UNSC was “determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.”¹⁷ Moreover, the prosecution of those persons responsible “in the particular circumstance of Rwanda [...], would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration

⁹ *Report of the International Tribunal for the Prosecution of persons responsible for serious violations of International Humanitarian Law committed in the territory of the Former Yugoslavia since 1991*, A/49/342, S/1994/1007, (Hereinafter referred to as ICTY Annual Report 1994) 29 August 1994, para 11

¹⁰ Resolution 827(1993), adopted by the Security Council at its 3217th meeting, on 25 May 1993, S/RES/827(1993), 25 May 1993

¹¹ *Ibidem*

¹² Resolution 955(1994), adopted by the Security Council at its 3453rd meeting, on 8 November 1994, S/RES/955, 8 November 1994

¹³ *Ibidem*

¹⁴ Resolution 827(1993), *op. cit.*

¹⁵ *Ibidem*. The Council also believed that “the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.” *Id.*

¹⁶ *Idem*

¹⁷ Resolution 955(1994), *op. cit.*

and maintenance of peace.”¹⁸ Those crimes will be “halted and effectively redressed.”¹⁹ According to the Council, there was also “the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects.”²⁰

The first ICTY annual report stressed that the establishment of the tribunal was “a judicial response to the demands posed by the situation in the former Yugoslavia, where appalling war crimes and crimes against humanity are reported to have been perpetrated on a large scale.”²¹ In the case of the ICTR the tribunal aimed at “bringing to justice those persons who were most responsible for genocide and violations of international humanitarian law that were committed in Rwanda in 1994.”²²

Beigbeder²³ detailed the objectives, aims and goals of the ICTY. According to him, the establishment of the ICTY assisted in putting an end to atrocities and discouraged some subordinates from being involved in crimes.²⁴ This could be achieved by bringing the alleged perpetrators to justice, contributing therefore to the restoration and maintenance of peace.²⁵ By bringing those involved to justice, the tribunal would “enforce international law, expand and interpret application of international law; end impunity for violations, especially for senior political and military leaders and re-establish the rule of law in the countries concerned.”²⁶ The

¹⁸ *Ibidem*

¹⁹ *Idem*

²⁰ *Id.*

²¹ ICTY Annual Report (1994), para. 4 ICTY also tried genocide in addition to war crimes and crimes against humanity.

²² Refer particularly to the concluding paragraph of the *Eleventh Annual Report*, A/61/265–S/2006/658, 16 August 2006; paragraph 88 of the *Tenth Annual Report*, A/60/229–S/2005/534, 15 August 2005; paragraph 80 of the *Ninth Annual Report*, A/59/183–S/2004/601, 27 July 2004; *Letter dated 30 November 2006 from the President of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 addressed to the President of the Security Council*, S/2006/951, 8 December 2006 (para. 58); *Letter dated 29 May 2006*, S/2006/358, 1 June 2006 (para. 65); *Letter dated 5 December 2005*, S/2005/782, 14 December 2005 (par 67); *Letter dated 23 May 2005*, S/2005/336, 24 May 2005 (para. 64)

²³ Beigbeder Yves, *International Justice against Impunity: Progress and New Challenges*, Martinus Nijhoff Publishers, Boston/Leiden, 2005

²⁴ Beigbeder Yves, *International Justice against Impunity*, op. cit., p. 161

²⁵ *Idem*

²⁶ *Idem*, p. 73

tribunal would become a deterrent of crimes in an ongoing conflict. It would restore the dignity of the victims and set the highest standard of fairness, and due process. Finally, it would contribute to civil peace and reconciliation in the affected community and create an accurate historical record.²⁷

Johnson, former UN Assistant Secretary General for Legal Affairs, summarised the goals of the *ad hoc* tribunals as mechanism of accountability for heinous crimes, ending impunity for those who committed them and hopefully, through that process, to contribute to peace and reconciliation in the community concerned.²⁸

Goldstone, the first Chief Prosecutor for the ICTY and ICTR was of the view that the UNSC “acted on Yugoslavia because of a convergence of circumstances in the middle of 1993.”²⁹ He held that the Serbian policy in Bosnia was seen as ethnic cleansing reminiscent to the Holocaust. This was widely broadcasted in the media that found in it a resemblance of World War II concentration camps.³⁰ “Politically abhorrent events were taking place in Europe that the European powers had assumed could never happen again.”³¹ Goldstone also believed that there was a pressure from governmental and non-governmental humanitarian organisations that publicised repeated violations of humanitarian law.³² The UNSC had already determined that the situation in the region called for the invocation of Chapter VII of the UN Charter. The Council acted upon a Report of the Commission of Experts that provided insightful evidence of war crimes being committed. The time was convenient to quickly establish an international criminal tribunal as earlier contemplated without necessarily going through a treaty which could have been too laborious and time consuming, but not necessarily binding on all States.³³

²⁷ Id.

²⁸ Johnson D. Larry, “UN-Based International Criminal Tribunals: How they mix and match”: Myres S. McDougal Lecture, University of Denver Sturm College of Law, March 10, 2007, *Denver Journal of International Law and Policy*, Vol. 36, 2007, pp. 275 – 281, p. 276

²⁹ Goldstone J. Richard, *For Humanity, Reflections of a war Crimes Investigator*, Yale University Press, New Haven & London, 2000, pp. 78 - 80

³⁰ *Ibidem*, pp. 78 - 79

³¹ *Idem*, p. 79

³² Id.

³³ *Idem*, pp. 79 - 80

According to Goldstone the trials assisted in the process of uncovering the truth. However, he doubted whether criminal tribunals assist in the process of reconciliation.³⁴

In the case of the ICTR, Manusama emphasises the fact that the speed of the events in Rwanda and the reluctance of the international community to intervene favoured the discussions about bringing the perpetrators to justice by judicial means even though the conflict and the tragedy were already over.³⁵ Having made a determination that genocide and other systematic, widespread and flagrant violations of international humanitarian law constituted a threat to international peace and security, the UNSC created the ICTR as a means to restore peace and security.

In contrast with the ICTY which was directly linked to the cessation of the threat to peace; the ICTR was not so much aimed at halting the conflict, but at contributing to the rebuilding of a peaceful Rwandan society. The ICTR had a broader horizon beyond the actual conflict.³⁶ Judge Byron, once President of the ICTR, concurs with the broader ambitious political goal.³⁷

According to the UNSC the ICTY and the ICTR were established for a threefold objective, namely doing justice, deterring further crimes and contributing to the restoration and maintenance of peace.³⁸ The tribunals were expected to serve as a “tool for promoting reconciliation and restoring true peace.”³⁹ Several years after their establishment, it is worth assessing their effectiveness and determining whether these objectives have been achieved.

The tribunals were created because there was a situation to deal with. The fundamental question remains, however, to know whether establishing *ad hoc* criminal tribunals was a worthy undertaking to respond to the violations of international humanitarian law in the former

³⁴ Goldstone, *op. cit.*, at p. 503

³⁵ Manusama Kenneth, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality*, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 162

³⁶ *Id.*

³⁷ International Criminal Tribunal for Rwanda: Model or counter model for International Criminal Justice?: The perspectives of the Stakeholders, International Symposium, Geneva, 9 – 11 July 2009, Session One, Intervention by Judge Byron, p. 10

³⁸ ICTY Annual Report (1994), para. 11 - 18

³⁹ ICTY Annual Report (1994), para. 18

Yugoslavia and Rwanda? From various perspectives a lot can be said on the causes of the tribunals' effectiveness or ineffectiveness. The attempt in this research is narrower than that. It consists of objectively looking into and evaluating the work of the *ad hoc* tribunals in five chosen areas; namely the establishment of the tribunals; their aims and objectives; the investigation and prosecution of the crimes under the tribunals' mandate; the usage of pragmatic legal techniques of guilty plea and judicial notice and the tribunals' imputation of criminal responsibility using the doctrines of joint criminal enterprise and command responsibility. The study cannot and will not cover all the aspects of the tribunals' work that are believed to constitute the problems that the tribunals were faced with. For instance, this research will not deal with the administration and internal functioning of the tribunals, the difficulties the tribunals had in establishing themselves during their initial stages, the securing of indictments and arrest of major war criminals, or the claim that the trials took too long to complete.⁴⁰ There are many other issues that will not be addressed here including the role of the defense in international crimes adjudication.

1.2. Statement and research questions

Several factors had a great impact on the effectiveness of the *ad hoc* tribunals. These factors come in successive sequences that progressively dilute the tribunals of their substance. The unusual manner in which the *ad hoc* tribunals were established poses a concern of legality and legitimacy. The mandate of prosecuting that envisioned the achievement of multiple and ambitious objectives diminished the tribunals' ability to focus on the ordinary work of a criminal tribunal. In a resolve to meet the UNSC mandate, the tribunals prosecuted the alleged perpetrators with the aim of convicting them with minor concern whether doing justice should have been the priority. From the observation of those who have been qualified as most responsible, one may argue that the prosecutor investigated people rather than investigating allegations of what they had done wrong. The disposition of some cases using administratively convenient techniques, like plea bargaining and judicial notice, yet morally questionable, did not consider the magnitude and gravity of the crimes of concern. The imputation of criminal

⁴⁰ These are the major criticisms that appear almost everywhere without specific references.

liability did not clearly reflect the objective extent of the accused participation because of two doctrines, namely joint criminal enterprise and command responsibility.

It is true that prosecuting serious violations of international humanitarian law through *ad hoc* international tribunals is a complex, huge and wide process. International crimes occur on large scales, expand over a wide geographical area and involve numerous actors and perpetrators. Their victims are too many to all be accounted for. Investigating, prosecuting and ascribing responsibility to those believed to be responsible becomes cumbersome. A whole apparatus of various legal and non-legal instruments needs to be searched and assembled normatively, institutionally, functionally and judicially. This goes with acceptance, criticism, objection, problems, rejection, and so on. These difficulties should however not be excuses for not doing the job properly. Indeed, this thesis attempts to offer an insight of good practice in this area of international crimes prosecution. It appraises the achievements made and acknowledges shortcomings and failures, addresses how they should be redressed.

Much work is still needed to ensure that international criminal justice ceases to be an exceptional undertaking but is instead increasingly seen as simply another dimension of ordinary criminal justice practised at the international level.⁴¹ The questions that the research poses are the following:

- (1) What is the legality and legitimacy of the *ad hoc* tribunals?
- (2) Was the establishment of *ad hoc* tribunals a proper and effective response to the situation that prevailed in the Former Yugoslavia and Rwanda in the 1990s?
- (3) What was their mandate?
- (4) How were investigations and prosecution conducted in the pursuit of the mandate, objectives and goals for which the *ad hoc* tribunals were established?
- (5) Do the techniques of guilty plea and judicial notice reflect the seriousness and gravity of the crimes the *ad hoc* tribunals were established to prosecute and to what extent do they serve to meet the objectives and goals of such tribunals?

⁴¹ Bassiouni M. Cherif, "Perspectives on International Criminal Justice", *Virginia Journal of International Law*, Vol. 50, No. 2, 2009- 2010, pp. 269 – 324, p. 318

- (6) What is the substance of the doctrine of joint criminal enterprise as a mode of imputing responsibility beyond its role to palliate the lack of evidence and the complexity of the crimes the *ad hoc* tribunals adjudicated?
- (7) Is command responsibility a universally applicable doctrine to impute responsibility to commanders and superiors?
- (8) Finally, how effective have the *ad hoc* tribunals been?

1.3. Aims and interest of the study

The study aims to reflect on and assess the effectiveness of two selected *ad hoc* tribunals, namely the ICTY and the ICTR. It will highlight the process leading up to their establishment, their founding instruments, mandate, organisation and prosecution processes as well as their achievements and failures, their prospects and on how they could be improved. As Damaska argues, it would be wrong to close our eyes to the shortcomings⁴² of international justice. This is one of those many works that aim to contribute to a more effective international criminal justice and to the development of international criminal law.

Ratner argues that “the enterprise of international criminal law remains underdeveloped in treaties, customs, judicial opinion, and doctrine.”⁴³ For Darcy international criminal law is a “discipline that is only just past its infancy, and from its very inception it has borrowed its rules and principles almost entirely from domestic criminal systems.”⁴⁴ This status has remained the same even “more than sixty years after the Nuremberg trials.”⁴⁵ Haque suggests that the literature on the philosophical foundations of this area is still too young and small, but also that it is quickly growing.⁴⁶ More telling is Bassiouni and Osiel’s observations that “the struggle for international criminal justice is still a work in progress, and how it develops and evolves is

⁴² Damaska Mirjan, “What is the point of International Criminal Justice”, *Chicago – Kent Law Review*, Vol. 83, No. 1, 2008, pp. 329 – 365, p. 329

⁴³ Ratner Steven R. & Abrams S. Jason, *Accountability for Human Rights atrocities in International Law: beyond the Nuremberg Legacy*, Oxford University Press, 1997, p. 302

⁴⁴ Darcy Shane, “Imputed Criminal Liability and the Goals of International Justice”, *Leiden Journal of International Law*, Vol. 20, 2007, pp. 377 – 404, p. 401

⁴⁵ Masayoshi Mukai, “Ad hoc Tribunals: the failure to contribute to precedence-setting for a universal model of international justice”, *Berkeley Journal of International Law Publicist*, Vol. 3, 2009, pp. 48 – 53, p. 48

⁴⁶ Haque A. Ahmad, “Group Violence and Group Vengeance: towards a retributivist theory of International Criminal Law”, *Buffalo Criminal Law Review*, Vol. 9, 2005 – 2006, pp. 273 – 329, p. 277

something history will record.”⁴⁷ The reason is simple, because, “in its fundamental theoretical ideas no less than in its practical implementation, international criminal law is very much a work in progress.”⁴⁸

Taking the international criminal law initiative forward “is yet to be ascertained” because “international justice will always have a tortuous and painstaking path.”⁴⁹ On the other hand, Groome held that:

international criminal justice must mature into a juridical entity internationally designed to realize its unique mandate and potential. The test of our success is whether this nascent legal system fairly adjudicates individual responsibility, whether it effectively and uniformly enforces international norms, whether it mitigates war’s unconscionable results, whether it furthers reconciliation and that it achieves all of this in a sustainable way.⁵⁰

Robertson complains that we have not yet found the right procedures for delivering international criminal justice fairly, expeditiously and effectively.⁵¹

This research on the effectiveness of the *ad hoc* tribunals is a modest contribution to construct an international criminal justice system with more confidence, credence and legitimacy. To borrow again from Groome, “international criminal justice must establish with certainty and predictability our resolve to end impunity – it must become expected and routine. The future of international criminal law lies in it becoming our ordinary response to extraordinary crimes.”⁵²

Anderson concurs by saying that the system is “the promise for the future, and perhaps it is well and truly coming to be.”⁵³ Osiel expresses this very well by suggesting that:

it is tempting to say that the more accurately law can reflect the real distribution of responsibility for such large-scale horrors, the more likely its conclusion will be accepted, rather than rejected as scapegoating or mythmaking. If law can find a way to get the facts right – in all their admitted complexity – its

⁴⁷ Bassiouni M. Cherif, “Perspectives on International Criminal Justice”, op. cit., p. 318.

⁴⁸ Osiel Mark, *Making Sense of Mass Atrocity*, Cambridge University Press, 2009, p. xiii

⁴⁹ *Ibidem*, p. 319

⁵⁰ Groome M. Dermot, “The Future of International Criminal Justice: Re-evaluating the theoretical basis and methodology of International Criminal Trials”, *Pennsylvania State International Law Review*, Vol. 25, no. 4, 2006 – 2007, pp. 791 – 802, p. 802

⁵¹ Robertson Geoffrey Q.C., “Ending Impunity: How International Criminal Law Can Put Tyrants on Trial”, *Cornell International Law Journal*, Vol. 38, 2005, pp. 649 – 671, p. 650

⁵² *Ibidem*, p. 802

⁵³ Anderson Kenneth, “The Rise of International Criminal Law: Intended and Unintended Consequences”, *The European Journal of International Law*, Vol. 20, No. 2, 2009, pp. 331 – 358, p. 343

conclusions cannot be so readily dismissed, one hopes, by the often sceptical communities whose leaders are thereby impugned.⁵⁴

Simply put, questioning the effectiveness of a system or an institution is a search for quality justice and for better results that meet the expectations and for the highest return. It is a normal, necessary and desirable inquiry. Tallgren envisions a system:

effective enough to finally live up to the public desire after almost 50 years of lip service and neglect [...] to enforce this responsibility in real trial that send real criminal to real prisons. In other words, nothing less than to discourage future offenses, deter vigilante justice, promote reconciliation, and reinforce respect for the law and new democratic regimes.⁵⁵

The *ad hoc* tribunals could have done no less than this. It is therefore fair and reasonable to look objectively at the *ad hoc* tribunals' mandate and to take account of the complexity of the task and the environment in which these tribunals operate. Particularly, these prosecutions, according to Bassiouni, "are the ones most fraught with political considerations, and thus are difficult to pursue."⁵⁶ He continues by arguing that "there will always be instances where some governments or the Security Council will manipulate international criminal justice to achieve the goals of *realpolitik*, which so frequently conflict with international criminal justice."⁵⁷

More generally, the project of international criminal justice from the time of its inception has always been "a political undertaking which serves the interests of the 'greater powers.'"⁵⁸ In fact, the project of international criminal justice "came to be hijacked for purposes alien to its

⁵⁴ *Idem*, p. viii, footnote 4

⁵⁵ Tallgren Immi, "The Sensibility and Sense of International Criminal Law", *European Journal of International Law*, Vol. 13, No. 3, 2002, pp. 561 – 595, p. 564

⁵⁶ Bassiouni M. Cherif, "Perspectives on International Criminal Justice", *op. cit.*, p. 319; see also Osiel who describes the environment, circumstance under which genocide, war crimes and crimes against humanity are committed and their aftermath. He suggests:

Pinpointing responsibility for mass atrocities on particular individuals – as the criminal law demands – is an elusive and perilous enterprise. Genocide, war crimes, and crimes against humanity occur in the havoc of civil strife, in teeming prison camps, and in the muck and messiness of heated combat. The victims are either dead or, if willing to testify, 'unlikely to have been taking contemporaneous notes.' There are the anonymity of mass graves, the gaps and uncertainties in forensic evidence, the complexity of long testimony covering several places and periods, years ago. There is also the fluidity of influence by leaders over followers and of equals in rank over one another, as well as the uncertain measure of freedom from others – both superiors and peers – enjoyed by all. The central questions become: How does mass atrocity happen? How should criminal law respond?

Osiel Mark, *Making Sense of Mass Atrocity*, *op. cit.*, p. vii

⁵⁷ Bassiouni M. Cherif, *The philosophy and policy of International Criminal Law*, *op. cit.*, p. 92

⁵⁸ Darcy Shane, "Imputed Criminal Liability and the Goals of International Justice", *Leiden Journal of International Law*, Vol. 20, 2007, pp. 377 – 404, p. 392

ideals.”⁵⁹ Therefore, a research in this domain provides a modest addition to the development of knowledge in the field where much still need to be revealed.

1.4. Assumptions and hypotheses

Prosecuting violations of international humanitarian law is an appraisable enterprise. Designing the institution entrusted with the task must be a disinterested action. The United Nations *ad hoc* tribunals, in the particular circumstances of the former Yugoslavia and Rwanda, were “desirable and necessary.”⁶⁰ They enable the international community to intervene where the domestic judicial systems had been unable or unwilling to act in the presence of mass atrocities. The international community regains its moral authority over recalcitrant States by representing an entire human society aggrieved by atrocious crimes. As Osiel put it “trials seek to influence collective memory of the catastrophic events they publicly recount and officially evaluate.”⁶¹ International crimes prosecution can and must work and “evolve into a fully functional system of institutional international justice.”⁶² The international criminal justice rendered through *ad hoc* tribunals needs to emerge in response to novel and genuine concerns for the safety of humanity and not as only a “manifestation of global governance priorities in post conflict scenarios.”⁶³

Groome is also of the view that “sustainable international criminal justice must be certain in its application, predictable in its process and have the moral authority of the world community.”⁶⁴ As an instrument to address serious violations of international humanitarian law, prosecution is an optimal way to deliver retributive justice for victims and to pursue due

⁵⁹ Osiel Mark, *Making Sense of Mass Atrocity*, op. cit., p. x

⁶⁰ Jallow B Hassan, “International Criminal justice: reflections on the past and the future”, op. cit., p. 271

⁶¹ Osiel Mark, Osiel Mark, “The banality of good: aligning incentives against mass atrocities”, *Columbia Law Review*, Vol. 105, 2005, pp. 1751 – 1862, pp. 1804 - 1805

⁶² Masayoshi Mukai, “Ad hoc Tribunals: the failure to contribute to precedence-setting for a universal model of international justice”, op. cit., p. 49

⁶³ Findlay Mark & Mclean Clare, “Emerging International Criminal Justice”, *Current issues in Criminal Justice*, Vol. 18, No. 3, 2006 – 2007, pp. 457 – 480, p. 457

⁶⁴ Groome M. Dermot, “The Future of International Criminal Justice: Re-evaluating the theoretical basis and methodology of International Criminal Trials”, op. cit., p. 800

process for perpetrators.⁶⁵ Can the effectiveness of the *ad hoc* tribunals be tested against these assumptions? It is possible and this is what this work strives to do.

Ad hoc tribunals have worked as normal judicial institutions. They have accomplished, to the fullest of their ability, the task assigned to them⁶⁶ and they may have been effective.⁶⁷ However, the picture depicted through the adjudication of the cases before the *ad hoc* tribunals is partial and conceals many terrible episodes of the events they were called to hear. The legal techniques used are contestable in many respects.

International prosecutors tend to interpret the statutes establishing international *ad hoc* criminal tribunals as giving them the powers to investigate and prosecute the individuals whose responsibility was the greatest.⁶⁸ At the outset, prosecutors assume that those people are also the most responsible for the crimes. Though this may appear practically tempting based on the seriousness of the crimes to be investigated and prosecuted, it is, however, a simplistic approach which is not legally founded, even for policy purposes.⁶⁹ On the one hand, experience

⁶⁵ Some words are borrowed from Rakate in Rakate P. T. Keiseng, “*The Duty to prosecute and the status of amnesties granted for gross and systematic human rights violations in International Law: Towards a balanced approach model*”, Doctoral thesis, UNISA, November 2004

⁶⁶ Judge Erik Møse, op. cit.; Nsanzuwera François-Xavier, “The ICTR Contribution to National reconciliation” *Journal of International Criminal Justice*, Vol. 3, Iss.4, 2005, pp. 944 - 949; Judge Dennis Byron, President [of the ICTR], Address to the United Nations Security Council, Six-monthly Report on the completion strategy [of] the International Criminal Tribunal for Rwanda, June 4, 2009. He suggests that the Tribunal has fulfilled many of the expectations of the Council and remains committed to ensuring that the legacy will be satisfactory to all Rwandans.

⁶⁷ See also Judge Byron, then President of the ICTR in a symposium who argues that:

Now, let us look finally at the goals of the Tribunal contributing to national reconciliation. The true impact of the Tribunal on reconciliation in Rwanda can be properly assessed only when the mandate is completed and more experience has also been gained with other mechanisms such as the Gacaca proceedings. The Rwandan government had considered in 1994 that it would be "impossible to build a state of law and arrive at true national reconciliation without eradicating the culture of impunity. But when assessing the Tribunal's contribution today, we should never forget that a judicial system, however important, is only one piece of the complex puzzle of efforts that are required to reconcile people in a country like Rwanda where survivors and perpetrators are in many cases forced to continue living together in close proximity to each other."

International Criminal Tribunal for Rwanda: Model or counter model for International Criminal Justice?: The perspectives of the Stakeholders, International Symposium, Geneva, 9 – 11 July 2009, Session One, Intervention by Judge Byron, pp. 14 - 15

⁶⁸ Del Ponte Carla, “Prosecuting the individuals bearing the highest level of responsibility”, *Journal of International Criminal Justice*, Vol. 2, Iss.2, 2004, pp. 516 – 519

⁶⁹ Idem. Del Ponte argues that investigating and prosecuting “big fishes” was the prosecutor’s priority of the ICTY and ICTR.

has shown that prosecutors do not investigate the persons most responsible for crimes, but the ones who held senior positions in government, politics and military or other similar structures.

On the other hand, judges have refrained from direct the proper conduct of investigation and prosecution, apparently to give deference to the separation of their role and that of the prosecutor. The current work argues, however, that it is an abuse of the office of the trial prosecutor and a failure of the function of judging. The prosecution policy lacks transparency and openness; heavily relying on discretion. The prosecutors underuse or overuse the law when they deem it to advance the prosecution theory of the case. The various prosecutors of the ICTY and ICTR have also consistently argued that “the tribunal was not established to prosecute all the crimes that falls within its jurisdiction, and [that] from the outset careful consideration had to be given to the selection of targets.”⁷⁰

It is true that *ad hoc* tribunals dealt with atrocities and horrors of extreme complexity. There are, however, other available avenues that can be resorted to when dealing with mass atrocities. If the *ad hoc* tribunals were genuinely fair and fully independent, they would “contribute to the prevention and redress of future human rights abuses.”⁷¹ The *ad hoc* tribunals did not offer the so much anticipated effectiveness as foreseen in the funding instruments. Their effectiveness could have been attained if they independently concentrate on the suspects whom the prosecutor believes has really committed the gravest crimes, and for whom sufficient evidence is available. Such suspects should also be prosecuted based on the crimes they have allegedly committed. Responsibility should be attributed based on the extent of the suspect’s involvement in the crimes. However, this does not happen. The whole process should aim at upholding and maintaining the moral value of justice in the search of substantive truth.

⁷⁰ Del Ponte Carla, “Investigation and Prosecution of Large-scale Crimes at the International Level : The experience of the ICTY”, *Journal of International Criminal Justice*, Vol. 4, Iss.3, 2006, pp. 539 – 558, p. 541

⁷¹ The promises and limits of International Criminal Justice: The “Extraordinary Chambers” in Cambodia, a Roundtable Discussion, hosted by: UBC Centre for Southeast Asia Research of the Institute for Asian; the Liu Institute for Global Issues; and the Centre for Asian Legal Studies at the Faculty of Law, 2 – 3 February 2006

1.5. Literature review

Much has been written on Rwanda and the former Yugoslavia, most particularly describing how genocide happened in Rwanda and the deliberate ethnic cleansing which took place in the Balkans. Were all the narratives on Rwanda and the former Yugoslavia to be reviewed, this would require more time and volumes of theses, not just a single and modest academic work. What is most common in the whole literature about events in Rwanda and the former Yugoslavia is that serious violations of international humanitarian law were actually committed. Unanimity is, however, far from being reached on the way the prosecution of the alleged perpetrators of these crimes has been conducted and the methods and means used to that effect. What also varies is the analysis and interpretation of those facts. Little has been written on the effectiveness of the *ad hoc* tribunals.⁷²

Barria and Roper attempted to assess the effectiveness of the ICTY and ICTR and concluded that “these tribunals have not been more effective in providing peace and security, justice to victims and defendants, as well as fostering national reconciliation.”⁷³ Based on a case study of the ICTY and ICTR, they observed that the lack of effective apprehension of suspects diminishes the deterrent effect of the tribunals and provided one of the primary justifications for the creation of an ICC.⁷⁴ Damaska extended the inquiry a bit further in arguing that politics still plays a greater role in shaping international criminal tribunals and their operations, the combination of which continues to weaken the delivery of international criminal justice. He, however, hopefully suggests that these weaknesses can be cured if the international criminal tribunals were to lessen the array of goals they pursue.⁷⁵

⁷² See for example Phelps R. Andrea, “Gender-Based War Crimes: Incidences and Effectiveness of International Criminal Prosecution”, *William & Mary Journal of Women and the Law*, Vol.2, Iss. 2, 2006, pp.499 – 520

⁷³ Barria A. Lilian and Roper D. Steven, “How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR”, *The International Journal of Human Rights*, Vol. 9, No.3, 2005, pp. 349 – 368, p. 363

⁷⁴ *Idem*, p. 349

⁷⁵ Damaska Mirjan, “What is the point of International Criminal Justice”, *op. cit.*

In his book “*A history of political trials: from Charles I to Saddam Hussein*” writing about the historical prosecution of heads of states and other sovereigns, Laughland⁷⁶ emphasises an important issue that is also relevant to international criminal prosecution in general and to the *ad hoc* tribunals in particular. The author suggests that, “generally speaking, we know more about the reasons why ex-sovereigns were prosecuted than about what they said in reply.”⁷⁷ Laughland aims therefore to “encourage people to reflect on the true nature and motives of the prosecution, and of course on the procedural shortcomings of these trials; there is a danger of too naively believing that because evil men were punished, the prosecution must have been flawless.”⁷⁸ The establishment and working of the ICTY and ICTR have been the easy way of handling embarrassing situations, but not necessarily the best and most effective way. Had the establishment of the tribunals been combined with a targeted military operation, the situation in both the former Yugoslavia and Rwanda could have improved to the better.

The breakdown of the states constituting the former Socialist and Federal Republic of Yugoslavia attracted attention when the world became aware of atrocities that were committed.

According to Morris and Scharf:

International observers, including information gathering missions conducted under the auspices of the United Nations Human Rights Commission, the European Community, the Conference on Security and Cooperation in Europe, the International Committee of the Red Cross, Amnesty International and Helsinki Watch, began to document widespread violations of international humanitarian law occurring in Bosnia.⁷⁹

These reports eventually prompted the UNSC to pay particular attention to what was happening in the Balkans. In resolution 780⁸⁰, the UNSC requested the UN Secretary General to establish an independent commission of Experts “with a view to providing the Secretary General with its conclusion on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.”⁸¹ Had it not been the perspicacity and resolute determination of its chairperson Bassiouni, *Resolution*

⁷⁶ Laughland John, *A history of political trials: From Charles I to Saddam Hussein*, Peter Lang Oxford, 2008

⁷⁷ *Idem*, p.19

⁷⁸ *Id*

⁷⁹ Morris Virginia & Scharf P. Michael, *op. cit.*, p 21

⁸⁰ Resolution 780 (1992), S/RES/780 (1992), 6 October 1992

⁸¹ Res. 708, para. 2

780 Commission could have died a natural death.⁸² Its UN sponsors wanted its mandate to be terminated without any tangible results. Bassiouni stressed “that international accountability would achieve five goals.”⁸³ Those goals were: “establishing individual responsibility, discrediting institutions and leaders responsible for the commission of atrocities, establishing an accurate historical record, providing victims’ catharsis, and promoting deterrence.”⁸⁴ Bassiouni’s statements in 1993 provided much impetus for the main achievements of the ICTY in the summer of 2008. The tribunal was proud that its work contributed to “bringing justice to victims, holding leaders accountable, individualising guilty, giving victims a voice, establishing the facts, strengthening the rule of law, and developing international law.”⁸⁵

After examining and analysing the data collected, the Commission of Experts concluded that “Bosnia was the scene of massive and systematic violations of human rights, as well as serious and grave violation of humanitarian law’ and that harassment of Muslims, including torture and violence, was ‘commonplace’ by the invading power, the Bosnian Serbs.”⁸⁶ The Commission prepared and presented a preliminary report to the Security Council at the end of August 1992⁸⁷ confirming the nature and character of the atrocities that were being committed.

It is, however, through the *Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*⁸⁸ that the ICTY was actually established. Bassiouni, who led the Commission, held that “the conflict in the former Yugoslavia and the efforts to assign

⁸² Resolution 780 did not indicate a due date for the completion of the Commission’s work. At that time, UN Deputy Legal Counsel Ralph Zacklin had told the Chairman of the Commission that he did not expect it to last more than six months. As mentioned earlier, no UN funds were provided to the Commission for salaries and travel after August 1993. On December 13, 1993, the Commission received a letter from the UN Legal Counsel, Carl-August Fleischauer, saying that the Commission would be terminated on April 30, 1994.

see Scharf P. Michael, “Cherif Bassiouni and the 780 Commission: the gateway to the era of accountability” in Sadat L. Nadya, and Scharf P. Michael, *The theory and practice of international criminal law: Essays in Honor of M. Cherif Bassiouni*, Martinus Nijhoff Publishers, 2008, p. 280

⁸³ *Ibidem*, p. 282

⁸⁴ *Idem*

⁸⁵ United Nations International Criminal Tribunal for the Former Yugoslavia, ICTY leaflet (not an official document), Summer 2008, available on www.icty.org.

⁸⁶ UN Document E/CN.4/1992/S-1/9, at pp. 2 -3, cited in Ball H., *op. cit.*, p. 140

⁸⁷ Ball Hall, *Prosecuting war crimes and genocide: the twentieth century experience*, University Press of Kansas, 1999, p. 140

⁸⁸ *Report of the Secretary – General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, presented on 3 May 1993, (S/25704)

international responsibility to its senior leaders and worst perpetrators of ‘crimes against humanity’ and ‘war crimes’ reflect the classic historic tensions between *Realpolitik* and justice.’⁸⁹

The difficulties on the establishment of the ICTY also appear in Scharf’s work.⁹⁰ It is interesting to find the true reason of the ICTY establishment where the author emphasises that:

Most observers believe that the Security Council, led by the United States, could have put an early halt to the bloodshed in the Balkans, but that the members of the council lacked the political will to take the necessary measures, such as air strikes and committing troops to a combat situation which had the potential of turning into a quagmire like Vietnam. Consequently, the idea of a war crimes tribunal appealed to the members of the council as a means of countering accusations that they tolerated massive violations of international humanitarian law in the former Yugoslavia and stood by idly while a defenceless Bosnia succumbed to Serb and Croat aggression.⁹¹

Robertson shares the same feeling by observing that “the United Nations could not be taken seriously unless something was done: the utter failure of diplomacy and sanctions, and the refusal to risk the lives of allied soldiers by armed intervention, made a war crimes tribunal the only face-saving device left.”⁹² It was also “a less expensive and easier option than military intervention to stop the human rights atrocities in the former Yugoslavia.”⁹³

The confusion and mixed agendas fortunately brought about the creation of a judicial institution through a process that was “completely novel”⁹⁴ and “controversial.”⁹⁵ For some, “there is widespread recognition that the decision of the Security Council to establish the *ad*

⁸⁹ Hazan Pierre, *Justice in a time of war: the true story behind the International Criminal Tribunal for the former Yugoslavia*, Texas A & M University Press, College Station, USA, 2004, p xi.

⁹⁰ Scharf P. Michael *Balkan Justice: the story behind the first International War Crimes Trial since Nuremberg*, Carolina Academic Press, Durham, North Carolina, 1997

⁹¹ Scharf P. Michael, *op. cit.*, p xv

⁹² Robertson Geoffrey, *Crimes against humanity: the struggle for global justice*, *op. cit.*, p. 286; the same argument is made by Wippman who finds that the Security Council was unwilling “to take strong military action to control the bitter conflict then tearing Bosnia apart (the Council) expressed its hope that the ICTY would contribute to ensuring that violations of international humanitarian law are halted and effectively addressed”, Wippman David, *Atrocities, deterrence, and the limits of international justice*, *op. cit.*, p. 473

⁹³ Forsythe P. David, *Human Rights in International relations*, Cambridge University Press, 200, cited in Birdsall A., *The International Politics of Judicial intervention: Creating a more just order*, The New International Relations Series, Routledge, London & New York, 2009, p. 103

⁹⁴ International Criminal Tribunal for the former Yugoslavia, *ICTY Manual on Developed Practices*, p. 3

⁹⁵ *Idem*

hoc tribunals constitutes a landmark in the fight against impunity and a major advance in international law.”⁹⁶

Events that unfolded in Rwanda can be traced back from a review of the *Final Report of the International Commission of Investigation on Human Rights Violations in Rwanda Since October 1990* (January 7 – 21, 1993).⁹⁷ The Commission did not have a specific mandate. It was only responding to a request from two Rwandan organisations for human rights with the approval of the Rwandan Government.⁹⁸ Based on the findings of the International Commission of Investigation and other information from various sources, the *Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions*, Mr. N’diaye⁹⁹, on his mission to Rwanda from 8-17 April 1993 later reported on the events that occurred in Rwanda as well. It “concluded that the substance of the allegations contained in the Commission’s Report could, by and large, be regarded as established.”¹⁰⁰

In August 1993, the UN Assistance Mission for Rwanda (UNAMIR) was tasked to assist the belligerents, namely the Rwandan Armed Forces (RAF) and the Rwandan Patriotic Army (RPA) to implement the peace accords signed in Arusha on 4 August 1993.¹⁰¹ In its

⁹⁶ Id

⁹⁷ The Commission was made of four organizations, namely Africa Watch, a Division of Human Rights Watch, New York; International Federation of Human Rights (FIDH), Paris; International Center of Rights of the Person and of Democratic Development (CIPPDD), Montreal; Interafrican Union of Human Rights (UIDH), Ouagadougou.

⁹⁸ See *Report by Mr. B.W. Ndiaye, Special Rapporteur, on his mission to Rwanda from 8 to 17 April 1993*, E/CN.4/1994/7 Add.1, 11 August 1993 (Hereinafter Ndiaye Report), paras.3 &5; and Annex II titled *Statement by the Government of Rwanda concerning the Final Report of the International Commission of Inquiry on Human Rights Violations in Rwanda since 1 October 1990*, Kigali, 7 April 1993

⁹⁹ Mr. N’diaye also appeared before the Special Commission of the Belgian Senate to answer to questions related to events in Rwanda on 16 April 1997, see Sénat de Belgique, Commission Spéciale Rwanda – Compte Rendu Analytique des Auditions, Session ordinaire 1996 – 1997, COM – R 1 - 27

¹⁰⁰ Ndiaye Report, para. 9

¹⁰¹ A peaceful agreement between the then Government of Rwanda and the invading force, named the Rwandese Patriotic Front (RPF), termed “*Arusha Accords*” was concluded in the northern Tanzanian Town of Arusha, the future seat of the International Criminal Tribunal for Rwanda; on August 4, 1993; for example, Dr. Dismas Nsengiyaremye, former Prime Minister of Rwanda between April 1992 and July 1993, testified before the Special Commission of the Belgian Senate that “il n’y a donc pas eu de plan strict visant uniquement les Tutsis” [there was not a strict plan targeting solely Tutsis] but acknowledges the existence of massacres aimed at Tutsis, moderate Hutus, Hutu victims of the RPF.

reconnaissance mission report, it observed that after the signing of the peace accord, the situation in Rwanda was calm¹⁰² despite problems of population displacement, strong resistance to the Arusha Accord and large quantities of arms hidden throughout the country which might, if the UN delays the deployment of the International Neutral Force, destabilise the country. Up until April 5, 1994, while everyone assisted to a series of killings, no one raised a hand on an alleged plan to wipe out the Tutsis.

It is only Special Rapporteur Segui who for the first time, on the international level, and on behalf of the Commission of Human Rights, spoke of planned genocide. He also pointed out that other crimes had been committed as well.¹⁰³ The various reports drafted by Mr. Segui constituted the direct basis for the establishment of the ICTR. But, they were not the only collection of information related to Rwanda. The French and Belgian governments also established parliamentary commissions to investigate the events. After the establishment of the ICTR, Morris and Scharf¹⁰⁴ compiled most of the legal instruments aimed at investigations and prosecutions. A complete compilation of legal, political and diplomatic archives on how events in Rwanda were viewed at the UN and in other spheres appears exhaustively in *The United Nations and Rwanda 1993 – 1996*¹⁰⁵ UN book series. This work relies on almost all those documents to re-establish the factual and legal contexts.

¹⁰² *Report of the UN Reconnaissance Mission to Rwanda* from 19 to 31 August 1993 document tendered into evidence in Case No. ICTR 98 – 41 – T, on 26 January 2004 as Exhibit No DB71 on file with the researcher.

¹⁰³ Mr. René Degni-Ségui, appointed by the Commission for Human Rights submitted 6 reports respectively on June 28, 1994; August 12, 1994; November 11, 1994; January 24, 1995; June 28, 1995 and January 29, 1996

¹⁰⁴ Morris Virginia and Scharf P. Michael, *The International Criminal Tribunal for Rwanda*, Vol. 2, Transnational Publishers, Irvington-on-Hudson, New York, 1998

¹⁰⁵ Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, The United Nations Books Series, Volume X, United Nations, New York, 1996. This collection comprises 188 main documents and other documents of interest on Rwanda. These documents may be broken up into various categories: 6 Resolutions of the United Nations General Assembly, 24 Resolutions of the United Nations Security Council, 14 Statements of the President of the Security Council on behalf of the Council, 7 Letters of the President of the Security Council to the Secretary – General, 3 other documents of the Security Council, 48 Reports and Letters of the Secretary General to the General Assembly and the Security Council, 7 Statements of the Secretary General, 13 Correspondences of the Secretary General, 7 Reports and letters of the Secretary General or his Representative on the situation of human rights in Rwanda, including the International Tribunal for Rwanda, 8 Reports of the United Nations High Commissioner for Human Rights and Special Rapporteur concerning the situation of human rights in Rwanda, 16 communications from the Rwandan Government, 18 communications from other member States, 6 communications from the Organisation of African Unity, 9 Joint statements, communiqués and agreements, and another 2 documents related, see the listing in Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, The United Nations Books Series, Vol. X, United Nations, New York, 1996, p. 144

The events in Rwanda attracted not only the legal, but also the political and diplomatic communities on what to do and how to do it. UNAMIR withdrew while the then governmental structures were actively involved in massacres and RPF was consistently refusing to agree to any ceasefire. RPF undertook a double pressure; first on the ground to force the governmental forces out and political one on the UN to admit that genocide was being committed. Once in power from 19 July 1994, it requested an international criminal tribunal to try the perpetrators.¹⁰⁶ Since then, all eyes and ears turned towards Rwanda. Journalists, scholars, human rights activists spent sleepless nights writing about the genocide. A first generation of reporters¹⁰⁷ openly and emotionally sympathised with the RPF and the victims without presenting the real situation on the ground. The horror and massive nature of the killings prevailed over a deep investigation and analysis of the events that were unfolding in Rwanda.

Another generation of authors hastily wrote on Rwanda, but their work was based on manipulated information which was not checked thoroughly for accuracy. Some reviewed their position and wrote again or contradicted their previous understanding in other *fora*.¹⁰⁸ The gist of their argument was to nuance their first hand understanding of genocide, emphasising that the information they relied on was not accurate.

¹⁰⁶See *Letter dated 28 September 1994 from the permanent representative of Rwanda to the United Nations addressed to the President of the Security Council, S/1994/1115*, 29 September 1994, reproduced in Morris V. and Scharf P. Michael, op. cit., p 359

¹⁰⁷ Chrétien J. Pierre (sous la direction de -), *Rwanda: Les medias du genocide*, éditions Karthala, Paris, 1995; Prunier Gerard, *The Rwanda Crisis 1959-1994: History of a Genocide* (Hurst & Company 1995); Melvern Linda, *Conspiracy to Murder: The Rwandan Genocide* (New York: Verso, 2004); Power Samantha, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002T), Destexhe Alain, *Rwanda and Genocide in the Twentieth Century* (New York University Press, 1995); Kuperman A. J., *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press, 2001); Dallaire Romeo, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Carroll & Graf, 2004); Gourevitch P, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families* (Picador, 1999). Uvin Peter, Prejudice, Crisis, and Genocide in Rwanda, *African Studies Review*, Vol. 40, No. 2 1997; Hintjens H. M. , Explaining the 1994 Genocide in Rwanda, *The Journal of Modern African Studies* (1999), 37; Lemarchand René, Genocide in the Great Lakes: Which Genocide? Whose Genocide?, *African Studies Review*, Vol. 41, No. 1, 1998; Magnarella P. J., *The Background and Causes of the Genocide in Rwanda*, T3 J. Int'l Crim. Just. 801 (Special Issue: Genocide in Rwanda: 10 Years On), and numerous others.

¹⁰⁸ It is worth citing in this category Lugan Bernard, *François Mitterand: L'Armée Française et le Rwanda*, éditions Rocher; 2005 ; Marchal Luc *Rwanda: la descente aux enfers: témoignage d'un peacekeeper Décembre 1993 – Avril 1994*, éditions Labor, 2001; Lugan Bernard, *Rwanda: Contre Enquête sur le génocide*, éditions Privat, 2007

A third generation of writers recounted the reality on the ground but was to be accused of denying genocide or revising it. Some landed in court due to their expressed opinions.¹⁰⁹ RPF dissenters and deserters¹¹⁰ also wrote on the criminal activities of the organisation when it was still in the field. Desouter went even further and openly accused the RPF of genocide, war crimes and crimes against humanity in his book.¹¹¹ UN officials' also broke their silence even though they did not tell it all.¹¹² Renowned researchers and academics¹¹³ entered the game in an attempt to explain the Rwandan tragedy; and their writings present some degree of objectivity in their analysis.

Insiders of the ICTR enlightened the public regarding the ways proceedings were conducted. Hartman¹¹⁴, a former spokesperson of the ICTR prosecutor, revealed the political games behind closed doors on the granting of a blank amnesty to RPF and the diplomatic fight over how the Balkan case was to be resolved. Cruvellier, a journalist who witnessed the proceedings in Arusha concluded that the ICTR is a Nuremberg for Africa.¹¹⁵ Essoungou, another journalist who reported the Arusha proceedings, titled his book “*Justice à Arusha: Un tribunal international politiquement encadré face au génocide rwandais*”¹¹⁶, or “Justice at Arusha: an international criminal tribunal politically flanked vis-à-vis the Rwandan genocide.” Ngirabatware¹¹⁷, a former Rwandan cabinet minister and academic echoed Cruvellier’s

¹⁰⁹Onana Charles, *Les Secrets du génocide rwandais: enquête sur les mystères d'un président*, éditions Duboiris, 2002; Philpot Robin *Ça ne s'est pas passé comme ça à Kigali*, éditions Les Intouchables, 2003; Onana C., *Silence sur un attentat : le scandale du génocide rwandais*, éditions Duboiris, 2005 ; Pierre Péan, *Noirs Fureurs, Blancs menteurs*, éditions Milles et Une Nuits, 2005 ; Philpot Robin; *Rwanda : Crimes, mensonges et étouffement de la vérité*, éditions Les Intouchables, 2007

¹¹⁰Kajeguhakwa Valens, *Rwanda: de la terre de paix à la terre de sang et après*, éditions Remi Perrin, 2001 ; Ruzibiza A. Joshua, *Rwanda : l'histoire secrète*, éditions du Panama, 2005

¹¹¹Desouter Serge, *Rwanda : le procès du FPR, mise au point historique*, éditions l'Harmattan, 2007.

¹¹² Anyidoho K. Henry, *Guns over Kigali*, Fountain Publishers, 1998; Booh – Booh J. Roger, *Le Patron de Dalaire parle : Révélations sur les dérives d'un général de l'ONU au Rwanda*, éditions Duboiris, 2005

¹¹³Mamdani Mahmoud, *When Victims become killers: colonialism, nativism and the Genocide in Rwanda*, Princeton University Press, 2001; Gasana K. James, *Rwanda : Du parti-Etat à l'Etat garnison*, éditions l'Harmattan, 2002 ; Ngbanda Nzambo H., *Crimes organisés en Afrique Centrale*, éditions Duboiris, 2004

¹¹⁴Hartmann Florence, *Paix et Châtiment : les guerres secrètes de la politique et de la justice internationale*, éditions Flammarion, 2007

¹¹⁵ Cruvellier Thierry, *Le Tribunal des vaincus: un Nuremberg pour le Rwanda?*, éditions Calmann – Lévy, 2003

¹¹⁶ Essoungou A. Michel, *Justice à Arusha : Un tribunal international politiquement encadré face au génocide rwandais*, l'Harmattan, Paris, France, 2006

¹¹⁷ Ngirabatware Augustin, *Rwanda : Le faite du mensonge et de l'injustice*, éditions Sources du Nil, 2006

findings, but he also landed at the United Nations Detention Facilities (UNDF) to respond to the allegations of genocide.

Both the ICTY and ICTR were labelled “a mechanism for the restoration and maintenance of international peace and security.”¹¹⁸ According to Kerr¹¹⁹ the Security Council powers in this respect were the “manifestation of an explicit link between peace and justice, politics and law.”¹²⁰ Kerr contends that “the main drawback of *ad hoc* tribunals is that they are inherently political and selective by virtue of their method of establishment, even if in themselves they are legitimate judicial institutions.”¹²¹ Kerr recognises that the demarcation between justice and politics was possible conceptually, but not in practice.¹²² This assertion finds its justification in “*Judicial behaviour*” where Segal writes, citing Gibson that, “judges’ decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do.”¹²³ In the strategic judicial decision making, Pritchett, an

¹¹⁸Kerr Rachel, *The International Criminal Tribunal for the former Yugoslavia: An Exercise in Law, Politics, and Diplomacy*, Oxford University Press, 2004, p. 1

¹¹⁹ *Ibidem*

¹²⁰ *Idem*, p. 1

¹²¹ *Idem*, p. 2; see also Intervention by Mr. O’Donnell, former Deputy Registrar of the ICTR at a Symposium in Geneva, 09 – 11 July 2009, Session 6, at page 30 where he argued that “So I can tell you within the sanctity of the judicial proceedings politics does not enter into the Judges’ considerations” but recognises that “... of course political considerations are relevant to the decisions to prosecute.”

¹²² The tribunal was established as a tool of politics but, in the administration of justice, it had to be apolitical. Conceptually, this is possible. The interaction between law and politics does not inevitably lead to the politicisation of the law or, indeed, a legalisation of politics. Instead, the two should be finely balanced. The question is how the balance between political and diplomatic interactions and the fulfillment of the judicial functions should be struck in practice. [.....] Given that the ICTY has to operate in a political environment, and has to solicit the support of states for its continued existence and activities, to what extent has it succeeded in establishing itself as an independent court, able to conduct its investigations, indictments, and judicial processes fairly and impartially?

Kerr, *op. cit.*, p. 9; see also Crane, a former Chief Prosecutor of the Special Court for Sierra Leone, noting that:

Prosecutors make decisions all the time that factor in the political ramifications of an indictment both domestically and internationally. It is an issue that floats just under the surface, never publicly discussed, but always there. If justice is to prevail, then politics in general might assist on that factor. Politics will always be the bright red thread in accountability decisions. The sooner it is recognised as such, the sooner international criminal law can advance in creating a more just and peaceful world.

Crane M. David, *The Bright Red Thread: Politics, Justice, and Accountability and international crimes, in The Politics of War Crimes Tribunals (symposium)*, *American Society of International Law Proceedings*, Vol. 102, 2008, pp. 17 – 22, p. 18

¹²³ Gibson J. L., *From simplicity to complexity: the development of theory in the study of judicial behaviour*. Political behaviour, 5: 7 – 49, cited by Segal J. A., *Judicial behaviour*, in Whittington K., Kelemen R.D., and Caldeira G. A., *The oxford Handbook of Political Science*, Oxford University Press, 2008, pp. 19 - 33

American scholar has also found that “both politicians and judges decide important public policy issues, formulate opinions, and issue a vote, enjoying substantial discretion.”¹²⁴

Commenting on the ICTY, Kerr remarked that “the decision to establish the Tribunal was political, and it was established for a political purpose, but its internal mandate was to deliver justice.”¹²⁵ Kerr is right because the *ad hoc* tribunals were established with a broad agenda including political goals; like the restoration and maintenance of peace and security and as contributions to the process of national reconciliation in the affected States. Delivering justice, as traditionally understood is a proper mandate of a court of law. Unfortunately, a criminal court cannot become a forum for political agendas to the scale the *ad hoc* tribunals did.

Kerr’s view is nevertheless shared by Scharf and Schabas. Writing on the *Milosevic* case, they posed and answered some questions in an interesting fashion:

Will history remember Milosevic as a victim of victor’s justice, a scapegoat tried in a show trial before a one-sided court? Or will the Milosevic trial be seen as fair and free of political influence? More than anything else, the answer to these questions may dictate the ultimate success or failure of the proceedings.¹²⁶

The two scholars rhetorically justified their position and argued that the ICTY was legitimate as was the trial of Milosevic. Scharf played a key role behind the political deciding figures to which he was a firsthand legal advisor.¹²⁷ There is no doubt about Scharf and Schabas’

¹²⁴ Pritchett, C. H., The voting behaviour of the Supreme Court, 1941 – 1942, *Journal of Politics*, 4: 491 – 506, cited by Spilller P. T., and Gely R., Strategic Judicial decision-making, *The oxford Handbook of Political Science*, op. cit., pp. 34 - 45

¹²⁵ Kerr Rachel, op. cit., p. 2

¹²⁶ Scharf P. Michael & Schabas A. William, *Slobodan Milosevich on Trial: A companion*, The Continuum International Publishing Library Group Inc, New York, 2002, p. 97

¹²⁷ Scharf proudly writes:

To the extent possible, consistent with State Department rules of confidentiality, I have filled these pages with behind-the-scene information gleaned from my days at the State Department...(p. xvi) having failed to take action to halt the atrocities in Bosnia, the Security Council became determined to at least take steps to hold the violators accountable.....as Attorney-Advisor for U.N Affairs at the State Department, I was assigned to prepare the initial draft of Resolution 771.

Scharf P. Michael, “*The Balkan Justice*”, op. cit., p. 37 - 44; as well in the Preface in Paul R. Williams & Scharf P. Michael, *Peace with Justice: war crimes and accountability in the former Yugoslavia*, Rowman & Littlefield Publishers, Inc., Lanham – Boulder – New York & Oxford, 2002. Both professors Williams and Scharf acknowledge that they began their professional engagement with peace-building and the former Yugoslavia when they served as attorney-advisers in the Office of the Legal Advisor for the U.S. Department of State. Professor Williams was deeply involved in the legal aspects of the U. S. response to the dissolution of Yugoslavia and the accompanying widespread commission of ethnic cleansing and attempted genocide and other efforts to bring about peace in Yugoslavia. Professor Scharf was likewise intensively involved in U. S. government efforts to utilize

objectivity and expertise if one considers their authoritative standing in the academe and in the international criminal prosecutions arenas. But, it is also true that these authors are parts and parcels of the great enterprise which is a by-product of political decisions. They cannot therefore contradict themselves in all respects. How credible and reliable they are is a question they can answer to as academics. Simpson distances himself from Scharf and Schabas by characterising war crimes trial as show trials.¹²⁸

Late Cassese contributed substantially to “the fundamentals of both substantive and procedural international criminal law”¹²⁹ even though their interpretation and application gave rise to many controversies. The *ad hoc* tribunals’ jurisprudence added value to the development of some principles and fundamentals, most particularly the substantive law, as elaborated on by Van Den Herik.¹³⁰ Some such controversies are discussed in this thesis, namely the investigation aspect, guilty pleas, judicial notice, command and superior responsibility and joint criminal enterprise.

When investigating and prosecuting crimes committed in Rwanda and the former Yugoslavia, under the umbrella of discretion, the prosecutor used and abused the powers vested in him. Gershman writes widely on these abuses of prosecutorial powers.¹³¹ Danner proposes that, to be accountable and to legitimise the international prosecutor’s actions, a “good process should include the public articulation of prosecutorial guidelines that will shape and constrain his discretionary decisions.”¹³² Is this enough? It is an opinion here that the international prosecutor should, by all means, seek to do justice and abide by professional ethics. It requires

the UN to promote a resolution of the conflict and drafted the first resolutions adopted by the SC - particularly Resolutions 771(1992), 780(1992) establishing the commission of experts to investigate the Yugoslav atrocities.

¹²⁸ Simpson Gerry, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law*, Polity Press, 2007

¹²⁹ Cassese Antonio, *International Criminal Law*, Oxford University Press, 2003

¹³⁰ Van den Herik J. Larissa, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Martinus Nijhoff Publishers, Amsterdam, 2005; see also Danner A. Marston, “When Courts Make Law: How the International Criminal tribunals Recast the Laws of War” *Vanderbilt Law Review*, Vol. 59, No1, January 2006, pp. 1 - 65

¹³¹ Gershman L. Bennett, *Prosecutorial Misconduct*, Clark Boardman Callaghan, Deerfield, New York and Rochester, 1997

¹³² Danner A. Marston, “Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court” *American Journal of International Law*, Vol. 97, Iss. 3, pp 510 – 552, p. 511

a commitment “to achieve a just, and not necessarily the most harsh result.”¹³³ This imperative is twofold. It means that, on the one hand, only plausible charges that could lead to a finding of guilt need to be brought to court instead of over-investigating and over-prosecuting¹³⁴ targets in a zealous fashion, possibly without merit. As will be discussed later in chapter five on professionalism, investigations and prosecutions lacked thoroughness in some respects. For example, Robertson observes in the foreword of Boas’ book on the Milosevic trial, that:

the prosecution was over-zealous and over-expensive, trying to impute too much to *Milosevic* and to attribute too much to his ‘Greater Serbia’ policy. This is borne out by the fact that it failed, at the close of its case, to establish over 1,000 of the allegations it made at the outset.¹³⁵

On the other hand, “the power to decline to prosecute in case of provable criminal liability”¹³⁶ also needs to be guided. Prosecutors should avoid guaranteeing blank amnesties by not thoroughly investigating and prosecuting all crimes to serve some known or unknown interests, even for peace purposes. In this regard, Bassiouni argues that:

in a world based on the rule of law and not on the rule of might, the attainment of peace to end conflicts cannot be totally severed from the pursuit of justice whenever that may be required in the aftermath of violence [...]. If peace is not intended to be a brief interlude between conflicts, then in order to avoid future conflict, it must encompass what justice is intended to accomplish: prevent, deter, punish, and rehabilitate.¹³⁷

Morris shares the same view by suggesting that “ideally full accountability for genocide, war crimes, crimes against humanity and other serious violations would be the norm.”¹³⁸ It would moreover avoid the chronic obstacles of political constraints and resources required to achieve full accountability.¹³⁹

¹³³ Bruce G. A., “Why Should Prosecutors ‘Seek Justice’” *Fordham Urban Law Journal*, Vol. XXVI, 1999, pp. 607 – 643 at p. 608; the idea is also found in Zacharias F C, “Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice” *Vanderbilt Law Review*, Vol. 44, Iss. 1, 1991, pp. 45 – 114

¹³⁴ Idea from Danner A. Marston, “Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel” *Stanford Law Review*, Vol. 55, Iss. 5, pp. 1633 – 1665

¹³⁵ Boas Gedeon, *The Milosevic Trial: Lessons for the conduct of complex international criminal proceedings*, Cambridge University Press, 2007, Foreword, p. xiv

¹³⁶ Langbein J H, “Controlling Prosecutorial Discretion in Germany” *The University of Chicago Law Review*, Vol. 41, No 3, Spring 1974, pp. 439 – 467 at p. 440

¹³⁷ Bassiouni M. Cherif, “Searching for Peace and Achieving Justice: the need for accountability”, *Law and Contemporary Problems*, Vol. 59, No.4, 1996, pp. 9 – 28, p. 13

¹³⁸ Morris H. Madeleine, “International Guidelines against impunity: Facilitating accountability” *Law and Contemporary Problems*, op. cit., pp. 29 – 39, pp. 29 - 30

¹³⁹ Idem

The international prosecutor's tendency nowadays is to charge as much as he/she can. He/she uses means and ways that can better facilitate his work. Some means are of a procedural nature like the ones discussed above. This thesis will look into judicial notice, guilty pleas in their procedural aspect and as attributes of the prosecutor. Other legal arms that the prosecutor frequently relies on are command or superior responsibility and joint criminal enterprise. A brief look into the literature on these doctrinal concepts presents a disparity of opinions.

Combs explores "the ways in which a widespread and systematic effort to obtain guilty pleas can enhance international criminal accountability by increasing the number of prosecutions that feasibly can be undertaken"¹⁴⁰ This exercise can be fruitful if it is based on a strong factual basis and tends to uncover the nature of atrocities that have been committed by a suspect. Plea bargains may save time and money, and serve other ends. But there is doubt as to whether the saving is worth the cost. Cohen and Doob, after a careful consideration of data concluded that "most Canadians disapprove of plea bargaining."¹⁴¹ A plea bargain is good and helpful if it is used reasonably.

The other tool is judicial notice. Judicial notice is first of all utilised by a prosecutor who seeks a decision from a chamber to not adduce evidence on uncontested issues before the court. As a matter of principle, it is used in exceptional circumstances. In a previous work¹⁴², the author tackled this doctrine. Bringing it back in the current research reinforces the previous opposition to the doctrine particularly the way it had been resorted to by the ICTR and ICTY prosecutors.

Command or superior responsibility as well as joint criminal enterprise are the most controversial tools to impute criminal liability. These concepts were abundantly used in the

¹⁴⁰ Combs N. Amoury., *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach*, Stanford University Press, Stanford, California, 2007, p. 4

¹⁴¹ Cohen A. Stanley and Doob N. Antony, "Public attitudes to Plea Bargaining", *Criminal Law Quarterly*, Vol. 32, Iss. 1, 1989-90, p. 85 and 95

¹⁴² Mutabazi Etienne, *The International Criminal Tribunal for Rwanda's Approach to Serious Violations of Humanitarian Law*, LLM Dissertation, UNISA, 2006, pp. 111 - 115

prosecutions before the *ad hoc* tribunals.¹⁴³ In many instances both doctrines are applied together. There is, however, a growing tendency to abandon the doctrine of command responsibility in favour of joint criminal enterprise.¹⁴⁴ It may be the case, for example, when the prosecution fails to prove the superior-subordinate relationship or the constructive knowledge element.

¹⁴³ See Darcy Shane, “Imputed Criminal Liability and the Goals of International Justice”, *op. cit.*, holding that the two forms of liability are central to many contemporary international criminal proceedings; Hamdorf Kai, “The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for parties to a Crime: a comparison of Germany and English Law”, *Journal of International Criminal Justice*, Vol. 5, Iss.1, 2007, pp. 208 - 226

arguing that “Joint Criminal Enterprise has become too expensive”, at p. 224; Harmen Van der Wilt, “Joint Criminal Enterprise: possibilities and limitations”, *Journal of International Criminal Justice* 5 (2007), pp. 91 - 108 adding that [the JCE] “doctrine has been mobilized to extend criminal responsibility to cover those members of a criminal group who could not have been held accountable on the basis of common theories of criminal responsibility”, p. 107

¹⁴⁴ For an understanding of this concept, see Cassese Antonio, “The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise”, *Journal of International Criminal Justice*, Vol. 5, Iss.1, 2007, pp. 109 - 133; Ambos Kai, “Joint Criminal Enterprise and Command Responsibility”, *Journal of International Criminal Justice*, Vol.5, Iss. 1, 2007, pp. 159 – 183; Hamdorf Kai, “The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of Germany and English Law”, *Journal of International Criminal Justice*, Vol.5, Iss. 1, 2007, pp. 208 – 226; Gustafson Katrina, “The Requirement of an Express Agreement for Joint Criminal Enterprise Liability: A Critique of Brđanin”, *Journal of International Criminal Justice* Vol.5, Iss.1, 2007, pp.134 – 158; Powles Steven, *op. cit.*; Piacente Nicola, “Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy”, *Journal of International Criminal Justice*, Vol. 2, Iss.2, 2004, pp.446 – 454; Danner A. Martinez and Martinez S. Jenny, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law”, *California Law Review*, Vol.93, Iss.1, 2005, pp.75 - 169; Easterday Jennifer, “Obscuring Joint Criminal Enterprise Liability: the conviction of Augustine Gbao by the Special Court of Sierra Leone”, *Berkeley Journal of International Law Publicist*, Vol. 3, 2009, pp. 36 – 46; Ralby M. Ian, “Joint Criminal Enterprise liability in the Iraqi High Tribunal”, *Boston University International Law Journal*, Vol. 28, 2010, pp. 283 – 343; Jayangakula Kitti, *Is the Doctrine of Joint Criminal Enterprise a legitimate Mode of Individual Criminal Liability? – A Study of the Khmer Rouge Trials*, Master Thesis, Spring 2010. In the “*Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Brđjanin and Talic* (IT – 99 – 36), Trial Chamber, 26 June 2001, para. 24, the Chamber used interchangeably “criminal plan”, a “common criminal purpose”, a “common design”, and a “common concerted design”; read as well Powles Steven, “Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity”, *Journal of International Criminal Justice* 2(2004), pp. 606 – 619, at p. 607. Osiel dismisses all these terminologies because they do not mean the same; each having its own precise meaning. He maintains that:

Some ICTY judgments speak of “agreements” among participants, but others have been content instead to find a “common purpose.” This presumably requires less of prosecutors, since individuals may independently choose to subscribe to a single purpose without entering into even a tacit agreement with others. To form an agreement, participants must be aware, at least, that others exist who share its terms. One may share a purpose with others, by contrast, while being completely ignorant of their existence.

In addition to agreements and purpose, the ICTY has sometimes spoken of a “common plan.” This language suggests greater programmatic specificity than “purpose”, as when one plans an aggressive war, or even a family vacation, concretizing the details of where one will reside on given nights. Unlike plans, common purposes – like tacit agreements – can readily form without the need for any direct interaction among participants. People may unite in highly mediated ways, as by accessing a single Web site advocating a political agenda they share and then physically “swarming” a location where a public demonstration has been announced to occur. In its first years, the ICTY employed the three terms almost interchangeably.

Osiel Mark, *Making Sense of Mass Atrocity*, *op. cit.*, p. 64

Joint criminal enterprise has taken a lion's share in the prosecution of international crimes. It has become "a magic weapon"¹⁴⁵ used as a form of accomplice liability. The doctrine still gives rise to conceptual confusion and conflicts with some fundamental principles of (international) criminal law.¹⁴⁶ It is resorted to when the prosecution evidence fails to prove command responsibility on one or more legs. It also helps to punish anyone who, in some way, has made it possible for the perpetrator of the reprehensible act to carry it out.¹⁴⁷ It is based on the assumption that international crimes involve many people who at different levels and in various capacities, knowingly or unknowingly, contribute to the realisation of what comes out of their disjointed effort, as a common design. According to Bigi, "the person concretely committing the crime can often be regarded as a mere participant in a broader criminal venture planned and organised by senior political or military leaders."¹⁴⁸ Such a person cannot be shed from criminal liability nor should his contribution be underestimated.¹⁴⁹

Conceptually, command responsibility and joint criminal enterprise differ. Joint criminal enterprise "requires a positive act or contribution"¹⁵⁰ while "an omission suffices"¹⁵¹ to engage command responsibility. Ohlin finds within the joint criminal enterprise alone three conceptual problems¹⁵², namely the mistaken attribution of criminal liability for contributors who do not intend to further the criminal purpose of the enterprise, the imposition of criminal liability for the foreseeable acts of one's co-conspirators and the mistaken claim that all members of a joint criminal enterprise are equally culpable for the actions of its members.¹⁵³ He unfortunately concludes that "the three conceptual problems with joint criminal enterprise identified [...] do

¹⁴⁵ Ambos Kai, "Joint Criminal Enterprise and Command Responsibility", *Journal of International Criminal Justice*, Vol. 5, Iss.1, 2007, pp 159 – 183, p. 153

¹⁴⁶ Idem

¹⁴⁷ See Kirs Eszter, "Ante Gotovina and the Joint Criminal Enterprise concept at the ICTY", *International Relations Quarterly*, Vol. 2 No.1, 2011, pp. 1 – 5, p. 3

¹⁴⁸ Bigi Giulia, "Joint Criminal Enterprise in the Jurisprudence of the International Criminal tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military leaders: the Krajsnik Case", *Max Planck Yearbook of United Nations Law*, Vol. 2010, pp. 51 – 83, p. 53

¹⁴⁹ Idem

¹⁵⁰ Ambos Kai, op. cit., p. 180

¹⁵¹ Ibidem

¹⁵² Ohlin J. David, "Three conceptual problems with the doctrine of joint criminal enterprise", *Journal of International Criminal Justice*, Vol. 5, Iss.1, 2007, pp. 69 - 90

¹⁵³ Idem, p. 69

not implicate the essential core of the doctrine.”¹⁵⁴ He advocates for the amendment of article 25 of the Rome Statute to adequately deal with “the problems of intentionality, foreseeability and culpability.”¹⁵⁵

Ohlin’s opinion fails to address the very essence of the doctrine. Hamdorf argues that its expansive use “may run the risk of violating the principles of legality and individual criminal liability.”¹⁵⁶ Judge Cassese attempts to set the “proper limits of individual responsibility under the doctrine of joint criminal enterprise”¹⁵⁷; but does not pre-empt the question. The enterprise as such, is confusedly defined. There is a complete confusion of terms. Is it an enterprise, a purpose, design, an agreement or any other thing of that nature? There is no definitive answer. Darcy moves forward and attacks the overreliance on both command responsibility and joint criminal enterprise. She demonstrates “how aspects of joint criminal enterprise liability and superior responsibility fall short of basic principles of criminal law, including the *mens rea* requirement and causation.”¹⁵⁸ She contends that “convictions secured under these modes of imputed liability may not accurately reflect the personal wrongdoing of an accused.”¹⁵⁹ She also points out that “reliance on modes of imputed criminal liability which overstate the responsibility of a particular accused may undermine public support for the work of international tribunals and hinder the prospects for reconciliation, the breaking of cycles of collective blame, and the maintenance of peace.”¹⁶⁰ To a certain extent, the public would be justified to reject the jurisprudence gained by the application of joint criminal enterprise in its current status.¹⁶¹

¹⁵⁴ *Ibidem*, p. 89

¹⁵⁵ *Idem*

¹⁵⁶ Hamdorf Kai, *op. cit.*, p. 224

¹⁵⁷ Cassese Antonio, “The proper limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise”, *op. cit.*

¹⁵⁸ Darcy Shane, “Imputed Criminal Liability and the Goals of International Justice”, *op. cit.*

¹⁵⁹ Darcy Shane, *op. cit.*, p. 403

¹⁶⁰ *Ibidem*

¹⁶¹ See Kirs Eszter arguing that:

As the public’s reaction following the delivery of the Gotovina Judgment demonstrate, judicial decisions of international criminal judicial bodies, obviously, touch upon sensitive historical points of the affected countries. At the same time, the acceptance of their jurisprudence is an essential factor for the successful fulfillment of the mandate of international criminal courts. From this perspective, it would be harmful to uphold JCE liability and to build future judgments on legal concepts whose contours cannot be clearly indicated by the judicial chambers based of *lex lata*.

Kirs Eszter, “Ante Gotovina and the Joint Criminal Enterprise concept at the ICTY”, *op. cit.*, p. 5

Darcy courageously and frankly breaks the silence and reveals the true reasons why those doctrines are overused. She suggests “that the employment of joint criminal enterprise and superior responsibility is primarily motivated by a prosecutorial desire for expediency, as exemplified in the construction of the majority of indictments.”¹⁶² She quotes Drumbl noting “how various factors such as political pressure to obtain convictions have made reliance on these imputed liability concepts all the more tempting.”¹⁶³ Darcy maintains that:

One cannot discount the idea that the tribunals are relying on these modes of imputed liability in order to ensure the conviction of indicted individuals and thus, in their view, the automatic fulfilment of the numerous objectives ascribed to international trials. Needless to say, it would be unacceptable for such trials to be used as a means to the end of achieving the ancillary goals, in disregard of the primary objectives of holding individuals accountable in accordance with established principles of criminal liability and fair trial.¹⁶⁴

The doctrine of command responsibility evolved over the ages. Bantekas is an outstanding authority who extensively wrote on command responsibility.¹⁶⁵ He is of the view that “superiors do not incur responsibility for the crimes of their subordinate simply because they happen to occupy that position.”¹⁶⁶ Despite its rationale, some states have been reluctant to rely on it to hold their commanders responsible for criminal acts committed by their subordinates. Those states have instead excelled in imputing severe penalties to fallen enemy commanders for failure to control their troops.

Command responsibility developed unevenly particularly after the Allies trial of Nazi and Japanese commanders. The case of General Tomuyuki Yamashita and captain Medina are good illustrations of this assertion. In the Yamashita case, Justice Murphy, dissenting from the majority was of the opinion that the charges against General Yamashita amounted to victors punishing the vanquished only because they lost the war.¹⁶⁷

¹⁶² Idem

¹⁶³ Id

¹⁶⁴ Id

¹⁶⁵ Bantekas Ilias, *Principles of direct and superior responsibility in international humanitarian law*, Juris Publishing, Manchester University Press, 2002...Foreword by Hans-Peter Gasser, p. x

¹⁶⁶ Bantekas Ilias, op. cit., p. 73

¹⁶⁷ Judge Murphy stated in his dissent:

We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for

In the majority judgment, the judges assumed knowledge of General Yamashita pursuant to the widespread and systematic nature of the atrocities committed without considering the general situation in which Yamashita operated as an ordinary human general. The majority did not bother considering the General's ability to stop the atrocities or even to punish the perpetrators, if he was able to identify them and if time so allowed. In Medina, judges did not apply the same reasoning. In Medina, an American military tribunal failed to apply the Yamashita standard. It found captain Medina not guilty of acts committed by his forces. Reasonably the tribunal could have concluded that Medina knew of the crimes committed, that he ordered or condoned those crimes. No superior to Medina was ever prosecuted. How could the doctrine of command responsibility born out of these two situations conclusively evolve as a norm of customary law?

The question becomes an inquiry into how to properly impute responsibility to a failing commander or superior; whether American or Japanese. The inquiry seeks to establish the real and actual responsibility of a commander taking into account all the circumstances that did not facilitate the discharge of his duties as a responsible commander, whoever he might be. "Every case needs to be decided on its own particular set of facts" as advanced by Hendrin.¹⁶⁸

having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganisation which ourselves created in large part. Our standards of judgment are whatever we wish to make them. Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganisation created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

Judge Murphy dissenting, *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol IV, London, HMSO 1948, Trial of General Tomuyuki Yamashita, United States Military Commission, Manila, 8th October – 7th December 1945, and the Supreme Court of the United States, Judgment delivered on 4th February, 1946, p. 51*

¹⁶⁸Hendrin E. Stuart, "Command Responsibility and Superior Orders in the Twentieth Century – A Century of Evolution", *Murdoch University Electronic Journal of Law*", Vol. 10, No.1, 2003, para. 281, available at http://www.murdoch.edu.au/elaw/issues/v10n1/hendrin101_text.htmlUT, accessed on 29 September 2003

Following the jurisprudence of particularly the ICTY, some scholars have elaborated on these two concepts, not necessarily in the traditional understanding of the doctrines but in what may be called a “must-to-be” relationship between commanders and superiors. They in fact praised how judges went about extending those principles in a legislative fashion. Boas, Bischoff and Reid contend, commenting on the *Osman Osmanovic* and *Ramiz Becirovic* trial judgment, that:

The relationship between a chief of staff and a commander is such that the former reports to the latter, takes orders from him and implement them. In this way, a commander exercises effective control over the chief of staff. There is no evidence that would indicate that the situation was different in the case of Osman Osmanovic and Ramiz Becirovic.¹⁶⁹

This approach is too unfair and detached from military reality. Prosecutors assume that a commander has control over a single foot soldier whatever the level of the unit might be. The prosecutor relies solely on the practice of reporting, giving orders and the military hierarchy structure. The prosecutor does not bother checking which orders have been given, whether they have been received and the feedback provided. How to properly ascribe criminal liability to the accused? This is the crux of the current research under joint criminal enterprise and command responsibility. It is also a contribution to the effectiveness of current and future international crimes tribunals.

The literature review has aimed at putting the current research in its factual and legal context. The breakdown of the former Yugoslavia was preceded by many events that facilitated the outbreak of war. It cannot be said with certainty that what has been written about those events has pre-empted the root causes of the conflict. It is a work historians may complete. The factual analysis of conflict in Rwanda was not unanimous. Some believed that it was a civil war. Others supported the idea that the war facilitated the commission of genocide. Again, historical and social research may better clarify what happened in Rwanda. Any factual conclusion necessitates a proper legal qualification.

The literature reviewed highlighted the writings that are relevant and upon which the current study needs to stand. A part of the literature pertaining to the five areas highlighted for the effectiveness of the *ad hoc* tribunals shows many shortcomings or partially touches on the

¹⁶⁹ Boas Gideon, Bischoff & Reid L. Nathalie, *International Criminal Law Practitioner Library*, Vol.1, Cambridge University Press, 2007, p. 188

questions posed. The other part addresses substantially the subjects of the inquiry that this research intends to develop. From the weaknesses observed, the current work will suggest improvements. From the strength noted, the research will take stock and add ingredients for sustainability and larger impact. The research methodology that follows emphasises how, from diverse sources of information, the focal point remains the diagnosis of the *ad hoc* tribunals for the best outcome of their work that can serve for the future.

1.6. Research methodology and sources

A lot of materials have been used to carry out this research. The approach consists firstly in describing the events in the former Yugoslavia and Rwanda. Secondly, the analysis compares relevant and best practice of law borrowed from international or domestic levels. The facts relevant to the five areas of the study were systematically and critically analysed in their historical and legal context. To arrive at theoretical and practical findings, a comparative approach looked into the domestic good practices and international odious or imperfect ones. The attempt is a search of consistency, coherence and stability. The legal analysis is predominantly used in this research. The work relies on the *ad hoc* tribunals' statutes, the rules of procedures and evidence, the judgments and other judicial decisions; the UNSC resolutions and other official documents.

International criminal law as applied by the *ad hoc* tribunals is not an autonomous discipline. It is also evolving. The working approach is therefore an interdisciplinary one. Measuring the effectiveness of the *ad hoc* tribunals refers not only to international criminal law, but also to disciplines like criminology, humanitarian law, human rights law, international relations, penology and politics; to just mention a few.¹⁷⁰

¹⁷⁰ See also Caplow Stacy & Fullerton Maryellen, "Co-teaching international criminal law: new strategies to meet the challenges of a new course", *Brooklyn Journal of International Law*, Vol. 31, 2005 – 2006, pp. 103 – 127. These two scholars suggest that "International Criminal Law encompasses parts of many other courses – International Law, Criminal Law, Criminal Procedure, Comparative Law, International Human Rights – and [that] it is evolving in front of our eyes as both an area of law and a law school course", p. 103; Swart likewise suggests that there are relationships between International Criminal Law and Public International Law; Internationally-Protected Human Rights; National Criminal and Procedure; Comparative Law and Procedure; International, Comparative and national Theories of Criminology; etc., Swart A.H.J, Comments on teaching International Criminal Law, *op. cit.*

From a fair and modest knowledge of the topic, the current research relies extensively on the work of others. The researcher worked at the ICTR as a Defence Legal Assistant and Investigator for more than twelve years.¹⁷¹ The author also researched the ICTR approach to international humanitarian law through Article 3 Common to the Geneva Conventions and Additional Protocol II.¹⁷²

The background information on facts and events that help apply the legal principles is found in materials utilised by international tribunals and courts such as transcripts of proceedings, expert reports, motions and briefs from parties which are in the public domain and other such information. All these sources are acknowledged within this work and clear indications are provided where the sources are not easily accessible to the public. For example, this is done when some materials were discussed on camera or were intended to be confidential or otherwise protected.

There are also abundant declassified documents from the United States of America Department of State¹⁷³ and UNAMIR reports which relate to the Rwandan events. These correspondences were facts on events at the time. They reflected what was happening in Rwanda. However, some important details contained in those correspondences were overlooked during the trial. They could have assisted in replaying the scene and allow to draw truthful and objective conclusions and worthy inferences. The same exercise is done with regard to most, if not all, of the United Nations documents, particularly the resolutions of the UNSC on the events in Rwanda and the former Yugoslavia, as well as such documents and reports related to the

¹⁷¹ Etienne Mutabazi worked as a Defence Legal Assistant and Investigator in the case of *Prosecutor versus André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, or the *Cyangugu Case*, ICTR – 99 – 46 T/A; *Prosecutor versus Augustin Bizimungu, Augustin Ndindiliyimana, François Xavier Nzuwonemeye and Innocent Sagahutu*, also called *Military II Case*, ICTR – 2000 – 56 – T; and *Prosecutor versus Yussuf Munyakazi*, ICTR – 97 – 36 A – T

¹⁷² Mutabazi Etienne, *The International Criminal Tribunal for Rwanda's Approach to Serious Violations of Humanitarian Law*, op. cit.

¹⁷³ These declassified documents are from the National Security Archive, an independent non-governmental research institute and library located at the George Washington University, the Archive collects and publishes declassified documents through the Freedom of Information Act. For a full address, refer to The George Washington University/ Gelman Library, Suite 701 2130 H Street, N. W. Washington, D. C. 20037; Phone 202 994 7000, Fax 202 994 7005; nsarchiv@gwu.edu; <http://www.nsarchive.org>

working of the two *ad hoc* tribunals, like the tribunals' annual reports. The study refers many times to reports of the UN Secretary General, reports of internationally appointed commissions of experts on Rwanda and the former Yugoslavia, and letters from the diplomatic community.

The documentation further comprises reports by nongovernmental organisations such as Human Rights Watch, Amnesty International, African Rights and major research centres and schools' records on the events in Rwanda and the former Yugoslavia from 1990 onwards. All these sources contain rich original and firsthand information and observations that are relevant to the identified research problem. They are indeed indispensable for the research.

Sources include many extracts from books and articles from prominent scholars that are related to any of the five areas identified for the study. The chosen writings constitute the best and most updated authorities in the domain of international criminal law, ICTY and ICTR. This required thorough library research and intensive readings of the literature. Books, journal articles and chapters in books assisted to shape different opinions expressed in the whole work, and to articulate conclusions. Articles from outstanding academics, scholars, experts, other prominent international criminal lawyers and social scientists on various disciplines and topics did the same. A great deal of international criminal law reviews which focus principally on prosecution of international crimes, particularly those related to *ad hoc* tribunals, are better evidence in this area of study.

The commentaries on the jurisprudence of the *ad hoc* tribunals, namely the ICTY, the ICTR and other such tribunals and courts of an international or hybrid character also helped to understand, argue and articulate the themes raised. The ICC, it is believed; has at its disposal plenty documents, that has been used as well. This jurisprudence is composed of appeal and trial chamber judgments and decisions. Before the *ad hoc* tribunals, there was the IMT that tried major war criminals of the Nazi regime in Europe. They left behind an abundant jurisprudence and enunciated principles that are still applied nowadays, albeit with much improvement. The same type of approach will be used as was applied in the IMTFE or such prosecutions of war criminals in the aftermath of World War II that were conducted in domestic jurisdictions and other forums.

The criticisms that accompanied all these prosecutions inspire one to make useful comparisons with the law and practice of the *ad hoc* tribunals. This thesis would be incomplete if the author did not consider the different reports of amnesty commissions because their work may help in understanding some proposed ways forward to pre-empt atrocities by such truth-telling commissions. What needs to be remembered however is that the research is undertaken with a postulate of improving retributive justice with relatively little emphasis on restorative justice. Truth commissions belong to the second category. These constitute the secondary sources.

1.7. Structure of the thesis

The thesis is divided into eight chapters. Chapter one introduces the topic and lays foundations for subsequent developments. The introductory remarks state the problem the research intends to investigate. It affirms the aim, objectives and interests of the research. It sets up its assumptions and the working hypothesis. The introduction contains the literature that is relevant to the research, the methodology and the sources.

Chapter two introduces and confronts legal positivism and naturalism in international criminal prosecutions. It shows how each theory applies to the themes of the study. Adjudicating international crimes portrays a more positivistic appraisal, while it should attempt to conform to justice as prescribed by natural law. There are moral and ethical imperatives that need to be looked at more seriously, what positive law does not comply with.

Chapter three elaborates on the events that brought about the establishment of *ad hoc* tribunals for the former Yugoslavia and Rwanda in 1993 and 1994. It further analyses the legal problematic of establishing these *ad hoc* international criminal tribunals. It emphasises particularly the opportunistic question of responding to the failure of the UNSC, to adequately and timely address the war that fuelled the commission of serious violations of international humanitarian law in the former Yugoslavia and Rwanda. An analysis of four cases held by both tribunals in which defendants contested the jurisdiction concludes that the UNSC did not have power to establish *ad hoc* tribunals.

Chapter four defines the objective of justice and other general criminal law objectives of deterrence, end to impunity, retribution and incapacitation. The chapter claims that it was too ambitious and unrealistic to expect criminal tribunals to contribute to the process of restoration and the maintenance of peace and national reconciliation. In the case of the former Yugoslavia, some objectives have begun to be achieved. For Rwanda, many questions remain unanswered.

Chapter five investigates the prosecution aspect of the *ad hoc* tribunals, emphasising the role of the prosecutor in the process. Ordinarily a prosecutor plays a double role. He must vigorously lead a criminal case in order to win it at all costs. By doing so, however, he must ensure that justice is done, that is his second priority. This twin obligation must consistently appear in the investigation and prosecution phases. To discharge its function, the prosecutor must be independent, accountable and professional. The *ad hoc* tribunals' experience shows the most dangerous power of the prosecutor that is picking people that he/she thinks he/she should, rather than picking cases that needed to be prosecuted.¹⁷⁴ The chapter looks moreover into the investigative and charging decisions vested in the international prosecutor. The chapter tests how the prosecutor uses his/her powers and discretion when adjudicating high profile cases involving for example heads of states and government and the passive role played by judges in the process.

Chapter six discusses the overuse of the guilty plea and judicial notice as speedy means to dispose of cases before the *ad hoc* tribunals. These techniques facilitate the work of the tribunals, secure time and resources. They nevertheless demean the gravity and seriousness of the crimes under the jurisdiction of the international criminal tribunals. One arguable suggestion is that guilty pleas do not allow the uncovering of the truth. Prosecutors tend to manipulate the accused persons who, under the false hope of benefiting from lighter sentences, plead to crimes they have not actually committed in order to minimise their responsibility. Judicial notice is adopted to avoid the necessity of the formal introduction of evidence in certain cases where there is no real need for doing so. Though sometimes legitimate, these doctrines are often misused.

¹⁷⁴ This idea is from Bennet L. Gershman, *Prosecutorial Misconduct*, Clark Boardman Callaghan, Deerfield, New York and Rochester, West Group, 1997, pp. 4-3

Chapter seven analyses joint criminal enterprise and command responsibility as preferred modes of imputing criminal liability. Joint criminal enterprise is a judicial creation, highly contested, but mostly used to alleviate the prosecution burden of uncovering evidence in complex criminal cases. Though the judges justified that joint criminal enterprise was part of customary law, the doctrine's application proved difficult and inconsistent in the cases held at the ICTY and ICTR.

Command or superior responsibility is an ancient concept that aims to hold superiors criminally responsible for illegal acts committed by their subordinates. After the end of World War II, the victorious nations applied it to punish the Nazis in Germany and the Japanese in the Far Eastern Theatre of Operations. Domestically the same nations have consistently resisted applying it to their nationals. The doctrine has not evolved evenly.

Chapter eight concludes the research. It recaps the main ideas developed throughout and presents the findings and new perspectives to improve the delivery of international criminal justice. Adjudicating international crimes needs to distance itself from political agendas¹⁷⁵ to actually deliver justice and nothing else, only guided by principles as in domestic jurisdictions. Justice must be seen to be done. This will enhance the popular respect for the rule of law and the restoration of trust in the international criminal justice system.

¹⁷⁵ Let's however observe that "the tribunal's dependence on the U.N. highlights one risk of interpreting ambiguous statutory language. The risk of political pressure on the tribunals creates the potential for the perception that the chambers are simply interpreting the language on an *ad hoc* basis to achieve predetermined results. To the extent that the international community perceives the tribunals as mere puppets of political factions within of the U.N., the tribunals will lose their legitimacy and effectiveness."

The Editors, *Development in the Law: International Criminal Law*, op. cit., pp. 2022 - 2023

CHAPTER 2: THE *AD HOC* TRIBUNALS' EFFECTIVENESS VIEWED THROUGH THE LENS OF POSITIVISM AND NATURALISM

2.1. Introduction

It would be fair to assume that the *ad hoc* tribunals were designed to achieve the standard objectives of domestic criminal law enforcement like retribution, deterrence, incapacitation and rehabilitation. They moreover sought to become instruments contributing to peace, security and national reconciliation processes.¹⁷⁶ *Ad hoc* tribunals were believed to also contribute to the emerging and development of the system of international criminal justice, more generally. All these matters are not only varied in their meaning, content, practicability and impact, they are also unclear.

Matters of clarification, focus, elucidation, consistency, uniformity and ownership could only be facilitated through a theoretical grounding in this perspective. It is not disputable that the UNSC used its powers to establish the *ad hoc* tribunals; yet the impact and consequences of their work fall on individual persons. Everyone has and must claim a say in this enterprise in an orderly, comprehensive and logical manner. Koerner rightly explains that “the command of our innermost destiny by a well-directed philosophy of life toward objective reality is one of the most important agencies of controlled orientation that is entrusted to the sound exercise of the human will.”¹⁷⁷

A theoretical legal inquiry and analysis into the substance, process and best practice of the *ad hoc* tribunals is warranted. What theory can promote human rights and humanitarian law through *ad hoc* tribunals' prosecution? As some have argued, human rights promotion is an area where “we might look for greater theoretical coherence.”¹⁷⁸ Is a theory on the effectiveness

¹⁷⁶ See Damaska Mirjan, “What is the point of International Criminal Justice”, op. cit., p. 331

¹⁷⁷ Koerner L. Robert, “The challenge of legal supremacy”, *Review of Social Economy*, Vol. XI, No 2, 1953, pp. 105 – 118, p. 105

¹⁷⁸ Duff Antony et al. (eds), *The Trial on Trial: Truth and Due Process*, Vol.1, Oxford and Portland, Oregon, 2004, p. 7

of the *ad hoc* tribunal needed and what would it look like? This is the convenient time to answer all these questions. If this attempt succeeds it can serve not only in understanding the philosophy of *ad hoc* tribunals, but it can furthermore be a step in shaping international criminal justice more generally.

Law is constantly tested to find out whether it rightly serves the interests of those it purports to protect. The standard envisaged here can be formulated through a naturalistic approach to the problem. This approach is desirable because what the UNSC did was to dictate, by its binding resolutions, the establishment of institutions which also worked in the framework of their mandate. This is called positivism in legal theory. Law as posited aims at upholding the natural rights of people. Neither naturalism nor positivism is novel in legal fraternity. In any event however, naturalism claims precedence over positivism. Before opting for naturalism, an understanding of what both theories encompass is necessary.

2.2. Meaning and relevance of naturalism and positivism in law

Naturalism and positivism have always been two opposed theories in legal philosophy. According to Adams, “the history of legal philosophy is importantly shaped by the conflict between these two opposing general conceptions of law and legality: law as power and law as justice.”¹⁷⁹ The conflict is older and deeper than that exists between each one’s advocates.¹⁸⁰ Law as power may signify the process of making that law. Law as justice is the substance contained in the made or posited law. The question is then one of understanding which has primacy between the substance and its regulation. Process also has a great impact because the broader the participation in law-making, the bigger its’ acceptance will be. It is through the process that the purpose and function of law appears.

The law reflects the will of its makers who allegedly represent the masses. However, law-making process should be a stakeholders’ analysis exercise. Stakeholder analysis was initially developed

¹⁷⁹ Adams M. David, *Philosophical Problems in the Law*, 3rd ed., Wadsworth, 2000, p. 46

¹⁸⁰ Barnett E. Randy, “Towards a theory of Legal Naturalism”, *Journal of Libertarian Studies*, Vol. 2, No. 2, 1978, pp. 97 – 107, p. 97

in business sciences, but currently, it serves to frame all kinds of activities, from policy initiatives to policy implementation. The method consists in gathering all necessary information from anyone who has an interest in a policy. Bryson¹⁸¹ identifies the variants of stakeholders. They include all parties that will be affected by or will affect a decision, a policy or an action. They also comprise any person, group or organization that can place a claim for attention, resources, or output, or who is affected by that output.¹⁸² In theory a stakeholder is “any entity with a declared or conceivable interest or stake in a policy concern. [...] Stakeholders can be of any form, size, and capacity. They can be individuals, organisations, or unorganized groups.”¹⁸³ Stakeholders as a term revolves around the idea of interconnectedness, that no one is fully in charge, that many individuals, groups and organizations are involved or affected or have some partial responsibility to act. Figuring out what the problem is and what solutions might work are actually part of the problem, and taking stakeholders into account is a crucial aspect of problem solving.¹⁸⁴ The law of the *ad hoc* tribunal was not made in the traditional international law making process.¹⁸⁵

Law is an abstract science which in the final analysis is designed to operate amongst individuals; and for the betterment of individuals. It regulates the conduct of individuals in a society. It is a “project to protect society, fundamental values and to solve conflict well.”¹⁸⁶ Where does law come from, and how is it designed to regulate the conduct of the people? This is in fact a question of the origins of the law *per se* and its purposes. There are two sets of law, namely natural and positive law. On one hand, natural law can be anything self-regulated

¹⁸¹ Bryson M. John, “What to do when Stakeholders matter: Stakeholder Identification and Analysis Techniques”, *Public Management Review*, Vol. 6, Iss. 1, 2004, pp. 21 - 53

¹⁸² Bryson, op. cit., pp. 23-24

¹⁸³ World Bank, What is Stakeholder Analysis?, available at <http://www1.worldbank.org/publicsector/anticorrupt/PoliticalEconomy/PDFVersion.pdf>, accessed on 8 November 2013

¹⁸⁴ Bryson, op. cit., p. 24

¹⁸⁵ See in this respect Pronto N. Alnold, “Some thoughts on the Making of International Law”, *The European Journal of International Law*, Vol. 19, No. 3, 2008, pp. 601 – 616. Pronto reviews Boyle, Alan and Chinkin Christina, *The Making of International Law*, New York, Oxford University Press, 2007. Pronto argues that ‘it is no longer the case that international law is made by a finite number of entities (states) through a handful of intergovernmental processes. Today international law is made in a large number of for a, including multilateral processes, tribunals and the organs of international organizations’; p. 602

¹⁸⁶ Marina J. Antonio, “Genealogy of Morality and Law”, *Ethical Theory and Moral Practice*, Vol. 3, Iss. 3, 2000, pp. 305 – 327, p. 316

without the intervention of legislators or lawmakers. It goes beyond the regulation of human conduct. The law of gravity for example, does not regulate human conduct. When natural law directs the conduct of individuals, it “is based on ideas of morality and justice, independent of sovereign created rules.”¹⁸⁷ Adams emphasises this argument in maintaining that “the phenomenon we call ‘law’ can adequately be understood only in relation to a certain view about the nature of moral judgments and standards.”¹⁸⁸ George appraises this argument because “theories of natural law are reflective critical accounts of the constitutive aspects of the well-being and fulfilment of human persons and the communities they form.”¹⁸⁹ Such a law sets principles aimed at ensuring “respect for rights people possess simply by virtue of their humanity – rights which, as a matter of justice, others are bound to respect and governments are bound not only to respect, but, to the extent possible, also to protect.”¹⁹⁰ Without the purpose of protecting these rights, law will have no meaning. So, at the bottom line there are rights which constitute the foundation of any regulatory process that is called law. The foundation is therefore very important to understand the resulting law.

Positive law, on the other hand, is a rule decreed by persons vested with authority like a legislature or a precedent set by a court and followed subsequently. Such a law may be an act of a representative body, like an elected parliament in a democracy; as it may also be an act of a self-appointed body or person, like in monarchies, dictatorship, totalitarianism, or that powerful institution beyond everyone’s control. In some instances the law does not necessarily reflect the reasonable fulfilment of individuals even if it is a resultant act of the majority. It is a derivative of natural law. It mainly vests three characteristics, namely imperativism, normativism and realism.¹⁹¹ In its first characteristic, law is a command that enjoins everyone to follow willingly or unwillingly. It does not offer a choice because it binds. Adams further suggests that: “the phenomenon of law is best understood as a system of orders, commands, or rules enforced by power.”¹⁹² He furthermore posits that “law is that which has been ‘posited’, that is, made,

¹⁸⁷ *Ibidem*, p. 146

¹⁸⁸ Adams M. David, *Philosophical Problems in the Law*, op. cit., p. 47

¹⁸⁹ George P. Robert, “Natural Law”, *Havard Journal of Law & Public Policy*, Vol. 31, Iss.1, 2008, pp. 171 – 196, p. 172

¹⁹⁰ George P. Robert, “Natural Law”, op. cit., p. 172

¹⁹¹ Barnett E. Randy, *Towards a theory of Legal Naturalism*, op. cit., p. 97

¹⁹² *Ibidem*, p. 47

enacted, or laid down in some prescribed fashion. It is as such a purely human product, ‘artificial’, rather than ‘natural.’¹⁹³ It establishes a new norm in the society. Finally, law reflects what is happening in the society irrespective of whether it contributes to justice or injustice at the time of its enactment. It becomes a fact in that time and place. Despite these characteristics of positive law, the principles of natural law still control human law.¹⁹⁴ Positive law must therefore conform to its source; which is natural law. The corpus of international criminal law, for example, comprises two distinct elements: a regulatory element constituted of positive law, and a regulated element that needs more than law. This latter element falls in the area of morality and ethics. Both elements cannot be dissociated. In the area of international prosecution, law becomes a matter of sanctions and punishment.¹⁹⁵ A clear demarcation must be drawn beforehand between the regulatory nature of law, to be properly applied to the regulated. George expresses this idea much better by drawing a distinction between what he calls strict “individualism” and “collectivism.” He highlights that natural law theorists reject both.¹⁹⁶ Naturalists reject the narrow vision as well as the wide vision of a person that have the potential to militate against self-fulfilment. On the one hand, George argues that:

Individualism overlooks the intrinsic value of human sociability and tends to view human beings atomistically. It reduces all forms of human association to the instrumental value they possess. To criticize this reductionism is not to deny that some forms of association are indeed purely instrumental valuable or that virtually all forms of human association have instrumental value in addition to whatever intrinsic value they may have, but instead to remember that sociability is an intrinsic aspect of human well-being and fulfilment.¹⁹⁷

On the other hand, he suggests that:

Collectivism compromises the dignity of human beings by tending to instrumentalize and subordinate their well-being to the interests of larger social units. It reduces the individual to the status of a cog in the wheel whose flourishing is merely a means rather than an end to which other things – such as governments, system of public and private law, and other institutions created by members of human communities for the sake of their common good – however noble and important (...) are ultimately merely means.¹⁹⁸

¹⁹³ Idem, p. 47

¹⁹⁴ Perrone Lawrence Joseph, “The Fundamental and Natural Law ‘Repugnant Review’ Origins of Judicial Review: A Synergy of early English Corporate Law with Notions of Fundamental and Natural Law”, *Brigham Young University Journal of Public Law*, Vol. 23, Iss.1, pp. 61 – 81, p. 61

¹⁹⁵ Anderson Kenneth, “The Rise of International Criminal Law:...”, op. cit., p. 341

¹⁹⁶ George P. Robert, op. cit., p. 173

¹⁹⁷ Idem, p. 173

¹⁹⁸ Id

George finally maintains that whether individualists and collectivists have theories of justice and human rights, they remain highly unsatisfactory because they are rooted in grave misunderstandings of human nature and the human good.¹⁹⁹ This is an interesting debate between those who believe that an individual exists as a member of the society in which he or she lives and those who postulate that one lives in society because he exists. The society is made of individuals. The individual is central to the existence of the society, which in fact is the sum of individuals.

In broader generalisation, yet in complete concurrence with George; the Matwijkiws²⁰⁰ understand positivism as “legal law”²⁰¹, and naturalism as “natural law.”²⁰² According to them, “natural law” means “morality.”²⁰³ Quoting Bassiouni, they argue that natural law is also the “law of humanity.”²⁰⁴ This proposition is in perfect agreement with the early concept of natural law. Natural law was fundamentally considered as unchanging and universally applicable. It remained an ideal to which humanity aspires or a general fact, the way human beings usually act.²⁰⁵ The powerful standing of natural law resides in its characteristic of being autonomous, universally valid and having a special weight in the sense that its standards are deemed to be more important than other guidelines of human conduct.²⁰⁶ Law generally speaking falls in this

¹⁹⁹ Id

²⁰⁰ Matwijkiw Anja & Matwijkiw Bronik, “A modern perspective on international criminal law: op. cit.

²⁰¹ Ibidem, p. 27

²⁰² Idem, p. 27

²⁰³ Id, p. 27

²⁰⁴ Bassiouni M. Cherif, “*Searching for Peace and Achieving Justice:...*”, op. cit.; cited in Matwijkiw Anja & Matwijkiw Bronik, Id. p. 27

²⁰⁵ idem

²⁰⁶ Koller P., “Law, morality and virtue”, *Annals of the Faculty of Law in Belgrade International*, Vol. 31, 2006, pp. 31 – 48, p. 34. Koller develops the three features of moral standards as follows:

First of all, moral standards are *autonomous standards* in the sense that they have binding force only for those persons who accepted freely and voluntarily. This feature distinguishes them from the heteronomous norms of law and social etiquette, but not from the standards of prudence and personal taste. Secondly, moral standards *claim universal validity* in the sense that people who accept them regard them as binding also for other people. This distinguishes those standards from personal desires, the recommendations of prudence and social habits, but not always from legal norms. And thirdly, moral standards have a *special weight* in the sense that they are deemed to be more important than other guidelines of human conduct, in some cases even so important that they take absolute priority over other guidelines, such as those of personal taste and prudence. On the basis of these features which leave room for a great variety of different conceptions of morality, it is possible to introduce two more specific concepts of morality, namely the concept of a conventional morality on the one hand and the idea of a rational morality on the other (Körner 1976: 137 ff)

Koller, op. cit., p. 34

category of instruments that regulate human conduct. A binding resolution of the UNSC is also in the same category. It must therefore be analysed through this lens.

Koller also speaks of “rational morality”, which he defines as “a set of moral standards that are based on good reason rather than mere convention or non-rational beliefs.”²⁰⁷ According to Koller, “conventional morality, understood as a set of moral norms that have effective validity in a certain aggregate of people, be it a social group, a society, a culture, or even humankind in general, because they are acknowledged by a vast majority of its individual members as supreme standards of their conduct.”²⁰⁸ Fuller divides morality into two aspects, namely the morality of aspiration and the morality of duty.²⁰⁹ The morality of aspiration aims at the full realisation of the human person. The morality of duty condemns men for failing to respect the basic requirements of social living.²¹⁰ Aspiration is within the individual while duty is outside of the individual. In Fuller’s view, law deals with duty. Law creates conditions that are essential for rational human existence. It operates at that lower level because it is only concerned with the “discernment and enforcement of legal duties and nothing more.”²¹¹ Once again, the individual’s nature comes into play. Law regulates and enforces that which existed already. Law does not create entitlement; it only states and proclaims rights an individual had already by virtue of being a person. The law of nature dictates the examination of the individual first before examining factors surrounding him, including law. What is then the working definition of natural law?

²⁰⁷ Koller, op. cit., p. 35. For this author:

Moral standards are based on good reasons, if they are sufficient reasons to assume that these standards should be unanimously acknowledged by all individuals possibly concerned as generally binding guidelines of human interaction from an impartial viewpoint and in consideration of all relevant information.

²⁰⁸ Koller, op. cit., p. 34. For this kind of moral standards, Koller says that they:

create, within the respective social aggregate, a certain degree of social pressure which results from the interplay of the individuals’ positive or discouraging reactions to the behaviour of others. Consequently, a conventional morality, though it is based on autonomous individual moral attitudes, always develops some heteronomous force too, because its norms are connected with corresponding social sanctions that enforce them even vis-à-vis those people who do not accept them.

²⁰⁹ Idea taken from Barnett; Barnett E. Randy, *Towards a theory of Legal Naturalism*, op. cit., p. 98

²¹⁰ Fuller Ron, *The Morality of Law*, Revised Edition, New Haven and London, Yale University Press, 1969, cited in Barnett E. Randy, op. cit., p. 98

²¹¹ Idem

2.2.1. Definition and characteristics of natural law

According to Washington, natural law dates back to the ancient Greek philosophy of Aristotle, Cicero, Plutarch and others, and was further developed by the Roman ideals of the natural dignity of mankind.²¹² Before these philosophers, Socrates:

is reputed to have once said that ‘the unexamined life is not worth living.’ He meant by this that it is important to critically reflect upon our own lives, the principles by which we live them, the values we cherish, and the cognitive and affective forces and processes that inform our decisions and actions – in short, the people we are, have been, and want to be.²¹³

This is a good combination of natural law, morality and ethics. Tracing a theory in ancient times therefore, and purporting that the theory is still holding clearly shows how strong the theory is and how useful it is to rely on it. Looking back in the Romans’ times, Cicero held in his *De Republica* that “true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions [...] There will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times.”²¹⁴

This philosophical thought of law dating back to the 1st century B.C had evolved alongside the Christian conception of natural law, particularly with the input of theologian Saint Thomas Aquinas at around 1265-1273 in his *Suma Theologica*. Aquinas spoke of an Eternal Law that “gives all beings the inclination to those actions and aims that are proper to them. Rational creatures, by directing their own actions and guiding the actions of others, share in divine reason itself. This participation in the Eternal Law by rational creatures is called the Natural Law.”²¹⁵ Aquinas is believed to be the naturalist of all times, but if one carefully analyses this statement, it comprises the idea of “own action” and “directing the actions of others” all of which are relevant if and only when they adhere to the Eternal Law.

²¹² Washington Ellis, *op. cit.*, p. 242

²¹³ Williams R. Christopher & Arrigo A. Bruce, *Ethics, Crime, and Criminal Justice*, Pearson Prentice Hall, Upper Saddle River, New Jersey, 2008, p. 9

²¹⁴ Lynch J Edward, "Natural Law", *op. cit.*

²¹⁵ *Ibidem*

Though Socrates did not involve the idea of God in his ethics, as did Aquinas, he insisted on self-introspection. Look at yourself before preoccupying about what others are doing. Ask your heart, and be at peace with it. Socrates' ethics "not only asks that we reflect upon the issues and/or controversies that we encounter in our personal and professional lives, it also asks us to examine ourselves [...], ethics asks that we live mindfully – to take some care in how we act, what and how we feel, what we think and believe."²¹⁶ For Aquinas, law is nothing other than an ordinance of reason for the common good²¹⁷ issued by one who has care for the community.²¹⁸ This argument contains both the idea of naturalism and ethical positivism. Naturalism may be considered here as the substance of the law and its righteous application. Positivism, in Aquinas' understanding may be taken as the formalisation of the right way of applying the law.

According to Aquinas "human law is necessary to implement and adapt the basic precepts of natural law, which are quite general, to the changing needs and contexts of human societies."²¹⁹ Those precepts are the same for everyone and do not change because of time and place.²²⁰ The point of departure and the point of arrival on the road of lawmaking are, in this understanding, the same for everyone everywhere. What differs from place to place and time to time, is the detailed conclusions drawn from these basic precepts and human law reflects this fact.²²¹ Adams adds that: "human law must adjust the principles of natural law to specific situations. Moreover, since human communities need many detailed regulations and ordinances simply to

²¹⁶Williams R. Christopher. & Arrigo A. Bruce., op. cit., p. 9

²¹⁷ The common good principle is like this. It is comprehensive, for it is concerned with acting for the common good: and the common good, as I argued earlier, should be understood as that comprehensive state of affairs in which every person's good is fully realised. But it does not merely affirm the importance of this good: it tells each person to do his or her share with respect to it. [...] there are two differences between the law and the common good principle. The law need be no more than a partial set of directives: it does not purport to exhaust the requirements that a citizen is under with respect to the common good. The law is a fairly precise set of directives: while law may well make use of notions that are open textured (vehicle) or that require employment of evaluative concepts (reasonable), the requirements that it imposes on citizens are more easily understood and thus more capable of guiding conduct than the common good principle alone.

Murphy C. Mark, *Natural Law in Jurisprudence and Politics*, Cambridge Studies in Philosophy and Law, Cambridge University Press, 2006, p. 114

²¹⁸ Murphy C. Mark, *Natural Law Theory*, in Martin G. P. & William E. A. (ed.), *The Blackwell Guide to Philosophy of Law and Legal Theory*, op. cit., p. 16

²¹⁹ Adams M. David, *Philosophical Problems in the Law*, op. cit., p. 51

²²⁰ *Ibidem*, p. 51

²²¹ *Idem*

function, natural law requires that they be made, although it does not, of course, dictate their particular content.”²²² Adams reinforces the basic idea of Aquinas’ philosophy in that “the force of human law necessarily depends upon its justice: human enactments or measures that contravene natural law are not laws ‘but a perversion of law’; they are acts of violence and do not bind in conscience.”²²³

Stepping in the footsteps of Saint Thomas Aquinas, Hugo Grotius, a Dutch jurist and diplomat, founded and developed the modern theory of natural law. He does not view law as having any divine origin. He considers law as emanating solely from the use of reason.²²⁴ Though Grotius hypothetically divorced from the idea of God as the source and giver of true law, he however revisited and reinforced the idea of “use of reason”. In vulgar language reason can be contrasted with emotion or ideas without use of reason, or use of power and force without substantiation. To echo Grotius’ argument of the use of reason without necessarily referring to God, Murphy understands law as a rational standard for conduct. If reason has been used in law-making, then the agents for whom law is made have strong, even decisive, reasons to comply to.²²⁵

All in all, one is asked to do the right thing without caring about the consequences. Kant, a great German philosopher principled this idea as a categorical imperative, which is “the basis of morality.”²²⁶ This means that “there are some rules that must be followed no matter what consequences may befall an individual, a group, a social institution, and/or society more generally.”²²⁷ Kant termed this a maxim of universal application and formulated it in saying “act only according to that maxim by which you can at the same time will that it should become a universal law.”²²⁸ In fact, from a good will results a right action irrespective of consequences which may be contingent. According to Kant:

²²² Id

²²³ Id

²²⁴ Lynch J. Edward, “Natural Law”, op. cit.

²²⁵ Murphy C. Mark, Natural Law Theory, in Martin G. P. & William E. A. (ed.), *The Blackwell Guide to Philosophy of Law and Legal Theory*, op. cit., p. 15

²²⁶ Williams C. R., & Arrigo B. A., *Ethics, Crime, and Criminal Justice*, p. 218

²²⁷ *Ibidem*, p.217.

²²⁸ Immanuel Kant, *Foundations of the Metaphysics of Morals*, p. 39, cited in Williams R. Christopher, & Arrigo A. Bruce, op. cit., p. 217

No matter how intelligently one acts, the results of human actions are subject to accident and circumstance; therefore, the morality of an act must not be judged by its consequence, but only by its motivation. Intention alone is good, for it leads a person to act, not from inclination, but from duty, which is based on a general principle that is right in itself.²²⁹

It is quite interesting to see that both positivism and naturalism meet somewhere in Kant's philosophy. The intersection requires that legislators be sufficiently illuminated and personally disinterested in the process of making law.

William and Arrigo are of the view that "once we figure out the rule or maxim we are adopting, the next step is to ask ourselves whether we would be willing to make it a universal law. By universal law, Kant meant a rule that would be followed by everyone, all of the time."²³⁰ With the topic of inquiry, of course, people will start asking whether this is feasible or even possible. In Kant's thought, the answer is positive. Moral actions, suggests Kant, "must be undertaken from a sense of duty ultimately dictated by reason, and no action performed out of inclination, for expediency, or solely in obedience to law or custom can be regarded as moral."²³¹ This is very crucial to measuring the effectiveness of *ad hoc* tribunals. They were established for expediency sake and operated solely relying on their Statutes. They should, however, have considered some moral issues in discharging their mandate.

The failure ensues because of a lack of rationality in reasoning and acting, but also a lack of consensus.²³² In view of this, a human being should mean what he says, and do what he or she believes to be right without preoccupying himself or herself of the unpredictable and uncertain consequences or the reactions of others. The critical test is therefore the intention at the inception of an act. Although consequences may also be relevant, they are secondary.

In the context of human rights that must be protected by the prosecution of the potential violators, Kant would liken it to the principle to "act so as to treat humanity, whether in your

²²⁹ "Ethics", Microsoft® Student 2008 [DVD]. Microsoft Corporation, 2007]

²³⁰ Williams R. Christopher & Arrigo A. Bruce, *Ethics, Crime, and Criminal Justice*, Pearson Prentice Hall, Upper Saddle River, New Jersey, 2008, p. 219

²³¹ Immanuel Kant. « Microsoft® Encarta ® 2007 [DVD]. Redmond, WA: Microsoft Corporation, 2006

²³² See in this respect Haque who argues that "moral universalism may fall short of global consensus but remains the guiding vision of those individuals and groups most responsible for the establishment of international law", Haque A. Ahmad, *op. cit.*, p. 297

own person or that of any other, as an end and never as a means only.”²³³ In the domain of international criminal prosecution as well as in any other domain, this principle equally applies. People would only do their best if they can pursue their moral duty and let the consequences come as they may.²³⁴ Kant also “believed that the world was progressing towards an ideal society in which reason would bind every lawgiver to make his laws in such a way that they could have sprung from the united will of an entire people, and to regard every subject, in so far as he wishes to be a citizen, on the basis of whether he has conformed to that will.”²³⁵

Tyler²³⁶ echoed Kant’s thought in what he calls normative commitment through personal morality and normative commitment through legitimacy, as opposed to instrumental modes of obedience to law.²³⁷ On the one hand, people obey good laws because they feel those laws are just. Moreover, people will abide by the laws because they feel the authority that makes the law and that enforces it has the right to do so.²³⁸ The body exercises legitimate authority. In this scenario everyone benefits. Lawmakers are ensured that the laws they enact will be complied with easily.²³⁹ The law abiding citizenry will feel that authorities have done what the people want. This normative perspective focuses on “people’s internalized norms of justice and obligation.”²⁴⁰ Compliance with a law from an authority is based upon factors which are “inherent in authority, such as the capacity of its decision-making process to produce correct decisions, and not on the basis of elements related to the command itself, such as a consideration of its correctness.”²⁴¹ One of the reasons why a person complies with the dictate of the law is its correctness. This means moreover that the process leading to the enactment of the law was fair and each stakeholder’s view has been considered directly or indirectly. The

²³³ Immanuel Kant, *Foundations of the Metaphysics of Morals*, p. 47, cited in Williams R. Christopher, & Arrigo A. Bruce, op. cit., p. 222

²³⁴ Williams R. Christopher, & Arrigo A. Bruce, op. cit., p. 223

²³⁵ Immanuel, Kant, Microsoft ® Encarta, op. cit.

²³⁶ Tyler R. Tom, *Why people obey the law*, Yale University Press, New Haven and London, 1990

²³⁷ Idem, p. 4

²³⁸ Id

²³⁹ Talyor R. Tom, “Procedural Justice, legitimacy and the effective rule of law”, *Crime and Justice*, Vol. 30, 2003, pp. 283 – 257

²⁴⁰ Id

²⁴¹ Jodoïn Sebastien, “Enhancing the procedural legitimacy of the UN Security Council: a normative and empirical assessment”, *Sri Lanka Journal of International Law*, Vol. 17, 2005, pp. 1 – 55, p. 8

law vests a double character. The procedure for the adoption of the law was incontestably right. The purpose of the law must also respond to the aspirations of the governed.

On the other hand, if people resist complying with an unjust law, the lawmaker resorts to external instruments to enforce compliance. Tyler calls this an instrumental approach to compliance.²⁴² Arguably this may better translate the way the UNSC understood how to enforce compliance with international humanitarian law in the former Yugoslavia and Rwanda by establishing *ad hoc* tribunals. The UNSC assumes its legitimacy even though it is made up of fifteen members among them five permanent members. Those members, particularly the five permanent ones, cannot always assume that the intention of the UN founders in 1945 is still the same. Things have evolved, yet the Council has not adapted itself to the changed environment that it, unfortunately, still regulates. It is naïve to believe that the UNSC as a powerful body representing the rest of the UN members acts disinterestedly. The men and women who sit in the Council may pursue various and most of the time diverging interests. Even assuming that its decision to establish an *ad hoc* tribunal could bring about effective results; it is still a fact that, as Horton observes, that it is an exercise of coercive power through force, deception or some other means.²⁴³ The effectiveness of such power does not, simply of itself, confer legitimacy on the Council. In other words, might does not make right.²⁴⁴

Having defined natural law and showed how it translates both issues of morality and ethics, it is time to explore positive law and to understand the relationship between them. Nystuen rightly believes that such a relationship is even more apparent in international law than it is in national legal systems. The international legal system shares and agrees to legislate on values widely considered as relevant everywhere beyond the national borders.²⁴⁵ Legislation with these considerations in mind is virtually impossible to explain the formation of international customary law from a purely positivist view.²⁴⁶ This brings back the earlier take on values that

²⁴² Tyler R. Tom, Why people obey the law, op. cit., p.4

²⁴³ Horton John, "Political legitimacy, justice and consent", *Critical Review of International Social and Political Philosophy*, Vol. 15, No.2, 2012, pp. 129 – 148

²⁴⁴ Idem

²⁴⁵ Nystuen Gro, *Achieving peace or protecting human rights: conflicts between norms regarding ethnic discrimination in the Dayton peace agreement*, Martinus Nijhoff Publishers, Leiden/Boston, 2005, p. 30

²⁴⁶ Idem

are common to society. This opinion may offend realists who believe that “the nature of international relations precludes morality in that sphere. And because morality is not operative in the international sphere, a moral theory of international law is an exercise in futility.”²⁴⁷ But, the point is not being missed here. The point is one of international criminal justice. “Justice in itself”, according to Findlay and McLean, “is a moral imperative at the heart of the law and of human rights.”²⁴⁸ International criminal justice becomes, therefore, in the opinion of Tallgren, the:

local interpreter of common values, offering a solution, a remedy to social problems, and thereby setting on them the miraculous seal of finality. Most importantly, criminal law carries utilitarian aspirations vis-à-vis the future: prevention of further crime, integration of society and rehabilitation of offenders.²⁴⁹

It needs to be repeated that a mechanical approach to law, in theory or in practice, worsens any undertaking. Morality and ethics should guide at all levels: domestically or internationally. An analysis of the shortcomings or weaknesses of positive law reinforces this argument. On the practical side of the venture, positivism in its ethical dimension also assists in arriving at a comprehensible and feasible mixture. The interest of this undertaking is so simple. Positive law is only important when it helps to solve practical problems. It also bars leaders and countries from natural law’s moral norms to fit their own selfish interests.²⁵⁰ Positivism will therefore be looked at with this view in mind.

2.2.2. Positive law and positivism

Lawmakers enact law that imposes command on what existed already. From the nature of things, law traces its way. So, natural law and positive law live side by side. Bix defines legal positivism as:

a theory about the nature of law, by its self-characterization a descriptive or conceptual theory. By its terms, legal positivism does not have consequences for how particular disputes are decided, how texts are interpreted, or how institutions are organized. At most, the theory may have something to say about how

²⁴⁷ Buchanan A. & Golove D., *Philosophy of International Law*, in Coleman J. L. & Shapiro S., (ed.), *The Oxford handbook of jurisprudence and philosophy of law*, Oxford, New York, Oxford University Press, 2002, pp. 868 – 935, at p. 872

²⁴⁸ Findlay Mark & Mclean Clare, “Emerging International Criminal Justice”, *Current issues in Criminal Justice*, Vol. 18, No. 3, 2006 – 2007, pp. 457 – 480, p. 460

²⁴⁹ Tallgren Immi, “The Sensibility and Sense of International Criminal Law”, *op. cit.*, p. 562

²⁵⁰ Henderson W. Conway, *Understanding International Law*, *op. cit.*, p. 13

certain ways of operating are characterized (it is 'law' or is it, for some reason, 'not law'?) but not on how they should be evaluated or reformed.²⁵¹

Bix's definition portrays a law that looks like a mechanised instrument that is set in motion to work without inner-self regulation. It goes where it is programmed to go and does what it is designed to do and no more. The people only need to follow its dictates whether right or wrong. Positivists deny any connection whatsoever between law and morality. They are not concerned by the correctness, the righteousness, even the truthfulness of an enacted law. For them, these characteristics are not necessary to make a law what it is.

Though Koller does not make a point about the separation of law and morality, he defines law as "a system of heteronomous norms which are based on authoritative enactment rather than voluntary acceptance and made effective by formal enforcement rather than informal social pressure."²⁵² Koller remarks that differences between law and morality are only "functional." He reinforces his argument in holding that "any law is connected to morality in the sense that it requires a moral justification."²⁵³

Washington suggests that the origins of legal positivism correspond:

to the height of the secular revival movement called 'The Enlightenment Period'. During this time men of learning and erudition consciously sought to discover knowledge solely through the use and development of their own natural faculties, apart from acknowledging any divine source as men of learning had done for centuries before. The two major theorists of positive law were the British philosophers, John Austin (1790 – 1859) and Jeremy Bentham (1748 – 1832). The common theme through their writings insisted that 'law as it is' is not necessarily the same as 'law as it should be'. In other words, law and morals were viewed as distinct and separate entities.²⁵⁴

This was the florescent and emerging time of the sovereign State from the nineteenth century onwards. Positive law even ascended to a level whereby it surpassed natural law in importance and took precedence and preference in legal thinking. The excitement over the emergence of positivism reduced the impact of natural law to the point where the State was heralded as the

²⁵¹ Bix H. Brian, Legal positivism, in Martin G. P. & William E. A. (ed.), *The Blackwell Guide to Philosophy of Law and Legal Theory*, op. cit., p. 31

²⁵² Koller, op. cit., p. 38

²⁵³ Koller, *Ibidem*.

²⁵⁴ Washington Ellis., *The Inseparability of Law and morality: the constitution, Natural Law, and the Rule of Law*, op. cit., p. 240

final arbiter on issues of right and wrong.²⁵⁵ Positivism's honeymoon phase did not last as naturalism regained the terrain.

As Bix posited earlier, positivism is a by-product of human will and wish to self-reliance in terms of thought. It centres on the human without consideration of divinity. It does not even consider what a human cherishes. Obeying the law is not instinctively drawn from oneself, but imposed from elsewhere. The flaws in legal positivism appear in its subsequent evolution. Once again, Washington highlights them as follows:

Positive law is actually an outgrowth of utilitarianism or the view that regarded the consequences of an act as demonstrative of what is good or morally right. This idea wasn't as innovative as one may think for over three centuries before positivism began to be applied to law, the great Italian political philosopher, Niccolo Machiavelli (1469 – 1527) coined the infamous phrase of political expediency: "the end justifies the means" in his famous treatise on political statecraft, *The Prince* (1513).²⁵⁶

Legal positivism in legal philosophy "holds that natural law involves a confusion between law as it is and law as it ought to be and contends that the definition of law does not require any reference to justice or other moral values."²⁵⁷ It is called a "cynical view"²⁵⁸ of law, as Souryal suggests. The positivist movement relegates ethical knowledge and moral character on the periphery in the administration of justice.²⁵⁹ This conception of law has also influenced the development of political science, which separates values from facts.²⁶⁰ This position, one may argue, misses the point and becomes the artificial representation of the reality. Sindjoun realises, instead, that "in the domain of political science, ethics is closely connected to political and moral philosophy and to normativism."²⁶¹

Looking at the argument of Machiavelli in *The Prince*, and later Thomas Hobbes' *Leviathan*, it will be fair to advance the idea that the positivist movement was aimed at strengthening the

²⁵⁵ *Ibidem.*, pp. 146 - 147

²⁵⁶ Washington Ellis, *The Inseparability of Law and morality: the constitution, Natural Law, and the Rule of Law*, op. cit., p. 240

²⁵⁷ Zagorin Perez, "Hobbes as a Theorist of Natural Law", *Intellectual History Review*, Vol. 17, No 3, 2007, pp. 239 – 255, p. 241

²⁵⁸ Souryal S. Sam, *Ethics in Criminal Justice: in search of the Truth*, 2nd edition, Anderson Publishing Co. Cincinnati, OH, USA, 1998, p. xii

²⁵⁹ *Ibidem*

²⁶⁰ Sindjoun Luc, "Positivism, ethics and politics in Africa", *International Review of Sociology: Revue Internationale de Sociologie*, Vol. 19, No.1, 2009, pp. 23-50, p. 26

²⁶¹ *Idem*, p. 27

political power with a means called “law.” Law could be enforced by the threat of force or actual use of force to coerce compliance. Was power politics involved? Could manipulations and intrigues play a role in the development and sustenance of positivism? What were the reasons behind such an effervescence of positivism? The movement was facilitated by three kinds of power-holders. Raz grouped those power-holders as people who exert naked power, *de facto* authorities and legitimate authorities.²⁶² While lacking any kind of right to rule or claiming that the population is under any obligation to obey, the first group shines by cynically terrorising the people.²⁶³ The power-holders expect compliance and obedience through a combination of physical coercion, fear, or self-interested calculation of the consequences of resistance. The relationship between the authorities and the governed is one of power without right on either side. The ones who exercise *de facto* power resemble the first group, but unlike them, they always claim legitimacy, the right to rule.²⁶⁴ The mere fact that they claim the right to rule means that they become authorities. In Raz’s third classification, authorities are like their counterpart in category two with the difference being that their claim is accepted. Their right to rule is recognised.²⁶⁵ From this posture of positivism, Sindjoun realises the promotion of political science as a value-free science.²⁶⁶

Thomas Hobbes, as notes Thivet, argues that it:

is usually regarded as the pre-eminent representative of the power-politics school of classic realism. He is frequently quoted for his pessimistic depiction of the state of nature that he so famously described as a brutal and anarchic arena in which each individual seeks his own advantage to the detriment of all other individuals, in a perpetual struggle for power.²⁶⁷

Despite this statement, Zagorin believes that Thomas Hobbes was not entirely positivist for two reasons:

First, natural law was a doctrine he could not have avoided or ignored because it occupied such a dominant position in the classical and Christian philosophical tradition of reflection on morality and law and their transcendental grounding in nature, the order of the universe, and the reason and will of God the

²⁶² Jozeph Raz, *Between authority and interpretation* 128 (2009), cited in Bottoms Anthony & Tankebe Justice, “Beyond procedural justice: dialogic approach to legitimacy in criminal justice”, *Journal of Criminal Law and Criminology*, Vol. 102, 2012, pp. 119 – 170, p. 125

²⁶³ *Idem*

²⁶⁴ *idem*

²⁶⁵ *Id*

²⁶⁶ *Id*

²⁶⁷ Thivet Delphine, “Thomas Hobbes: a philosopher of war or peace?”, *British Journal for the History of Philosophy*, Vol. 16, No. 4, 2008, pp. 701 – 721, p. 701

creator. Second, from the later sixteenth century onward, natural law constituted a strand in the formation in Western Europe of a revolutionary political theory sanctioning a right of resistance to kings and unjust governments.²⁶⁸

Positivism is structured in a way that, as in all political organisations, on the top, there is a thinking head and below, there is a huge class of followers. The means between the head and the followers is law. How the leaders and the followers interact is the domain where law intervenes. It is enforced by force if compliance fails. Interaction will be much healthier if the law is good and accommodative for everyone. Relations will sour if the law remains strictly positive without adjustment and the followers abide unwillingly.

The evolution from naturalism to positivism was premised on an assumption that the existence of natural law could not be proven. In short, toward 1832 John Austin, believed to be the founder of legal positivism, conceived the idea that:

the existence of law is one thing; its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation.²⁶⁹

Finis concurs with Austin by suggesting that “Legal positivism is in principle a more modest proposal: that state law is, or should systematically be studied as if it were a set of standards originated exclusively by conventions, commands, or other such social facts.”²⁷⁰ This is short-circuiting the law and its ambit, one may also argue. Law cannot be studied as a kind of mechanised instrument that only focuses in one pre-established direction of obedience without consideration of its finality. Contrary to Finis, Fuller is of the opinion that:

law is not merely an object or entity, to be studied dispassionately under a microscope; law is a human project, with an implied goal – and an implied moral goal – the ability of people to coexist and cooperate within society. It is not merely that law has an ideal, but that one cannot truly understand law unless one understands the (moral) ideal towards which it is striving. Law is the enterprise of subjecting human conduct to the governance of rules. Law thus is a process, to be contrasted with the slightly different process of managerial direction [...]²⁷¹

²⁶⁸ Zagorin Perez, “Hobbes as a theorist of Natural Law”, op. cit., p. 241

²⁶⁹ Bix H. Brian, Legal positivism, in Martin G. P. & William E. A. (ed.), *The Blackwell Guide to Philosophy of Law and Legal Theory*, op. cit. p. 29

²⁷⁰ Finnis John, Natural Law: the classic tradition, in Coleman L. Jules, & Shapiro S., (ed.), *The Oxford handbook of jurisprudence and philosophy of law*, op. cit., p. 9

²⁷¹ Finnis John, Natural Law: the classic tradition, in Coleman J., L. & Shapiro S., (ed.), *Ibiden*, p. 77

What Fuller attempts to do is to bridge the gaps between law as a regulatory process of human conduct and what that conduct ought to be. Fuller does not categorically separate law from its aims, neither does Finnis.²⁷² Fuller's argument is that "law is better understood as being the official response to certain kinds of problem – in particular, the guidance and coordination of citizens' actions in society."²⁷³ He looks at the law through the prism of its purposes, function, aims and finality. So, "once one takes a 'functional' approach to law, then the mantra often ascribed to natural law theory, 'an unjust law is no law at all', begins to make sense."²⁷⁴ The prosecution of international crimes in any forum be it through *ad hoc* tribunals or anything else remains an application of law. So, to be "meaningful, rational and obeyable"²⁷⁵ this law needs to cover itself with the umbrella of ethics and morality. The positivists could have attempted to refine the rough material of natural law in a net positive law. The attempt to separate law from its morality suggests the failure the positivists registered.

2.3. Converging concerns of natural and positive law

2.3.1. Natural law and positive law are not mutually exclusive

Marina suggests that "every legal solution must preserve the fundamental value of society."²⁷⁶ He is right. Natural law represents those fundamental values, while positivism stands for a legal solution. There is a kind of interlink between naturalism and positivism. The literature utilised above has shown that neither positivism nor naturalism is independent from each other. They do not exclude each other. In probability, a thing is exclusive of the other if the occurrence of thing "A" excludes the likelihood of occurrence of thing "B". Positive law theorist like Austin and Hart have attempted to separate law, in fact decreed law, from its underlying validity (morality). Yet others like Dworkin, a natural law theorist, reject the strict separation between law and morality. The argument for the inseparability of both concepts resides in the consideration that moral evaluations are a necessary part of determining the content of a legal

²⁷² "If you want to be 'positivist,' 'rigorously descriptive' about law as a kind of social fact, you had better be positivist, rigorously descriptive, about morality, too." Finnis, "Natural Law: the classic tradition", in Coleman L. Jules & Shapiro S., (ed.), *The Oxford handbook of jurisprudence and philosophy of law*, pp 1 – 60, p. 15

²⁷³ Finnis J., Natural Law: the classic tradition, in Coleman J., L. & Shapiro S., (ed.), *Idem*, p. 78

²⁷⁴ *Ibidem*, p. 78

²⁷⁵ Souryal S. Sam, *Ethics in Criminal Justice: in search of the Truth*, op. cit., p. xii

²⁷⁶ Marina J. Antonio, "Genealogy of Morality and Law", *Ethical Theory and Moral Practice*, op. cit., p. 312

system.²⁷⁷ Both naturalist and positivist's encounter difficulties to explain why they may stand for one and ignore the other. Rohr argues that "the positivist knows no higher law to stand in moral judgment on duly enacted laws of the state. The natural law school has difficulty explaining the content of the moral order of the universe to which the law of the state should conform."²⁷⁸ Yet, such order exists. According to Koller, "morality and law have, essentially, the same object, namely the social interaction of people, and serve a similar function, namely making a just and efficient social life possible."²⁷⁹ The reasons for such a rejection are quite simple to discern in any system of law. William and Arrigo underscore that "it is always important to remember that laws are made by people"²⁸⁰ and that in all instances, those people are fallible and "subject to the same biases, pressures, conflicts, and errors."²⁸¹ Moreover, they have divergent and conflicting interests in mind.

Looking into Dworkin's approach, Finnis dismisses the suggestion that one can determine what law is without assessing its morality. Law may even be a reflection of "something different from the official decisions that most people conventionally associate with the term."²⁸² What is of particular interest, however, is to know the valid reasons that were behind each law. Those reasons need not be clearly stated. For Finnis, "law cannot be properly understood without morality, especially the moral values towards which all law necessarily aspires."²⁸³ This quest is in fact a return to or a confirmation of the powerful stand of natural law, which clearly shows the weaknesses and shortcomings of positive law. Positive law cannot deny where it comes from. It may even be argued that positive law is an outgrowth of natural law. Moreover, "the philosophers of positive law differ among themselves about the exact relation of law to justice and to morality more broadly, but all of them want clearly to distinguish the law enforced by courts from the demands of justice and morality."²⁸⁴ In addition, positivists are unable to deal

²⁷⁷ Finnis J., Natural Law: the classic tradition, in Coleman J. L. & Shapiro S., (ed.), *The Oxford Handbook of jurisprudence and philosophy of law*, op. cit., p. 84

²⁷⁸ Rohr A. John, *Law and Ethics*, Encyclopedia of Public Administration and Public Policy DOI: 10.1081/E-EPAP2-12001038, 2008, pp. 1132 – 1135, p. 1132

²⁷⁹ Koller, op. cit., p. 38

²⁸⁰ Williams R. Christopher & Arrigo A. Bruce, *Ethics, Crime and Criminal Justice*, op. cit., p. 11

²⁸¹ Id

²⁸² Finnis John, Natural Law: the classic tradition, in Coleman J. L. & Shapiro S., (ed.), op. cit., p. 84

²⁸³ Idem

²⁸⁴ Murphy J. Bernard, *The Philosophy of Positive Law: Foundations of Jurisprudence*, op. cit., p.4

with the moral questions when they manage to get the two separated. That inability stems from the positivists' "simultaneous attempt to assert and to prove that law and morality are separated, the argument reduces to a vicious circle."²⁸⁵ These philosophers do not, however, say why such a separation is of utility. Steinitz observes that "they make no attempt to connect their philosophy of law either to political philosophy generally or to substantive legal practice, scholarship, or theory."²⁸⁶ Emphasizing such a separation deprives the law of its substantive meaning and aims. In any case, the separation cannot hold.

The explanation that these philosophers give of the separation is not sufficient, instead it is self destructive. Murphy insists on the fact that "just because a law is enforced by a court does not conclusively prove that it is consistent with the demands of justice. It is essential to the whole project of criticism and reform of law that we not confuse the existence of a law with its justice."²⁸⁷ Murphy also adds that:

even when consistent with the demands of justice, law plays a role in regulating human conduct different from that played by rule of morality. Legal precepts must provide much more specific guidance to human conduct than do moral precepts because law must provide clear and determinate guidelines if it is to coordinate myriad human endeavours.²⁸⁸

Again this position does not advance any further. Were positivists to be understood, they simply mean that laws are details of generic moral values. They are not separate entities *per se*, existing by and on their own.

Murphy points out other attempts to explain the positivists' arguments about law but none stands still against natural law. He, moreover, remarks that "in any system of social interdependence, we cannot achieve our goals without relying on our expectations of the conduct of others. Within broad moral boundaries, we value, above all, that others' conduct is

²⁸⁵ D'Amato Anthony, "The Moral Dilemma of positivism", *Valparaiso University Law Review*, 1985 – 86, Vol. 20, Iss.1, pp.43 – 53, p. 43

²⁸⁶ Maya Steinitz, "The *ad hoc* International Criminal Tribunals and a Jurisprudence of the Deviant", *International Law Forum du Droit International*, Vol. 7, Iss.2, 2005, pp. 119 – 126
, pp. 119 – 126, p. 120 citing Ronald Dworkin, "Thirty Years On The Practice of Principles", 115 *Harv. L. Rev.* 1655, 1678 (2002) (reviewing Jules Coleman, *The Practice Of Principles: In Defense of Pragmatist Approach To Legal Theory* (2001)

²⁸⁷ Murphy J. Bernard, *The Philosophy of Positive Law: Foundations of Jurisprudence*, op. cit., p. 4

²⁸⁸ *Ibidem*, p. 4

stable and predictable.”²⁸⁹ What positivists miss here is that there must be a common goal towards which any law aspires for the regulation of conduct of individuals and the collective. Even Murphy’s final argument that “moral law governs all thoughts, words, and deeds, while positive law governs only that which is publicly manifest; courts can take no notice of thoughts, words, or deeds that are private”²⁹⁰ does not resolve the matter. Positive law remains partial, a form without substance. When explaining this unfulfilled status of positive law²⁹¹, Murphy shows a law that is not worthy of its name unless it vests both the formal and substantive aspects. Contrary to Murphy, Washington is of the view that:

moral theorists are not trying to force any ideas upon anyone, but to instruct, to teach, to demand, and to require morality in law as an irrevocable prerequisite against mob rule and civilization backwardness. [...] Truth doesn’t require a majority vote. Martin Luther King stated, “truth crushed to the ground will rise again”. Truth, though held by one person, because of its intrinsic verity, ultimately overrules all other competing ideas and ideologies [...] truth is inevitable.²⁹²

On the nature of truth and on how to measure its reach, Souryal resorts to the Greeks’ concept of *veritas* which is the focal point of philosophy. He argues that:

Without knowing the truth, the human race would be like children living in a world of fantasy, or worse still, a herd of animals in an open pasture. The truth is the central point of reference around which all intelligible forms revolve. Without establishing this point, living would be random, and reasoning would be meaningless, because neither the purpose of life nor the goodness of society would make any distinguishable difference.²⁹³

Both Washington’s stand and the Greeks’ concept of truth are diametrically opposed to Kelsen’s philosophy of law. In Finnis’ view, “Kelsen’s official theory – at least when he was doing legal philosophy – was that there may be moral truths, but if so they are completely

²⁸⁹ *Idem*

²⁹⁰ *Id*

²⁹¹ What is most puzzling about the philosophy of positive law is that to define human law as positive can mean at least two different things. In one sense, something is positive because it has been deliberately laid down, imposed, or enacted – as opposed to what arises spontaneously by custom or nature; but in another sense, something is positive because it lacks intrinsic rational or moral force, its content is “arbitrary,” in the sense that it could be different – as opposed to what has intrinsic rational or moral force by its essence or nature. The first sense of positive is a descriptive or empirical claim about the origins of the law, namely, that it stems from deliberate imposition; positive law is here posited or enacted law. The second sense of positive is a normative claim about the content of a legal norm, namely, that it lacks, on various accounts, intrinsic moral necessity, moral universality, or moral force; positive law here seems arbitrary, such as the English rule of driving on the left side of the road. As we shall see, many writers use positive law in these two senses, but almost none explicitly distinguishes between them.

Murphy J. Bernard, *The Philosophy of Positive Law: Foundations of Jurisprudence*, op. cit., p. 5

²⁹² Washington Ellis, *The Inseparability of Law and morality: the constitution, Natural Law, and the Rule of Law*, op. cit. p. 278

²⁹³ Souryal S. Sam, op. cit., p. 9

outside the field of vision of legal science or philosophy.”²⁹⁴ In a way, Kelsen is a pure positivist, and nothing else. Koller mediates between a positive law and its morality. In his opinion, “under social conditions where a conventional morality alone cannot secure a just and peaceful social order, establishing an appropriate system of law is itself a moral imperative that is directed to the ultimate aim of any law, namely to ensure a just and generally advantageous social life.”²⁹⁵

On the one hand, Koller’s second argument that justifies the inseparability of law and morality is that “any law must take the moral convictions of its addressees into account in order to gain their acceptance without which it cannot achieve sufficient effectiveness.”²⁹⁶ On the other hand, Nemeth sustains that “positive law is not intended to contradict natural law, but rather to complement it, almost as a commentary.”²⁹⁷

Washington’s stand is, however, very radical and she severely criticises how, for instance, the trials were conducted at *Nuremberg*. She suggests that the adjudication of the *Nuremberg* cases could have condemned the Nazi regime as evil in itself, rather than concentrating on the outcome of such evil deeds.²⁹⁸ Adherence to the Nazi regime “led to injustice.”²⁹⁹ This means that the *Nuremberg* adjudication flew over without looking at the root causes of the evils surrounding the crimes the tribunal was to prosecute. The thrust of Washington’s point is that the rhetoric of international treaties or conventions, if not accompanied by a moral commitment to realise their objectives, becomes nothing or is self-destructive. To borrow the proper terms used by Washington, she suggests:

²⁹⁴ Finnis J., “Natural Law: the classic tradition”, in Coleman J. L. & Shapiro S., (ed.), *The Oxford handbook of jurisprudence and philosophy of law*, op. cit., p. 9

²⁹⁵ Koller Peter, op. cit., p. 38 - 39

²⁹⁶ Koller Peter, op. cit., p. 39

²⁹⁷ Nemeth Irene, “Punishing Nazi War Criminals in Australia: Issues of Law and Morality”, op. cit., p. 148

²⁹⁸ Had the United Nations tribunal relied on Natural law principles in conducting the Nuremberg trials, they would have effectively condemned Nazism as a fraudulent government, a sham state, antithetical to all known universal moral principles. Tragically, since Nuremberg trials openly denigrated or ignored the theistic suppositions of Natural law, they were conducted solely on secular, humanistic, empirical, bureaucratic, Positive law precepts; therefore the root of Nazi totalitarianism has flowered in contemporary times.

Washington Ellis, op. cit., p. 88

²⁹⁹ Nemeth Irene, “Punishing Nazi War Criminals in Australia: Issues of Law and Morality”, op. cit., p. 148

International treaties, as important as they are in maintaining civility among the nations of the world, in reality became merely symbolic posturing by politicians which are usually broken before the ink dries on the document signed. [...] It is imperative to understand that treaties are not sacrosanct and for one to fail to understand that belies an ignorance of the intractable perversity of human nature and international law.³⁰⁰

According to Washington, history has demonstrated that “all attempts to separate law from morality have only devolved into some forms of ineffective public policy, societal instability, socialism anarchy, nihilism and death.”³⁰¹ The inseparability of law and morality transpires much better in Aquinas’ thoughts. Basing his argument on law as an ordinance of reason as earlier seen, Aquinas introduces both morality and ethics in positive law. Aquinas argues that “law is a rule not concerning an individual *qua* individual, but for the governance of the group conduct; and just as what determines reasonable conduct of an individual is that individual’s good, what determines reasonable conduct for members of a group is the common good of that group.”³⁰²

2.3.2. Natural law as foundation of proper law

Even though natural law is an old legal theory, its importance in the making of positive law cannot be denied. At a time in Europe:

the operation of power politics was comfortable with a philosophy that permitted states to shape rules to their liking. Although positivism ascended to a superior position in the nineteenth century, natural law was not entirely eclipsed. Natural law made an important come-back in the post-Second World war period with the birth of the modern human rights movement.³⁰³

The human rights movement revisited the centrality of the human person. The movement gave particular attention to “the perennial need of human beings to find significance in their lives, to integrate their personalities around some clear, consistent, and compelling view of existence, and to seek definite and reliable methods in the solution of their problems.”³⁰⁴

³⁰⁰ Washington Ellis, *The Inseparability of Law and morality: the constitution, Natural Law, and the Rule of Law*, op. cit., p. 92

³⁰¹ *Ibidem*, , p. 1

³⁰² Murphy C. Mark, Natural Law Theory, in Golding & William E. A. (ed.), *The Blackwell Guide to Philosophy of Law and Legal Theory*, op. cit., pp. 16

³⁰³ Henderson W. Conway, *Understanding International Law*, op. cit., p. 14

³⁰⁴ Corliss Lamont, *The Philosophy of Humanism*, 8th edition revised, Half-Moon Foundation, Human Press, Amherst, New York 14226, 1997, p.3

The reason for this choice is again borrowed from the Matwijkiws'. They argue that "any conflict between legal and moral law must be resolved by using moral law or morality as a test for legal law, meaning that legal law must accord or conform in order to be said to have status as law proper, that is, as a rule of law – as opposed to the mere might."³⁰⁵ This also applies to the rulers or sovereigns who are depositors of authority and powers. Koerner suggests that:

the real meaning of sovereignty is seen as a moral power – the ultimate (not unlimited) right of decision possessed by a political body, taken together with the correlative obligation on the part of the subjects to obey its decisions as a consequence of their social nature. Mere will, in the sense of the arbitrary imposition of physical force as a justification for legal command, can have no place in such a definition.³⁰⁶

But, why law should be subjugated to morality to remain "law proper"? A simple answer is that laws are not infallible; they can be immoral, and they do not include all moral concerns.³⁰⁷ Law must reflect the intention of those who entrusted confidence in their rulers. Globally, "it is not enough to do the right thing"³⁰⁸, let alone that "even if we do the right thing by legal standard we are not necessarily acting morally."³⁰⁹ We act morally when we do the right thing for the right reason. Koller suggests that "law is not an appropriate means for enforcing inner convictions, attitudes and virtues: using it for this purpose unavoidably would turn it into an instrument of terror."³¹⁰ Williams and Arrigo support this proposition arguing that "laws, policies, rules, guidelines, codes"³¹¹ and anything like that "are made by fallible people who are subject to the same sorts of biases, pressures, conflicts, and errors in reasoning as the rest of us."³¹² These authors also believe that laws respond to specific circumstances.

Lawmakers arrive at conclusions about what they believe is right or wrong based on what, at the time, amounts to good reasons or sound justifications. These reasons and justifications, in turn, may or may not be suspect. Laws may or may not be moral; they may or may not promote

³⁰⁵ Matwijkiw Anja & Matwijkiw Bronik, op. cit., p. 27

³⁰⁶ Koerner, op. cit., p. 115

³⁰⁷ Id

³⁰⁸ Williams R. Christopher, & Arrigo A. Bruce, *Ethics, Crime, and Criminal Justice*, Pearson Prentice Hall, Upper Saddle River, New Jersey, 2008, pp. 10 - 13

³⁰⁹ Id

³¹⁰ Koller P., "Law, morality and virtue", p. 39

³¹¹ Williams R. Christopher, & Arrigo A. Bruce., *Ethics, Crime, and Criminal Justice*, op. cit., pp. 10 - 13

³¹² *Ibidem*, p. 11

moral behaviour.³¹³ An example of this argument is taken from the laws that applied during the Nazi reign in Germany and the South African Apartheid legal regime. Anyone undertaking a study of crimes and justice, politics, society and life must bear in mind that “right does not equal righteous. That is to say, just because something is a legal right does not make it a moral right.”³¹⁴ Neither do legal rights necessarily achieve justice. William and Arrigo finally observe that “there is much more to morality than law.”³¹⁵ MacIntyre calls this the “thomistic view” of law. For MacIntyre, only laws that conform to reason and justice are genuine laws.³¹⁶ This is what Finnis referred to as “objectivity.” According to Finnis objectivity:

is a matter of openness to the data, and willingness to entertain all relevant questions, and to subject every insight to the critique of further questions. It is a matter of our intellectual operations being free from all biases that would make the attainment of truth the goal of enquiry – less likely. To the extent that we as subjects (acting persons) have this openness and this freedom from truth-obscuring biases, we are being objective, our enquiries and judgments are objective, not merely subjective, and, subject to occasional error and deception, the realities we affirm and the goods we judge to be truly pursuit-worthy and beneficial are objectively what we judge them to be.³¹⁷

Furthermore, the law of a system; be it international or domestic, “does not supplant morality even for the judges acting within the system.”³¹⁸ The judge’s moral duty consists in ensuring that justice is done, not necessarily that law has been applied. When the law fails to produce the just result, considerations of justice should prevail.³¹⁹ Judges must use their wisdom without contravening the requirements of the law. Nemeth advocates for a separation between the legal and moral obligation of a judge. He argues that:

Distinguishing in this way between a judge’s legal and moral duties is important, though morality surely has the last word. The law (understood conventionally) might or might not do justice in a case. Even when the law fails, a judge may have a moral duty to follow the law. The moral values of a Rule of Law – predictability, coordination, separation of powers, fairness, equal treatment, and the like, may require the judge to follow the law despite the instant injustice. Consequently, a separate understanding of a legal judge’s legal duty is needed in order to identify what the law requires in its own terms, separate from balancing the moral reasons for following the law against the moral reasons for doing something else.³²⁰

³¹³ Williams R. Christopher, & Arrigo A. Bruce., *Ethics, Crime, and Criminal Justice*, op. cit., p. 11

³¹⁴ *Idem*, p. 13 is “Iem.” correct?

³¹⁵ *Id.*

³¹⁶ MacIntyre Alasdair “Theories of Natural Law in the culture of advanced modernity”, in McLean E. B., *Common Truths: New Perspectives on Natural law*, ISI Books, Wilmington, Delaware, 2000, pp. 91 – 115, at p. 92 - 93

³¹⁷ Finnis John, “Natural Law: the classic tradition”, in Coleman J., L. & Shapiro S., (ed.), *The Oxford handbook of jurisprudence and philosophy of law*, op. cit., pp. 39 - 40

³¹⁸ Burton J. Steven, *Judging in Good Faith*, Cambridge University Press, 1992, p. 35

³¹⁹ *Ibidem*, p. 203

³²⁰ St. Thomas Aquinas, *The Summa Theologica*, trans. Fathers of the English Dominican Province (New York: Benziger Brothers, Inc., 1947) II – II, Q109, art 2 at 1662, in Nemeth P. Charles, *Aquinas on Crimes*, Saint-Augustine Press, South Bend, Indiana, 2008, p. 108

This is quite confusing, because, it may seem, legal and moral duties are inseparable. The legal duty is to apply the law as it is. There is no morality required in this instance. The moral duty is to question the rationality of the law even though one may be constrained to apply it unquestionably. The judge must find the justice of the law. The judge then avoids applying the law mechanically without using his reason. It is self-evident that there is no absolute moral duty to follow an unjust law as Nemeth suggests.³²¹ This is because moral duties are not written, neither are they conventional. The fact that moral duties are not couched in writing or conventionally accepted does not rob them their authority over the written law.

The powerful argument of natural law over positive law is also overemphasized by Bix who suggests that:

While some schools of thought have faded in a matter of decades, by contrast at least one approach to legal theory, natural law theory, has been around literally for millennia, yet remains vibrant. Legal positivism is neither thousands of years old nor the product of recent fashion. While in some circles, legal positivism now seems the dominant approach to the nature of law, this dominance has never meant that the approach was without critics.³²²

In very strong and edifying terms, Washington sounds a clarion call that:

Former and current legal and philosophical approaches to the law like: democracy, positive law, utilitarianism, relativism, egalitarianism, secularism, liberalism, feminism, progressivism, pragmatism, materialism, have in modern times proven themselves to be wholly untenable, dangerous and inevitably lead to a corruption of societal morality.³²³

Her contention is that natural law principles should always be put back in place as the controlling philosophy of the Constitution. The same would apply to the legal framework of strict construction as the only form of legitimate constitutional jurisprudence and judicial decision-making.³²⁴

These arguments are quite eloquent to give natural law the place that it deserves, either before the UNSC in its various decisions or before the *ad hoc* tribunals in their criminal adjudication

³²¹ Idem

³²² Bix H. Brian, Legal positivism, in Martin G. P. & William E. A. (eds), *The Blackwell Guide to Philosophy of Law and Legal Theory*, Blackwell Publishing, 2005; pp. 29 – 49, p. 29

³²³ Washington Ellis, *The Inseparability of Law and Morality: the Constitution, Natural Law, and the Rule of Law*, op. cit., pp. 1- 2

³²⁴ Ibidem, p. 2

procedures. It is a value-oriented approach in critically answering some crucial questions. What outcome should one expect from the prosecution of international crimes? How should this be done from the outset through various procedures? Is there a better way of doing it? It is in fact the whole system that is tested.

2.4. Relevance of both naturalism and positivism to *ad hoc* tribunals' adjudication of international crimes

It is obvious that *ad hoc* tribunals apply the law posited by the UNSC. This law has the characteristics of other laws irrespective of whether they have been enacted by a domestic body or an international institution that follows and adheres to the decision-making process of international law. The law of the *ad hoc* tribunals is a criminal law designed to apply at an international level. Criminal law in this respect, like any other category of human law is designed to help men live the best possible lives.³²⁵ The commission of egregious crimes in the former Yugoslavia and Rwanda disturbed not only the social order in those two states, but it dislocated the conscience of the whole of humanity. So, designing a proper law to prosecute the violators and to re-establish the harmonious order is extremely important in this area. A balanced law that tends to achieve human expectations is key. There is no doubt that laws are enacted to operate on individuals, so was the law of the *ad hoc* tribunals. Irrespective of the institution that crafted the statutes of the *ad hoc* tribunal, the double aspect of law had to be consistently present. The depository authority must firstly posit it. Laws cannot be enacted without a properly empowered political authority; whether a parliament, a UNSC or any other representative body. Some laws are enacted by authoritarian or dictatorial regimes and continue to impact on individuals. There is a difference between representative bodies and non-representative ones. In non-representative bodies, like dictatorships, “power is usurped, legitimacy can be manufactured or purchased, and authority is conferred by the possession of instruments of coercion.”³²⁶ Law, must, secondly and ultimately respond to those expectations. This means a law that is not imposed by might even in representative bodies like the UNSC, but the one that is value-oriented and upholds rights.

³²⁵ Nemeth P. Charles, *Aquinas on Crime*, op. cit., p. 1

³²⁶ Ayittey N.B. George, *Defeating Dictators: Fighting tyranny in Africa and around the world*, Palgrave Macmillan, 2011, p. 85

Representative bodies should enact law in which each individual finds his fulfilment as a person who lives in a society.

This is not to suggest that a body like the UNSC must consult with people even in countries that have concerns regarding its resolutions. It only means that the resolutions, which we call here law, must reflect what the people anticipate to see happening. The resolutions must be an expression of the will and expectations of the “people of the world”. The people’s desire from the UNSC legislation is to see justice done. An act that is aimed at justice will be complied with. Tyler argues firstly that, studies of a decision’s acceptance suggest that it is usually procedural justice that is especially important in shaping people’s willingness to defer to the decisions made by legal authorities.³²⁷ It is procedural fairness that shapes both the acceptance of the decision and the deference to the authority that has taken the decision. When people find that the procedure that leads to a decision was fair and that the outcome of the decision was desirable, they are more willing to accept it.³²⁸ Secondly, Tyler suggests that “people are more willing to defer to authorities when they trust their motives.”³²⁹

According to Sindjoun, the creation of the *ad hoc* tribunals reflects, to some extent, historical universal ethics or the conception of the good as expressed by member states of the United Nations.³³⁰ The statutes of both the ICTY and ICTR provide that the prosecution of the crimes committed will ensure that such crimes are halted and the conflicting situation in which human rights violations were committed will be redressed. The statutes provide moreover that justice will be done to the victims, the process of national reconciliation will be embarked on and that peace and security will be maintained. The criminal law posited through the *ad hoc* tribunals, it may be argued, was aimed at the betterment of humanity. Osiel finds that these efforts to bring perpetrators to justice are inspired by sincere humanitarian sentiment and by remorse at not having done more to prevent the wrong.³³¹ Osiel is not that naïve and he believes in what he says. He sets a good point of departure for any discussion of international criminal law in the

³²⁷ Tyler R. Tom, “Procedural justice, legitimacy, and the effective rule of law”, *Crime and Justice*, Vol. 30, 2003, pp. 283 – 257, p. 292

³²⁸ *Idem*, p. 294

³²⁹ *Id*

³³⁰ Sindjoun Luc, “Positivism, ethics and politics in Africa”, *op. cit.*, p.26

³³¹ Osiel Mark, *Making Sense of Mass Atrocity*, Cambridge University Press, 2009, p. 10

broader understanding of the topic. Osiel's opinion, however, envisages international prosecutions as an alternative to something else that could have been done.

The purpose of international crimes prosecution should be straightforward. International criminal law dispensed through *ad hoc* tribunals may re-establish the uneven balance brought about by violations of the dictates of that law. That is what justice is all about. In the words of Hyman, this means that "when a crime is committed, justice must be done."³³² The question then becomes to know how to go about obtaining justice. The enacted law is the answer. But because the focus is justice, the procedure to apply needs to be fair and not an automatic application of the law as it stands. Procedural law must go beyond its formalism and compliment the purpose for which a judicial institution has been put into place. Hyman argues that "though it is easy to create an appearance of justice, mere appearance may turn out to be only an illusion."³³³ In concrete terms, this bears on the institutional and normative aspects of international criminal justice. Rubin suggests that "the international legal order has its own complex history and traditions; its own legislative process; its own reflections of the conceptual antagonism between those who find 'natural law' and those who find 'positive law' models to be more congenial."³³⁴ Yet, as demonstrated elsewhere, this order is nothing less than an expansion of domestic shared values to the international level. At the end of the day, those values are the same among all people. In the centre there is a human who attempts to regulate and improve.

The distinction between rules of international law (as well as national law) from other rules is not whether they are positively formulated or not, but rather that they are binding. Rubin contends that rules are binding if there is a legal obligation to follow them. This obligation must stem from the content of those rules. That content reflects the aspiration of the people who have entrusted their confidence in rule-makers. This is the reason why the content of the legal rule must be tackled. In Rubin's thought, exploring the content of the rules of international law goes as follows:

Some writers have held that natural law or moral considerations form the ultimate basis for international law, others that such obligations arise out of consent to be bound (which can be seen to be a logic

³³² Hyman Gross, *A Theory of Justice*, New York, Oxford University Press, 1979, p. xv

³³³ *Ibidem*, p. xv

³³⁴ Rubin P. Alfred, *Ethics and Authority in International Law*, Cambridge University Press, 1997, p. 35

consequence of state sovereignty). The reason why an obligation to be bound arises from consent would, in a positivist view, be because this followed from authoritative rules laid down by competent organs. The natural law approach would be that rules are authoritative because they are rooted in a higher set of norms, having an a priori existence as *jus divinum* (divine law) or as moral norms that have an inevitable force through their reflection of right and wrong. Legal positivists will hardly dispute the fact that moral and ethical norms are a basis for positive rules, they would just claim that the binding force of positive rules stem from the fact that they have been adopted by a competent organ, or otherwise have acquired their status as legal norms through, for example, formation of customary law. From this point of view, there is a close relationship between natural law and legal positivism.³³⁵

Nystuen agrees with this position by giving the example of human rights which clearly have a basis in natural law.³³⁶ States are not considering themselves as bound by the prescript of human rights because they are enshrined in conventional binding treaties. Rather, they consider themselves bound “because it seems morally or ethically correct.”³³⁷ Nystuen synthesizes his argument in holding that the formation of international customary law happens, partly as a result of State practice, but also partly as a result of *opinio juris*. In other words, States are following rules they presume to be binding. He concurs with Brierly who states that:

implied consent is not a philosophically explanation of customary law, international or municipal; a customary rule is observed, not because it has been consented to, but because it is believed to be binding, and whatever may be the explanation or the justification for that belief, its binding force does not depend, and is not felt by those who follow it to depend, on the approval of the individual or the state to which it is addressed.³³⁸

It is therefore fair to argue that “legal positivism and natural law are thus not mutually exclusive; they are descriptive concepts which can be used to facilitate the understanding of different aspects of law.”³³⁹ Whereas there might be diverging interest in international relations and how they regulate them, there are also many shared values. Buchanan and Golove contend that “the implication is that the lack of shared ends severely limits the normative content of international law and hence the scope of a moral theory of international law.”³⁴⁰ Nations may not even share substantive ends, but still they share the core concept of justice, for example.

³³⁵ Nystuen Gro, *Achieving peace or protecting human rights: conflicts between norms regarding ethnic discrimination in the Dayton peace agreement*, op. cit. p. 29

³³⁶ *Ibidem*, p. 29

³³⁷ *idem*

³³⁸ Brierly J.L., *The law of nations: An introduction to the international law of peace*, 4th edition, Clarendon Press, Oxford, 1949, p. 53, cited in Nystuen, op. cit., p. 30

³³⁹ Nystuen Gro, *Achieving peace or protecting human rights: conflicts between norms regarding ethnic discrimination in the Dayton peace agreement*, op. cit. p. 30

³⁴⁰ Buchanan Alan & Golove David, *Philosophy of International Law*, in Coleman, Jules L. & Shapiro S., (ed.), *The Oxford handbook of jurisprudence and philosophy of law*, Oxford, New York, Oxford University Press, 2002, pp. 868 – 935, p. 875

According to these authors, “this shared core conception of justice in liberal societies provides the foundation for a more morally robust system of law; its absence implies that the moral content of international law, at least as it pertains to human rights, must be minimal.”³⁴¹ Moreover, in accordance with Engle, “human rights are universal. Not in the sense of being the same positive laws, at all times and places, but rather as being aspirational goals, at all times and places, and also as containing core values which are indeed universal, such as the right to life (no irrational deprivation of life).”³⁴² There is therefore a common understanding about human rights as the foundation of any society. Such an understanding is also implied in the defence of those rights. The law governing the *ad hoc* tribunal cannot, on its own, depart from these precepts.

2.4.1. Naturalism and positivism’s impact on the effectiveness of the *ad hoc* tribunals

It is quite interesting to elucidate how the shared moral values discussed above apply to the *ad hoc* tribunals’ effectiveness. Positivists may argue that the tribunals have been effective because they discharged the functions entrusted to them. From a naturalistic view, however, the tribunals have not been effective because they did not follow the values they were supposed to be guided by. It would moreover be naïve to believe that because the *ad hoc* tribunals are courts of law they can resist the influence and pressure of the mother founder, the UNSC. *Ad hoc* tribunals, like any other court, enforced the resolutions of the UNSC. They served to block and repulse any challenge brought about by those resolutions; giving an appearance that the rule of law prevailed.

The effectiveness of the *ad hoc* tribunals should not be conceived as the optimum delivery in terms of numbers. It is instead the delivery of a good and right work that any reasonable person would expect. An effective prosecution of international crimes by an *ad hoc* institution is not a work done in isolation. The whole system that includes the establishment, the procedure, the functionality, the outcome and the legacy of the courts must be analysed in the lenses of natural law. Barlow writes that this approach must holistically look at the institutions, the policies, and

³⁴¹ Buchanan Alan& Golove David, *Ibidem*, p. 876

³⁴² Engle Eric, “Human Rights: A Generation History”, *Annual Survey of International Law and Comparative Law*, Vol.XII, 2006, pp. 219 – 268, p. 219

the practices “that achieve justice in the present without compromising the ability of future generations to have the benefits of a just society. It is justice for one (person or place) that does not preclude the possibility of justice for all.”³⁴³ This means that the whole range of legal, moral and ethical concerns must be addressed without fear, favour or prejudice. These concerns make sense only if they are approached reasonably, rationally and objectively. It is not an easy task. Had, for example, the *ad hoc* tribunals been set up by a regularly empowered body, like the UN General Assembly; had they prosecuted a token of individuals in the only pursuit of justice without political concerns, using a properly sound jurisprudence, no one would be questioning their effectiveness.

How to apply the concept and tenets of natural law, of morality and ethics to this matter is the exercise to embark on. There was a situation and facts associated with it. The task is to dispose of the situation and the facts. The tools are available; they are morality and ethics. They must guide the process of re-claiming the natural order that was disturbed by the violations of international humanitarian law. Perhaps a clear understanding of ethics is warranted at this level, because ethics and morality are different concepts. Souryal conceives ethics as “a philosophy that examines the principles of right and wrong, good and bad.”³⁴⁴ He defines morality as being:

the practice of these principles on a regular basis, culminating in a moral life. As such, morality is conduct that is much akin to integrity. Consequently, while most people may be technically viewed as ethical (by virtue of knowing the principles of right and wrong), only those who internalize these principles and faithfully apply them in their relationships with others should be considered moral.³⁴⁵

Both ethics and morality must form an individual’s character in order to create a proper balance. They must reflect the work of an individual wherever he is called to serve. Singer provides a useful insight into how ethics and morality interact in an individual’s life, as a person and as an agent of society. He suggests that:

The ethical life is the most fundamental alternative to the conventional pursuit of self-interest. Deciding to live ethically is both more far-reaching and more powerful than a political commitment of the traditional kind. Living an ethically reflective life is not a matter of strictly observing a set of rules that

³⁴³ Barlow H. Melissa, Sustainable Justice: 2012 Presidential Address to the Academy of Criminal Justice Sciences, *Justice Quarterly*, Vol. 30, No 1, 2013, pp. 1 – 17, p. 1

³⁴⁴ Souryal S. Sam, op. cit., p. 18

³⁴⁵ Souryal S. Sam, op cit., p. 18

lay down what you should or should not do. To live ethically is to reflect in a particular way on how you live, and to try to act in accordance with the conclusion of that reflection.³⁴⁶

Easily stated, international crimes are prosecuted to ensure future respect of human rights, to secure humankind and to do justice. According to Haque “human dignity, the equal moral worth of every human person, is now accepted as the precondition of all other legal and political values.”³⁴⁷ International criminal law exists to vindicate the rights of humanity.³⁴⁸ The question of the forum in which these crimes are prosecuted does not have relevance at this stage. No better outcome may, however, emerge from a flawed foundation. This is where the institutional setting has relevance.

Fighting evil deeds therefore needs to rely on principles and standards that are devoid of any treachery, manipulation or deceit. In the words of Bassiouni “no matter what today’s manipulative purpose may be, however, this law [international criminal justice] may one day become effectively and fairly applied.”³⁴⁹ An international *ad hoc* tribunal set up to prosecute crimes of unimaginable cruelty, with concerns other than the stated intention does not have its place here. Yet, through *ad hoc* tribunals, the UNSC manipulated the international community by portraying facial objectives while the intentions were something else. By means of manipulation, the UNSC, as dominant elite on the international scene, led the international community to conform to its political objectives. The UNSC used its unfettered discretion to advance the interest of the powers, especially those of the five permanent members that compose the Council. The rest of the international community even those represented in the General Assembly remained simple spectators. Out of that process, *ad hoc* tribunals were born. They carried out their work with little or no deference to moral and ethical principles in judging the crimes that offend the conscience of humanity as a whole.

The argument here is that the UNSC disregarded the principles of ethics and morality when it established the *ad hoc* tribunals. Faced with a dilemma about whether or not to send military interventions to stop the war that fuelled the killing, it opted for the establishment of *ad hoc*

³⁴⁶ Singer Peter, *How are we to live? Ethics in an age of self-interests*, Random House Australia, 1993, p. xi

³⁴⁷ Haque A. Ahmad, “Group Violence and Group Vengeance:...”, op. cit., p. 296

³⁴⁸ Ibidem. Haque suggests however that this claim needs further qualification; otherwise, it must be resisted.

³⁴⁹ Bassiouni M. Cherif, “Perspectives on International Criminal Justice”, op. cit., p. 318

tribunals in a legally contested environment that raised many questions about the tribunals' legitimacy. Legitimacy here has a double meaning. It is firstly the legitimacy of the UNSC action's itself, namely Resolution 827(1993) and Resolution 955(1994); and secondly, the institutions that the two resolutions created. This is very important because, as Horton articulates:

legitimacy determines who has political authority, by virtue of what characteristics, qualities or processes it is possessed, and also what those who have political authority may properly do. Moreover, it follows that if a law or policy is enacted by a legitimate political authority, those subject to it are afforded good, though not necessarily decisive, reasons to comply with its directives.³⁵⁰

Surely the UNSC has authority flowing from the UN Charter. But, what about the characteristics of that authority? How is it possible to properly exercise that authority? Can that authority be questioned on ethical and moral grounds? To the extent that the Council exercises this authority for the maintenance of international peace and security, it remains in its boundaries. Once it has decided, compliance follows. Tyler suggests that:

The existence of authority ultimately depends on its ability to ensure that a majority of the governed complies with its commands a majority of the time, which requires the establishment and maintenance of conditions which lead to compliance. One such condition is the belief in the legitimacy of authority, which is an appeal to the normative values and the internalized obligations held by the governed: 'citizen may comply with the law because they view the legal authority they are dealing with as having a legitimate right to dictate their behaviour; this represents an acceptance by people of the need to bring their behaviour into line with the dictates of an eternal authority.'³⁵¹

To the other extent, however, the questions may remain unanswered. It is, for instance arguable whether the UNSC has a vested authority to establish *ad hoc* tribunals. The Council claims that it has. The UNSC adopted binding resolutions that bypassed the traditional consent process of the states through negotiated treaties. The work of the tribunals likewise reflects a mismatch between the imperative of natural justice and loyalty to the mother founder, namely the UNSC. Judge Lloyd Williams, presiding over a case before the ICTR expressed this loyalty to the mother body by stating that:

We are here. The United Nations gave a mandate to this Tribunal to try these cases. We took an oath to carry out that mandate, and we will take whatever steps are necessary to get the proceedings going and to have the cases tried. We cannot have either the Defence counsel or the accused obstructing the process.³⁵²

³⁵⁰ Horton John, "Political legitimacy, justice and consent", op. cit., p. 130

³⁵¹ T.R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990), pp. 19 and 25; cited in Jodoin Sebastien, "Enhancing the procedural legitimacy of the UN Security Council: a normative and empirical assessment", op. cit., p. 5

³⁵² *The Prosecutor versus André Ntagerura et al.*, Case No ICTR-99-46-T, Transcript of proceedings, 19 September 2000, English Version, p. 37, lines 11 to 19

Without inquiring into what the alleged obstruction was about or the circumstances that brought the judge to make the statement; it is clear that judge Williams firmly applied the law of the UNSC. He was less concerned about any other legitimate claim that challenged that authority. Whether the judge intended to do justice begs a response. He further stated:

But let it be clearly understood, the Court is not going to operate under threats. No decent Court could allow that sort of situation to exist. We are going to uphold the law, and we are going to act in accordance with the Rules. And your interpretation of the Rules seems to differ from our interpretation. But so far as this trial is concerned, it is the interpretation that the Chamber makes that is the interpretation that must be obeyed and carried out.³⁵³

Judge Williams is one among many judges who were elected by the General Assembly from a list submitted by the UNSC to serve at the *ad hoc* tribunals. The judge's remarks reflect the common and shared understanding of the panel of judges of the *ad hoc* tribunals who apply the UNSC law.

The prosecution likewise was very concerned with the exercise of this power vested into the judges. Objecting to a defence question posed to an expert witness, a prosecution counsel argued that:

Your Honours, your powers are clearly laid out in the Statute of the tribunal and it is of no relevance what the expert thinks or perceives your powers to be. Your powers are not an issue and that is the question that should be left for final submissions not to elicit an answer from the witness.³⁵⁴

The presiding judge upheld the prosecution's objection. What lacks from Judge Williams and the prosecution's counsel representatives is the idea of objectivity, of justice, of fairness; and the search for truth as well. The prosecutor and the judges were not interested in the fairness of the procedure. They did not want to hear any other input. They only wanted the UNSC's law to be applied as it was irrespective of its lack of justice. The representations show the positivist character of the law the *ad hoc* tribunals must apply, whether immoral or unethical. David Scheffer, a former US Ambassador for war crimes observed in his assessment notes that in the ICTY's 10 years of existence "the diplomatic underpinnings of the International Criminal Tribunal for the Former Yugoslavia (ICTY) are critical to any understanding of the 'why' and

³⁵³ Ibidem, p. 38, lines 7 to 18

³⁵⁴ The Prosecutor versus André Ntagerura et al., Case No. ICTR – 96 – 46 – T, Transcript of proceedings, 16 July 2002, p.25, lines 10 - 17

‘how’ of the tribunal’s creation in 1993 and subsequent operation.”³⁵⁵ There is therefore no question about the connection and collusion between the way the *ad hoc* tribunals were established, their statutes and how they operated. It is also stressed in the first ICTY annual report that:

Being the newest institutional arrival on the international judicial scene, the Tribunal has had to face a number of practical uncertainties and, indeed, criticism as to its legal basis and effectiveness.[...] The fundamental uncertainty, for some, lies in the very method by which the Tribunal was created. [...] Thus, the traditional approach of establishing such a body by treaty was discarded as being too slow (possibly taking many years to reach full ratification) and insufficiently effective as Member States could not be forced to ratify such a treaty against their wishes. Instead, the Security Council proceeded to establish the Tribunal by exercising its special powers under Chapter VII of the Charter of the United Nations.³⁵⁶

The lack of the definition and delimitation of the objectives that the tribunals were to achieve is also another indication of a lack or disrespect of rules of ethics and morality. A chapter on the prosecution and its role will show that many aspects of natural justice were not observed. The reliance on guilty pleas and judicial notices portrays an alarming lack of ethical practices in adjudicating genocide, war crimes, crimes against humanity and serious breaches of the Geneva Conventions. Imputing criminal liability through the doctrines of joint criminal enterprise and command responsibility proves a positivist approach that only comforted the whims and wishes of the UNSC, without any moral or ethical consideration whatsoever. These criticisms are not meaningless or unfounded. In Campbell’s view, they are aimed at “devising and seeking conformity to appropriate rules of conduct, but also involve the choice of alternative performances when the rules do not or cannot adequately cover the situations in question.”³⁵⁷ Ethics can fulfil this function if taken as “a matter both of the moral standards of conduct which ought to govern the performance of the various legal roles and of the required commitment and conformity to these standards, typically where there are no legal sanctions involved.”³⁵⁸

The better way to arrive at this objective is through truth and reason. St. Thomas Aquinas emphasises the concept of “truth” as self-serving and virtuous. He says:

³⁵⁵ Schafer David, “Three Memories from the Year of Origin, 1993”, *Journal of International Criminal Justice*, Vol. 2, 2004, pp. 353 – 360, p. 353

³⁵⁶ ICTY Annual report 1994, 29 August 1994, paras 5 - 7

³⁵⁷ *Ibidem*, p. 43

³⁵⁸ Campbell Tom, *Prescriptive Legal Positivism: ...*, op. cit., p. 43

The truth is the truth whereby a thing is true, not whereby a person says it's true. Like anything else is said to be true, from the fact it attains its rule and measure, namely, the divine law: since rectitude of life depends on the conformity to that law. This truth of rectitude is common to every virtue³⁵⁹

Without capturing the truths around the *ad hoc* tribunals, we are left with images that may not only be irrational, but more importantly, disgraceful.³⁶⁰ Without an honest and full inquiry into the truthfulness of these institutions by focusing particularly on the “weaknesses, biases, and prejudices”³⁶¹ of all who are involved, their legacy may “grow into a degenerative field; more like a temple without a god, a body without a soul, and a theory without a meaning.”³⁶²

The preamble to the UN Charter reads: “we the people of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person.”³⁶³

This introduction to the UN Charter reflects an earlier statement by an American great leader, James Wilson, who once said:

All men are, by nature, equal and free. No one has a right to any authority over another without his consent; all lawful government is founded on the consent of those who are subject to it; such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is that the happiness of society is the first law of every government.³⁶⁴

The Matwijkiws in their often cited contribution to a book maintain again that:

a law void of human rights does not count as law proper. If the law does not recognize human rights, then it is illegitimate, although still legal in Bassiouni's opinion. But the ultimate source of validity is morality. It is more important, therefore, to determine whether the law is just or right, or per Bassiouni, civilized or humane than to know whether it is binding in a merely formalistic sense.³⁶⁵

Washington argues in this respect that “the philosophical presuppositions of international law were not based on secular, humanistic, abstract notions of positive law, where ‘he who is sovereign rules’, but was originally based on the immutable, objective, universal principles

³⁵⁹ St. Thomas Aquinas, *The Summa Theologica*, trans. Fathers of the English Dominican Province (New York: Benziger Brothers, Inc., 1947) II – II, Q109, art 2 at 1662, in Nemeth P. Charles, *Aquinas on Crimes*, op. cit., p. 108

³⁶⁰ The same idea is expressed in Souryal S. Sam, *Ethics in Criminal Justice: in search of the truth*, op. cit., p. xii

³⁶¹ Souryal, S. Sam, op. cit., p. xiii

³⁶² Id

³⁶³ Preamble, UN Charter

³⁶⁴ “Consideration on the nature and extent of the Legislative authority of the British Parliament” by James Wilson, cited in Koerner, “The Challenge of Legal Supremacy”, op. cit., p.110

³⁶⁵ Matwijkiw Anja and Matwijkiw Bronik, “A modern perspective on international criminal law: accountability as a meta-right”, in Sadat L. N., and Scharf M. P., *The theory and practice of international criminal law: Essays in Honor of Bassiouni M. Cherif*, op. cit., pp19 – 79, p. 33

rooted in the Judeo-Christian traditions of theism, the Bible, the Rule of Law, morality and natural law.”³⁶⁶ Likewise this is the philosophy of the UN, as it expresses the will of the people of the world. Short-circuiting this endeavour devalues the wishes of the nations and of the entire humanity. Any law and its application must therefore abide by this imperative. Law needs to undergo a double test. First, the moral content of the law must prevail at its inception. Putting people at the epicentre of any law is a must. The Preamble of the UN Charter refers explicitly to the dignity and worth of the human person in whatsoever business the international organisation does. Law must undergo a second test when it is being applied to a situation. Unethical professionals can subvert the aim of the law. Burton summarises this approach in holding that “law can appear to be objective, neutral, and determinate body of rules, but really is situated in a social context, exposed to political bias, and indeterminate to a significant extent.”³⁶⁷

Perhaps it is apposite to return to the earlier discussion on the law of the Security Council when it established the *ad hoc* tribunals. The representative of Spain at the Security Council, for example, commented that “in the final analysis, the Council, by adopting resolution 827(1993) is seeking to make a reality of the determination contained in the preamble of the Charter to reaffirm faith in fundamental human rights, in the dignity and worth of the human person.”³⁶⁸ Assuming that this was a sincere statement, the argument can therefore be taken further by looking at the application of that law by the tribunals so established. Whenever such application tends to ignore or underestimate the rationale of its existence, which is the defence of human rights, it is no longer “law proper.”

The prosecution of international crimes should therefore uphold these moral values. Ambassador Arria who represented Venezuela at the Security Council stated that: “accountability for criminal conduct affecting and offending humanity should also entail global

³⁶⁶ Washington Ellis, *The Inseparability of Law and Morality: the Constitution, Natural Law, and the Rule of Law*, op. cit. p. 93

³⁶⁷ Burton J. Steven, *Judging in good faith*, op. cit., p. 7

³⁶⁸ Provisional verbatim record of the three thousand two hundred and seventeenth meeting held at headquarters, New York, on Tuesdays, 25 May 1993, at 9 p.m., S/PV. 3217, 25 May 1993, in Scharf P. Michael & Morris Virginia, *An insider guider’s guide to the International criminal tribunal for the Former Yugoslavia: a documentary history and analysis*, op. cit., p. 204

accountability.”³⁶⁹ This requirement is valid at all stages in the building up of the system of international criminal adjudication. Its relevance starts with a determination to act from the UNSC itself. It continues in the investigation and prosecution of those responsible for the crimes committed. The final judgment will reveal that order has been re-established because the guilty has been punished proportionately and the innocent has been acquitted. The process need to be consistent throughout. Establishing *ad hoc* tribunals was an inconsistent undertaking because not everyone at the UNSC believed that the tribunals could work.³⁷⁰ Talking about the criminal justice system in general, but also contributing to this suggestion as far as *ad hoc* tribunals are concerned, Souryal argues that:

During the maturation process, serious excesses and failures appear, creating contradiction between the goals of the field and the means by which objectives are to be met. In attempting to reason away contradiction, an introspection usually emerges, urging caution, denouncing falsity, and searching for the truth. This introspection gradually hardens, constituting the collective conscience of the discipline – its soul. In time, the soul becomes instrumental in halting intellectual ostentation, in exposing fallacies, and in reaffirming basic values.³⁷¹

What Souryal calls the goals of the field and the means by which the goals are to be met³⁷², once again, constitutes the demarcation between natural and positive law. Natural law leads to the goals, the purpose and the intention. Positive law constitutes the means. Souryal further advances that “it is in responding to immoral behaviours that civilized governments must employ moral means. Succinctly stated, the more civilized a state is, the more willing it is to address the ‘worst among us’ by the most noble means we have.”³⁷³ Souryal does not question the validity of laws as posited. Instead he presents ethics as an “umbrella of civility” under which the laws can be more meaningful, rational, and obeyable.³⁷⁴

³⁶⁹ Provisional verbatim record of the three thousand two hundred and seventeenth meeting, held at headquarters, New York, on Tuesday, 25 May 1993, at 9 p.m., 3217, 25 May 1993, in Morris Virginia & Scharf P. Michael, *Ibidem*, p. 183

³⁷⁰ See for instance the verbatim report of the UNSC proceedings when discussing Resolution 827(1993) in Scharf P. Michael & Morris Virginia, *An insider guider’s guide to the International criminal tribunal for the Former Yugoslavia: a documentary history and analysis*, Vol. 2, Transnational Publishers, Inc. Irvington-on-Hudson, New York, 1995

³⁷¹ Souryal, S. Sam, *op. cit.*, p. xiii

³⁷² Souryal S. Sam, *op. cit.*, p. xiii; Adams also refers to Aquinas who “argued that law necessarily involves (given that they have their source in reason) must have some purpose or goal [...] Aquinas insists that this goal must be overall happiness or the ‘the common good’. [...] Human law, by contrast with eternal and divine law, is created by us for the purpose of carrying out the requirement of natural law”, Adams M.David, *Philosophical problems in the law*, *op. cit.*, p. 50

³⁷³ Souryal S. Sam, *op. cit.*, p. xii

³⁷⁴ *Ibidem*

MacIntyre schematizes Souryal's thought regarding law saying that "every account of natural law, no matter how minimal, makes at least two claims"³⁷⁵: the one of precepts and the one of enforcement of those precepts. What is needed therefore is to bridge "goals" and "means".

Obviously "goals" are good in themselves. The means must conform to the goals; and not contradict, manipulate or defeat them. This is where ethics becomes very important. Once a fact has been identified, many alternative courses of action are available. Out of those alternatives, an ethical decision is one that considers a decision that is likely to produce more good, and eventually produce little or no harm or damage to anyone. The decision must be tested and reflected on. The one who takes the decision ensures follow up and feedback. Pojman and Fieser highlight how ethical awareness is "the necessary condition for human survival and flourishing."³⁷⁶ They argue that:

If we are to endure as a free, civilized people, we must take ethics more seriously than we have before. Ethical theory may rid us of simplistic extremism and emotionalism—where shouting matches replace arguments. Ethical theory clarifies relevant concepts, constructs and evaluates arguments, and guides us on how to live our lives. It is important that the educated person be able to discuss ethical situations with precision and subtlety.³⁷⁷

It is no surprise that ethical demands concern everyone, whether acting as an individual or as part of a structure of social life. In international politics, there is a conception of realism that can interpose with ethics. It is a way of thinking "that places high value on such conditions as stability, order, and peace, which provide a context in which all those secured by these conditions are provided the space to contemplate questions of morality and principles of ethical action."³⁷⁸ The realists do not ignore the conflicting relationships that characterise international

³⁷⁵ MacIntyre Alasdair, "Theories of Natural Law in the culture of advanced modernity", in McLean, common Truths: New Perspectives on Natural Law, op. cit., p. 94. MacIntyre suggests that:

Every account of natural law, no matter how minimal, makes at least two claims: first, that our human nature is such that, as rational beings, we cannot but recognize that obedience to some particular set of precepts is required, if we are to achieve our good or goods, a recognition that is primarily expressed in our practice and only secondarily in our explicit formulation of precepts; and second, that it is at least one central function of any system of law to spell out those precepts and to make them mandatory by providing for their enforcement.

³⁷⁶ Pojman P. Louis & Fieser James, *Ethics: Discovering Right and Wrong*, 7th edition, Wadsworth, Boston, USA, 2012, p.3

³⁷⁷ *Ibidem*, p. 3

³⁷⁸ Lentner H. Howard, "A realist's view of ethics", *American Foreign Policy Interests: The Journal of the National Committee on American Foreign Policy*, Vol. 33, No. 4, pp. 153 – 157, p. 154

relations and the interests that may come to dominate those relations. Realists recognise, however, “the tension between guiding principles of universal applicability and the arrangements of power.”³⁷⁹ The question is therefore not one of excluding ethics outright, but of looking at one’s own interests without ignoring others people’s interests. Ignoring something does not mean that the thing does not exist or that one is not bound to be guided by it or live according to it. It is only a regrettable failure. Ethicists consider both. Realists also, “point to the commonplace that the most powerful frequently assert claims to universality while the less powerful assert aspirations for justice in putting forth their own claims.”³⁸⁰ The higher norm remains ethics once again. Realists may only stick to an interest-oriented value; but which they know not to be right. Realists know what right is; and what doing right means. They choose not to do the right thing knowingly and deliberately. They know they can do otherwise. They hesitate to do right because they consider prudence as being the supreme virtue in politics.³⁸¹ Politicians evaluate their action with much attention to “worldly consequences external to the agent.”³⁸² This is more a question of integrity than a lack of a meaningful sense of ethics. Were realists to keep their integrity, they would take action that they know is right and just. They would stand by and remain truthful to that action. Their action would be a matter of principles. Montessori notes, “a loss of integrity is a loss of oneself.”³⁸³ Yet, as Bassiouni observes,

From both an ethical and moral perspective, there is no price tag for doing what is right; there is no utilitarian test that can measure the objective outcomes of doing the right thing. To curtail impunity for core international crimes and to have enhanced accountability, no matter by what margins, is an accomplishment that the international community should herald.³⁸⁴

Groome steps in, arguing that “the theoretical basis of international criminal trials is not to create a ‘fair contest’ to resolve a dispute – but to accurately and fairly identify, investigate and adjudicate which individuals have violated international norms.”³⁸⁵ Groome is further of the

³⁷⁹ Ibidem

³⁸⁰ Idem

³⁸¹ Id

³⁸² Das Ramon, “Virtue ethics and right action”, *Australian Journal of Philosophy*, Vol. 81, No. 3, 2003, pp. 324 – 339, p. 324

³⁸³ Montessori M. Nicolina, “Politics and Morality”, *Critical Discourse Studies*, Vol. 8, 2011, pp. 73 – 74, p. 73

³⁸⁴ Bassiouni M. Cherif., “Perspectives on International Criminal Justice”, *Virginia Journal of International Law*, Vol. 50, No. 2, 2009- 2010, pp. 269 – 324, p. 317

³⁸⁵ Groome M. Dermot, “The Future of International Criminal Justice: Re-evaluating the theoretical basis and methodology of International Criminal Trials”, *Pennsylvania State International Law Review*, Vol. 25, No. 4, 2006 – 2007, pp. 791 – 802, p. 797

view that “accurately identifying and adjudicating transgressions of international norms is the foundational and animating principle of international criminal trials.”³⁸⁶

It is an assumption that when the Security Council undertook to establish the *ad hoc* tribunals for the former Yugoslavia and Rwanda, it had genuine, frank and sincere objectives to attain. It is said that it was discharging its main mandate of maintaining international peace and security. The worry is, however, that like in Nuremberg; Rwanda and the former Yugoslavia have become, as Mutua suggests: “the model of the triumph of convenience over principle, the subordination of justice to politics, and the arrogance of might over morality.”³⁸⁷ It is clear that the UNSC was driven more “by consideration of expediency [...] rather than by any more fundamental principles.”³⁸⁸ The power of principles was clearly expressed by its philosophical master, Aristotle. He once exclaimed: “*Magnus amicus Plato Maior amica veritas*, or ‘Dear is Plato, but dearer still is truth.’”³⁸⁹ This sends out a very powerful message on the precedence that principles occupy over convenience. Souryal takes it that:

[Aristotle] *dictum* demonstrates that even among the best of friends, one should, out of conviction, still courageously disagree and argue one’s point of reasoning. Furthermore, the dictum implies that personal loyalty to a superior or a boss is not that important when the resolution of the issue at hand must be based on truths rather than sentiments. Unquestionable loyalty to an individual, rather than to a principle or an ideal, may be harmful – if not outright dangerous, it can, as in the case of Watergate, Iran-Contra, and many other lesser cases, compel well-trained professionals to overlook the truth.³⁹⁰

Humanism in the action of the UNSC was represented by the values that the Council wanted to secure, namely human rights, and the “dignity of humankind as a whole, and of each and every person in particular.”³⁹¹ Those values to defend, according to Marina are “previous to every set of rules as they are created to defend them.”³⁹² Unfortunately, power triumphed over reason and imposed itself.

³⁸⁶ *idem*

³⁸⁷ Mutua Makau “From Nuremberg to the Rwanda Tribunal: Justice or retribution”, *Buffalo Human Rights Law Review*, Vol. 6, 2000, pp. 77 – 91, p. 82

³⁸⁸ Duff Antony, Farmer Lindsay, Marshall Sandra and Tadros Victor (eds), *The Trial on Trial: Truth and Due Process*, Vol.1, Oxford and Portland, Oregon, 2004, p. 7

³⁸⁹ Cited in Souryal S. Sam, *op. cit.*, p. 15

³⁹⁰ *Ibidem*

³⁹¹ Bassiouni M. Cherif, “Perspectives on International Criminal Justice”, *op. cit.*, p. 322

³⁹² Marina J. Antonio, “Genealogy of Morality and Law”, *Ethical Theory and Moral Practice*, *op. cit.*, p. 313

The tribunals mandate was to render justice which is a universal aspiration. Anderson emphasises that “the right to administer [justice] is earned on the basis of having shown oneself to be, not the neutral, but the just party or the party of the just party. Appeal to the rule of law does not offer international criminal law the blanket moral independence from the conditions under which it is administered.”³⁹³ Specifically that conception of justice, in the opinion of Bassiouni, is a matter of value-oriented goals.³⁹⁴ This is of course the minimum that can be achieved. Bassiouni then sums up those value-oriented goals as being:

(1) prevention through deterrence and the strengthening of social values; (2) enhancement of peace by providing retribution and corrective justice which makes violators accountable and punishable, which in turn reduces the victims’ needs for revenge; and (3) provide victims with redress, which in some ways compensates them the harm they have suffered and the losses they incurred.³⁹⁵

Bassiouni goes further in explaining what needs to be understood through these value-oriented goals. He suggests that:

To attain these value-oriented goals, the international criminal justice system, as a whole, as well as in its parts, must, in its processes, be impartial and fair. These notions of impartiality and fairness include three other unarticulated philosophical premises – equality, liberty, and individual dignity, which are reflected in almost all legal systems throughout history, and evidence the philosophical understanding that human justice is achieved by processes that are perceived as impartial and fair because they uphold equality, liberty and human dignity. Experience also reveals that in order for legal processes to be impartial and fair, they must also be effective, for without effectiveness, they cannot have such characteristics of the international criminal justice system whose processes are to be impartial and fair.³⁹⁶

The study provides evidence which indicates that the *ad hoc* tribunals did not reach this minimum. The tribunals only attempted to do so.

There are reasons to doubt that the UNSC was animated by the search for truth and justice. Mutua observes in the case of Rwanda that “from the start the tribunal was intended to achieve neither the abolitionist impulses nor the just ends trumpeted by the United Nations.”³⁹⁷ It was a self-deceiving statement that by establishing the *ad hoc* tribunal, the aim was to render justice. It was just a claim, not properly and genuinely grounded. One may suggest that in the circumstances that prevailed in the former Yugoslavia and Rwanda at the time, the proper and

³⁹³ Anderson Kenneth, “The Rise of International Criminal Law: Intended and Unintended Consequences”, op. cit., p. 337

³⁹⁴ Bassiouni M. Cherif, *The philosophy and policy of International Criminal Law*, in Bohlander Michael, *Globalization of Criminal Justice*, Ashgate, Farnham (England) and Burlington (USA), 2010, p. 253

³⁹⁵ *Ibidem*

³⁹⁶ *Idem*

³⁹⁷ Mutua Makau, “From Nuremberg to the Rwanda Tribunal: Justice or retribution”, op. cit., p. 78

effective action the UNSC could have undertaken was military intervention. Justice could have followed after the war was over, or even during the fighting where possible. The question of legitimacy re-emerges again. Without halting the war, there was no way justice could take its course. Anderson draws the sequence:

It is your actions to stop and prevent today that give you the right to be the administrator of justice tomorrow. It is lexically and morally ordered looking forward, not the other way around. Justice may be a matter for the angels, above all things and looking down, but the administration of justice is an earthly mission that partakes as much of partiality as impartiality, peculiar as that must sound to international criminal lawyers and those, like the human rights organizations, who believe they have unique purchase on the categorical imperative because they incarnate Kant.³⁹⁸

Even after the tribunals' establishment as alternative to effective military action, the Council did not dedicate much energies and resources to enable the tribunals to function effectively.

The action of the Council was conventional and binding only to the extent that Yugoslavia and Rwanda were concerned. Though there were no consistent precedents to rely on, there existed however, since time immemorial, principles and standards of universal application for the search of justice and truth. The core concern was to protect human rights in the former Yugoslavia and Rwanda. Human rights are also shared universal values. The protection of these values required a consideration of norms of justice, equity and fairness from the inception of the tribunals as well as throughout their functioning, and not only to serve as laboratories for the development of international humanitarian law or international criminal law. Mutua dismisses this later concern of developing international humanitarian law and international criminal law. According to him:

There is little doubt that the establishment of the tribunals affords the international community an opportunity to develop international law with respect to atrocities. While that effect is salutary, it does little to respond to the real and graphic abuses and sufferings of the victims in Rwanda and the former Yugoslavia. Laws are less meaningful if they cannot be applied or enforced without prejudice to redress transgressions or unless they have a deterrent effect such as behaviour modification on the part of would be perpetrators.³⁹⁹

The applicable international laws that existed at the time of establishing the *ad hoc* tribunals were sufficient to enable a judicial institution to do the right job. This does not mean that the

³⁹⁸ Anderson Kenneth, "The Rise of International Criminal Law: Intended and Unintended Consequences", *The European Journal of International Law*, Vol. 20 No. 2, 2009, pp. 331 – 358, p. 339

³⁹⁹ Mutua Makau, "From Nuremberg to the Rwanda Tribunal: Justice or retribution", *op. cit.*, p. 86

development of law has to be left aside. It means that law must be developed to the extent that it serves the needs of the people. Groome supports Mutua's argument by arguing that:

Integral to the theoretical basis of international criminal justice must be a consideration as to how its methods further this paramount purpose of international humanitarian law. While the eradication of impunity hopefully becomes a deterrent to a violation of international norms – the methodology we employ must be informed by and contribute to a reduction of the excesses of armed conflict. The future of international criminal justice must not only seek to hold violators accountable but must make it more difficult to violate the laws and customs of war.⁴⁰⁰

What follows demonstrates, however, that the Security Council's action masked its failure to take appropriate measures. The positivist approach was used to establish the institutions and compel everyone concerned to follow. When the tribunals started their work, many principles and standards of universal application were likewise not rigorously adhered to, missing once again the precepts of natural law. The whole process becomes ineffective. The enormity and gravity of the crimes committed prompted the UNSC to act. Yet the action it took was not an effective tool for the task at hand.

2.4.2. Negative consequences of might over morality

The ICTY recognises that it was established in speed and that it adopted the same speed to start its work.⁴⁰¹ This argument is not enough to justify the way the tribunal was established or the manner in which it discharged its functions. Reasons of effectiveness and expedition were likewise invoked to establish the ICTR. In both scenarios, expeditious action overtook other reasonable and convincing alternatives. It is quite agreeable that the establishment of the *ad hoc* tribunals was a political decision and that the UNSC is empowered to take political decisions. It is another way of saying that the Council has the power of might and can do everything unquestionably. There is structurally and in reality, no "higher authority in or outside the UN to monitor the Security Council and interpret [its] proper application of the Charter."⁴⁰² Halliday underscores that that "might is alive and perceived by some to be acceptable."⁴⁰³ Halliday speaks as a former UN Assistant Secretary General, who served the UN for 34 years. Can that power alone be questioned on reasonable grounds? Yes, it must, because "it is international law and its

⁴⁰⁰ Groome M. Dermot, op. cit., p.798

⁴⁰¹ ICTY Annual Report (1994)

⁴⁰² Halliday J. Denis, "The United Nations: The embarrassment of international law", *Medicine, Conflict and Survival*, Vol. 18, No. 4, pp. 346 – 354, p. 351

⁴⁰³ *Ibidem*, p. 347

proper application that must drive the work of the United Nations not the ‘might’ and national interests of some, the most powerful member states.”⁴⁰⁴ The proper application of international law requires a return to the very basic principles upon which that law is founded. Those are the moral values that nations share. But the examples that follow prove that power is given priority over reason and by that token negates the moral value of an action.

The first case is the North Atlantic Treaty Organization (NATO) bombing over Serbia in 1999. During *Operation Allied Forces* conducted from 24 March to 10 June 1999, NATO forces bombed the Federal Republic of Yugoslavia. The operation cost the lives of approximately 500 civilians⁴⁰⁵ and damaged properties and the environment. Allegedly, the operation intended to weaken the Yugoslav Army in Kosovo and press for its pullout from Kosovo.⁴⁰⁶

The number of the victims and the circumstances under which they were killed raised a public outcry. The question was whether NATO forces had committed a war crime under the jurisdiction of the ICTY. Prosecutor Louise Arbour established a working group “to assess the allegations and advise her as to whether or not there was evidence of sufficient weight to merit a full investigation.”⁴⁰⁷ Del Ponte pursued the work of the team. She was particularly interested in an air attack over a bridge that collapsed with a passenger’s train, attacks on Serbia’s television and the Embassy of China in Belgrade, and NATO’s use of cluster bombs.⁴⁰⁸ The prosecutor eventually attempted to seek information from the NATO hierarchy and nothing was availed to her.⁴⁰⁹ Her assessment team also concluded that “no further investigation was warranted, because no information before it led the members to suspect that further investigation would ever lead to prosecution of persons higher up the chain of command.”⁴¹⁰ In June 2000, having considered the report of the commission, the prosecutor concluded that there was no basis to initiate

⁴⁰⁴ *Idem*, p. 347

⁴⁰⁵ Massa Anne – Sophia, “NATO’s intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: an abusive exercise of prosecutorial discretion”, *Berkeley Journal of International Law*, Vol. 24, 2006, pp. 610 – 649, p. 611

⁴⁰⁶ Roberts Adam, “NATO’s Humanitarian War over Kosovo”, *Survival*, Vol. 41, No. 3, 1999, pp. 102 – 123, p. 111

⁴⁰⁷ Del Ponte Carla with Sudetic Chuck, *Madame Prosecutor: Confrontations with Humanity’s worst criminals*, Feltrinelli Editore, 2008, p. 59

⁴⁰⁸ *Ibidem*

⁴⁰⁹ *Idem*, p. 60

⁴¹⁰ *Idem*, p. 61

investigations for an eventual prosecution before the ICTY. For all purposes, the NATO air campaign was not authorised by the UNSC. Apparently, had NATO sought authorisation, “it could have been more difficult to get public support for a military action which had actually been vetoed in the UN, and the whole process might expose divisions in the alliance.”⁴¹¹ This is a clear illustration of power politics. NATO action was illegal because no principles or guidelines could justify the intervention.

The Rwandan genocide case is a second telling illustration of might over morality. In December 1999, Carla Del Ponte, Former ICTR/ICTY Prosecutor, had opened investigations into Tutsi officers of the army of the Rwandan Patriotic Front (RPF) under Kagame’s command. These investigations were known as “special investigations.”⁴¹² They were “so secret that many high-ranking prosecution officials were not privy to their status.”⁴¹³ Had Del Ponte successfully investigated and eventually prosecuted at least a token of Tutsi officers, this would have erased any suspicion of selective prosecutions. But, as Del Ponte writes “the Tutsi-dominated Rwandan government was effectively blackmailing the tribunal, sabotaging its trials of accused Hutu *génocidaires* in order to halt the Office of the Prosecutor’s Special Investigation of crimes allegedly committed by the Tutsi-dominated Rwandan Patriotic Front (RPF) in 1994.”⁴¹⁴ Her predecessor, Justice Louise Arbour of Canada even “feared that the Rwandan Government might carry out reprisals against her investigators based in Rwanda to derail the investigations of RPF officers.”⁴¹⁵ Arbour recalls that “the Rwandan government was reading my mail. [...] we were infiltrated. They knew what I was doing. So if I sent someone off to do an investigation, they might be killed. I wouldn’t do it.”⁴¹⁶ She eventually managed to open “a preliminary probe of

⁴¹¹ Roberts Adam, NATO’s Humanitarian War over Kosovo, op. cit., p. 104

⁴¹² Hartmann Florence, *Paix et Châtiment: les guerres secrètes de la politique et de la justice internationales*, op. cit., p. 262

⁴¹³ Peskin Victor, “Beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda”, *Journal of Human Rights*, Vol. 4, No. 2, 2005, pp. 213 – 231, p. 224 [initial reference omitted]

⁴¹⁴ Del Ponte Carla, *Madame Prosecutor: Confrontation with Humanity’s Worst Criminal and the culture of impunity*, Feltrinelli Editore, Milan, 2008, p. 224

⁴¹⁵ Peskin Victor, “Beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda”, *Journal of Human Rights*, Vol. 4, No. 2, 2005, pp. 213 – 231, p. 223

⁴¹⁶ Quoted in Peskin Victor, “beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda”, op. cit., p. 223 [initial reference omitted]

RPF atrocities. The probe, which was carried out quietly and cautiously, laid the groundwork for Del Ponte's subsequent investigation of specific RPF war crimes suspects.⁴¹⁷

Del Ponte remembers how she was intimidated to not carry any investigation of crimes allegedly committed by the Rwandan Patriotic Front. She relates a visit she paid to President Kagame on 28 June 2002. She recalls President Kagame instructing her that the tribunal must not investigate the Tutsi militia, the militia Kagame had commanded and that had metamorphosed into Rwanda's Army.⁴¹⁸ She quotes Kagame saying:

you are destroying Rwanda. You must investigate and prosecute the genocide. You haven't gotten Kabuga, go and get him. Don't look into the military. We have done this, and we will do this. [...] you will disrupt the reconstruction of the nation....I am rebuilding this country....I have to maintain internal order.... If you investigate, people will believe there were two genocides....All we did was liberate Rwanda.⁴¹⁹

Kagame himself and the RPF in general admitted to have killed in cold blood a group of bishops and other clergymen in Gakurazo in Southern Rwanda on June 4, 1994. The ICTR Prosecutor was investigating those facts. Yet, Kagame made it clear that:

You misunderstood what I told you before. Now I'm telling you what we are doing.... We will not allow you to do this. It is damaging our country. It is possible that soldiers have committed crimes. But we have punished these soldiers. And we will do it.⁴²⁰

Following this encounter, Del Ponte regrets that she did not inform the international community of Rwanda's obstruction of justice. In her own words, Del Ponte suggests:

And with that, the last conversation I ever had with Kagame came to an abrupt close. I refused even to consider answering questions from journalists. This was a mistake. I should have exploited the opportunity to explain to the world how Rwanda's government was obstructing justice in order to blackmail the tribunal to drop an investigation of these men who had become the country's political and military elite.⁴²¹

Whereas President Kagame addressed the Chief Prosecutor openly as the Chief of the Rwandan State, he was not acting alone in order to decline investigations into RPF crimes, in fact to obstruct justice. Hartman, acting in her capacity as the spokeswoman of Del Ponte assisted at a meeting at the State Department. During the 15 May 2003 meeting, Richard Prosper, US

⁴¹⁷ Peskin Victor, "Beyond Victor's Justice? Op., cit., p. 223

⁴¹⁸ Ibidem, pp. 224 - 225

⁴¹⁹ Idem, p. 225

⁴²⁰ Id., p. 225

⁴²¹ Id., p. 226

Ambassador at large for war crimes made it clear that Del Ponte should drop any special investigation she was conducting. As an eye witness of the event, Hartman recalls that Prosper intervened on several occasions to encourage the prosecutor to give up the special investigations to Rwanda. Del Ponte was ready to grant the Kigali authorities a few months to show evidence of their desire to do justice. The crimes have been committed and the commission was acknowledged. Yet, they were overlooked. Del Ponte believed that bringing perpetrators to justice would be a contribution to national reconciliation⁴²², one of the ICTR objectives. Del Ponte fought an unwinnable battle as she was finally dismissed from her responsibility as the ICTR prosecutor.

From all the arguments raised above and relying on the prosecutor dropping of investigation into the bombing of the FRY and her forfeiture of investigation into RPF crimes in Rwanda, one can rightly state that law has always been what the powerful individuals and bodies wanted it to be. The rationale of the claim is that law should apply to everyone equally. Natural justice, as already seen requires that same cases be treated the same. It is only human behaviour, attitude and preference that bring about the imbalances. Rwanda was a case of selective prosecution. Yugoslavia frustrated the prosecutor who could not carry on her investigative work. Similarly situated persons and circumstances have not been either investigated or prosecuted because of the might-power. Might-power justifies the lack of morality in the work of the *ad hoc* tribunals.

2.5. Summary

This chapter explored naturalism and positivism to explain what the world expected from the creation and work of the ICTY and the ICTR. Naturalism and positivism cannot help calibrate the various concerns of the *ad hoc* tribunals without themselves being defined within this perspective. Naturalism is the theory based on natural law. Natural law can vest the character of divine given law. Theologian Saint Thomas Aquinas detailed how all human law has its origin in God. Aristotle, Socrates and Hugo Grotius decouple law from divine origin. A human being must use reason to discover the truth. The search for the truth was largely developed by Souryal and principled by Kant with his categorical imperatives. Introducing natural law in the

⁴²² Hartman, Paix et Châtiment, op. cit., p. 268

prosecution of international crimes, especially in the *ad hoc* tribunals' work is therefore not an exercise in futility. It is an insistence that any law that is enacted be founded on its truthfulness and be principled, and be characterised by its justice. The law must reflect the aspirations and values of those it intends to regulate. Positivism was a movement of thought that attempted to dissociate law as it is from law as it ought to be. Prince Machiavelli, Thomas Hobbes and Brian Bix have been advocates of the law as an instrument that establishes a sort of contract between the ruler and the ruled. The ruled has a duty to unquestionably follow the commands of the ruler.

Like any other law, whether domestic or international, the law of the *ad hoc* tribunals needs to be tested in its procedural enactment and its substantive content. The law governing the *ad hoc* tribunals was posited by the UNSC. Though the Council acted after making a determination that there was a threat to peace, it is questionable whether it had legitimate authority to establish *ad hoc* tribunals to fulfill its mandate of maintaining international peace and security, and whether this can be assessed on natural grounds. Using its mighty power, it voted binding resolutions that created the *ad hoc* tribunals. It decided to do so based on the assumption that its decisions will be followed and executed. By doing so, however, the UNSC defeated the purpose for which it enacted the tribunals' statutes. A look into the situations in the former Yugoslavia and Rwanda sheds light on the available options the UNSC had by the time it established the tribunals. What is at the epicenter of the discussion is the truthfulness of the armed conflict that swept both the former Yugoslavia and Rwanda. If reason had prevailed, the UNSC could have used its armed teeth to halt the serious violations of international humanitarian law that the fighting brought about. Whether a criminal tribunal could be entirely naturalistic or positivistic will remain an unanswered theoretical question. What is most needed is the balance of the the interrelation between the two theories in the designing and functioning of criminal tribunals with the aim of searching for the truth.

CHAPTER 3: BACKGROUND AND APPROPRIATENESS OF THE ESTABLISHMENT OF ICTY AND ICTR

3.1. Introduction

The ICTY and ICTR were respectively established by binding Security Council resolutions 827(1993), of 25 May 1993 and 955(1994) of 8 November 1994. The Council resorted to its powers under Chapter VII of the UN Charter. The Council believed that the tribunals constituted enforcement measures taken without recourse to the use of armed force in the broader performance of the Council's mandate of maintaining international peace and security. The Security Council's action is a mixture of legal and political and diplomatic considerations. A resolution under Chapter VII of the Charter binds states to comply. The tribunals were also vested with jurisdictional powers. The question is whether the UNSC was legally empowered, under the provisions of the UN Charter, to establish judicial institutions. An *ad hoc* institution is circumstantial and exceptional in all respects. What then is the explanation and why did the Council use the road of *ad hoc* tribunals?

It is therefore necessary to explore the legal route taken and find out how effective that route was. The UNSC could not establish tribunals without a purpose. The UNSC allegedly intended to maintain peace and security and further attain the aims of justice, contribute to national reconciliation, and combat impunity. How appropriate and effective was the UNSC's action? Before responding to these questions, it is important to understand how the situation was in the former Yugoslavia and Rwanda that warranted the establishment of *ad hoc* criminal tribunals.

3.2. The situation in the former Yugoslavia from 1991⁴²³ and the establishment of the ICTY

The conflicts in the republics constituting the former Socialist and Federal Republic of Yugoslavia (SFRY) spread from 1991 with Serbia's invasion of Slovenia until 2001 when a peaceful settlement was reached between conflicting parties in the Former Yugoslav Republic of Macedonia.⁴²⁴ The ICTY was established when the war had already started in some republics. Despite the existence of the tribunal, the war continued unabated eight years later and eventually covered all the territory of the SFRY.

It is beyond the scope of this research to rewrite the history and the causes of the conflicts in the former Yugoslavia that brought about the disastrous events of the 1990s. Some well-informed authors have done so extensively and accurately.⁴²⁵ It is, however, useful, for the purpose of this research, to note that “from 1946 to 1991 Yugoslavia comprised six republics”⁴²⁶ that were Bosnia and Herzegovina, Croatia, Montenegro, Macedonia, Serbia and Slovenia. Within Serbia there were two autonomous regions of Kosovo in the south and Vojvodina in the north.

⁴²³ For a comprehensive and abridged analysis of the conflicts in the republics of the former Yugoslavia, see Ljiljana Hellman, Impunity Watch (ed.), *Action to Combat Impunity in Serbia: Options and Obstacles*, Utrecht, Netherlands, December 2008, available at www.impunitywatch.org. For the editors, the author divides the conflicts in the former Yugoslavia as follow: Slovenia, the ten-days war starting from 27 June 1991; the Croatian War, from 1991 until 1995; Bosnia and Herzegovina, April 1992 to September 1995 and Kosovo War, from February 1998 to June 1999.

⁴²⁴ See <http://www.icty.org/sid/322>, last accessed on 12/1/2010

⁴²⁵ For a thorough daily analysis of atrocities that were committed from June 1991, see Gutman Roy, *A witness to Genocide*, A Lisa Drew Book, MacMillan Publishing Company, New York – Toronto, Oxford – Sydney, 1993. An illustrative and brief presentation of the root causes of the conflict in the former Yugoslavia may also be found in Elizabeth L. Pearl, “Punishing Balkans war criminals: Could the end of Yugoslavia provide an end to victors’ justice,” *American Criminal Law Review*, Vol. 30, 1992 – 1993, pp. 1373 – 1414, pp. 1378 – 1378; Cohen J. Philip, MD, “Ending the war and securing peace in former Yugoslavia,” *Pace International Law Review*, Vol. 6., 1994, pp. 19 – 40; Hochkammer K. Arthur, “The Yugoslav War Crimes Tribunal: the compatibility of peace, politics, and International Law”, *Vanderbilt Journal of Transitional Law*, Vol. 28, 1995, pp. 121 – 172; Scharf P. Michael, *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg*, Carolina Academic Press, 1997; Bass J. Gary, *Stay the Hands of vengeance: the politics of War Crimes Tribunals*, Princeton University Press, 2000, pp. 206 – 275; Davis W. Jeffrey, *Two Wrongs do Make a Right: The International Criminal tribunal for the former Yugoslavia was established illegally – but it was the right thing to do...So who cares?*, *N. C. J. Int'l L. & Com. Reg.*, Vol. 28, 2002 – 2003, pp. 395 – 420; Kaufman J. P., *NATO and the Former Yugoslavia, Crisis, Conflict, and the Atlantic Alliance*, Rowman & Littlefield Publishers, INC, Lanham – Boulder – New York – Oxford, 2002; Williams R. Paul & Scharf P. Michael, *Peace with Justice: War Crimes and Accountability in the Former Yugoslavia*, Rowman & Littlefield Publishers, Inc., Lanham Boulder New – York - Oxford, 2002

⁴²⁶ Rusinow Dennison, “*War of Yugoslav Succession*”, Microsoft © Student (2007) [DVD], Redmond, WA: Microsoft Corporation, 2006

Yugoslavia was also a mixture of ethnic and religious groups⁴²⁷, mainly Orthodox Christians, Catholics and Muslims. Bosnia and Herzegovina also divided into three entities, namely Republika Srpska, and the Federation of Bosnia and Herzegovina – and the Brcko district.⁴²⁸ Apart from Slovenia; which was inhabited by homogenous population, other republics were populated by inter and intra-ethnic and religious groups. Yugoslavia, like other communist block states did not escape from the collapse of the 1990s and started to disintegrate. When the conflict started, each group fought for its kinsmen against the federal authorities or against the opposite group and vice-versa.

Slovenia and Croatia declared independence on 25 June 1991. The declaration sparked an invasion by the Yugoslav People's Army (JNA), the majority of which were Serbs. In Slovenia, the conflict lasted for only 10 days with a victory of the Slovenian army and the withdrawal of the JNA.⁴²⁹ In Croatia, the war lasted until January 1992, when an unconditional ceasefire was agreed between the Croatian government and ethnic Serbs.⁴³⁰ This war was characterised by the shelling of cities and villages, destruction of historic monuments and large scale massacres of civilians. The destruction of Dubrovnik, in the South East of Croatia, and Vukovar, in the North East, by Serbs' forces are worthy of note in this regard.

In Bosnia and Herzegovina the conflict was the deadliest in all the republics particularly with the massacre in Srebrenica, Prijedor, Omarska, Konjic, Foca, Brcko, Mostar, Sarajevo, to just cite a few massacre sites. That war stopped with the signing of the Washington agreement in March 1994, which established a Muslim-Croat federation in Bosnia. Fighting between Croat-Muslim forces and the Serbs continued despite international efforts to establish a lasting ceasefire.⁴³¹ On 14 July 1995, the UN protected enclave of Srebrenica was shelled with heavy

⁴²⁷ <http://www.icty.org/sid/322>, last accessed on 12/1/2010

⁴²⁸ Human Rights Watch, *A Chance for Justice? War Crime prosecutions in Bosnia's Serb Republic*, Human Rights Watch, Vol. 18, No. 3(D), March 2006, p. 7 (footnote 16)

⁴²⁹ <http://www.icty.org/sid/322>, accessed on 12/1/2010

⁴³⁰ Rusinow Dennison, "War of Yugoslav Succession", op. cit.

⁴³¹ Idem

artillery by forces of Ratko Mladic, a Bosnian Serb general.⁴³² The UN Implementation Forces (IFOR), “for fear of eventual reprisals”⁴³³ did not retaliate to save the civilians under attack. Instead the conflict increased in intensity with renewed Bosnian Serb attacks on Sarajevo which precipitated NATO air attacks on Bosnian-Serb targets across Bosnia and Herzegovina in August 1995.⁴³⁴

On 21 November 1995, the Bosnian, Croatian, and Serbian governments agreed to a peace—negotiated at Dayton, Ohio, in the United States.⁴³⁵ This accord was signed in Paris on 14 December 1995 by the Presidents of Serbia Slobodan Milosevic, the President of Croatia Franjo Tudjman and the President of Bosnia and Herzegovina, Alija Izetbegović.⁴³⁶ The Dayton accords constituted a package of various protocols aimed at ending the war in the three states. Among other provisions, there was that of cooperating with the ICTY in the arrest of suspect war criminals.⁴³⁷ But the question of dislocation and disintegration was not over yet because the war spread also to Kosovo and Macedonia. This research will concern itself with the territories in which crimes, under ICTY jurisdiction, were mainly committed. Therefore, neither Macedonia nor Slovenia will be dealt with here.

The events in the Serbian province of Kosovo also attracted much attention.⁴³⁸ The tension was fueled by the oppression by the Serbian authorities and the sentiment of self-determination of Kosovo Albanians. The violence involved provocations, reactions and contra-reaction between

⁴³² Hazan Pierre, *Justice in Time of War: The true story behind the International Criminal Tribunal for the Former Yugoslavia*, (translated by James Thomas Snyder), A & M, University Press College Station, 2004, pp. 42 – 45, 65

⁴³³ Hazan Pierre, op. cit., p. 86; 89

⁴³⁴ Rusinow Dennison, “*War of Yugoslav Succession*”, op. cit.

⁴³⁵ *Ibidem*

⁴³⁶ Nystuen, Gro, *Achieving Peace or Protecting Human Rights?*, op. cit., p. 38

⁴³⁷ Rusinow Dennison, “*War of Yugoslav Succession*”, op. cit., p. 38

⁴³⁸ Interested readers and researchers may usefully learn about Kosovo in Judah Tim, *Kosovo: What everyone needs to know*, Oxford University Press, 2008; Weller Marc, *Peace lost: the failure of conflict prevention in Kosovo*, Martinus Nijhoff Publishers, Leiden & Boston, 2008; Hosmer S. T., *The Conflict over Kosovo: Why Milosevic decided to settle when he did*, Rand, 2001; Vickers Miranda, *Between Serb and Albanian: A history of Kosovo*, Columbia University Press, New York, 1998; Malcolm Noel, *Kosovo: a short history*, MacMillan, 1998; Miller William, “Slobodan Milosevic’s prosecution by the International Criminal Tribunal for the former Yugoslavia: A harbinger of things to come for International Criminal Justice”, *Loyola of Los Angeles International & Comparative Law Review*, Vol. 22, 1999 – 2000, pp. 553 – 580; Spillman R. Kurt & Krause Joachim (eds.), *Kosovo: Lessons learned for International Cooperative Security*, Peter Lang, Bern-Berlin_Bruxelles_Frankfurt a. M-New York-Oxford-Wien, 2000

Kosovo Serbs and Kosovo Albanians. The immediate conflict was triggered by acts of violence “between Serbian authorities and ethnic Albanians.”⁴³⁹ Baggett remarks that “between February 28 and March 1, Serbian police killed eighty ethnic Albanians in the Kosovo town of Drenica. The crackdown was in response to an attack on a bus-load of Serbian police by members of the Kosovo Liberation Army”⁴⁴⁰ (KLA). According to Weller, the police and the Serbian armed forces destroyed several villages, including the town of Prekaz. There, families were massacred, including women and children, turning them into instant martyrs for the Kosovo Albanians.⁴⁴¹ The violence seemed of a small-scale magnitude at the beginning, but it later led to a conflict that had ramifications with what has started earlier in Slovenia, Croatia and Bosnia and Herzegovina. Before NATO’s intervention in Kosovo that eventually halted the violence, and the war to a large extent:

many human rights abuses and war crimes were committed against ethnic Albanian civilians, but Serb civilians too were victims of abductions, beatings, and executions at the hands of members of ethnic Albanian paramilitary forces such as the KLA, which also targeted ethnic Albanians suspected of collaboration with the Serbs.⁴⁴²

After the withdrawal of Serbian forces pursuant to NATO air strikes, the violence increased against Serbs and other minorities to “a horrific level during the first months of the UN Mission.”⁴⁴³

The crimes committed in the former Yugoslavia came to be known through media coverage⁴⁴⁴ and humanitarian non-governmental organisations and combined actions of the United Nations

⁴³⁹ Baggett Ted, “Human rights abuses in Yugoslavia: to bring an end to political oppression, the International community should assist in establishing an independent Kosovo”, *Georgia Journal of International and Comparative Law*, Vol. 27, Iss.2, 1998 – 1999, pp. 457 – 476, p. 458

⁴⁴⁰ Baggett Ted, op. cit., p. 458

⁴⁴¹ Weller Marc, *Peace lost: the failure of conflict prevention in Kosovo*, Martinus Nijhoff Publishers, Leiden & Boston, 2008, p. 67

⁴⁴² Cady J-C. & Booth N., “Internationalized Courts in Kosovo: An UNMIK Perspective”, in Romano C. P. R., Nollkaemper A. and Kleffner J. K. (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, 2002, p. 59

⁴⁴³ *Ibidem*, p. 59

⁴⁴⁴ On 19 July 1992 for example,

Newsday’s Roy Gutman published the first article about Bosnian Serb-run concentration camps, giving the first mention of names that would become notorious: Omarska, Keraterm, Trnopolje, and Manjaca. Bosnian Serb leader Radovan Karadzic denied that his forces were operating concentration camps. On August 6, Penny Marshall of ITN took Karadzic up on his rash offer to let journalists visit Omarska, and beamed chilling pictures around the world of emaciated Bosnian prisoners behind barbed wires. ‘It looked like the Holocaust’, says a senior Bush administration official. ‘Nobody pretended not to know.’

Human Rights Commission and the UNSC. The Human Rights Commission appointed Mr. Tadeus Mazowiecki as its Special Rapporteur on the former Yugoslavia. He submitted his first Report on 28 August 1992 in which he proposed the establishment of an investigative commission.⁴⁴⁵ By resolution 713(1991), the Security Council imposed an arm embargo on Yugoslavia. It also determined that the fighting and heavy loss of life and material damage constituted a threat to international peace and security. The resolution contained many other enforcement measures including the creation of ‘safe areas’ in Srebrenica, Sarajevo, Tuzla, Zepa, Gorazde, and Bihac.⁴⁴⁶ Hochkammer argues that this resolution brought too little too late.⁴⁴⁷ In his opinion, the UN’s “reaction to the Yugoslav conflict typified the world’s rush to condemn Serbian aggression, but reluctance to intervene”⁴⁴⁸ in a war that was spreading so quickly.

Thereafter, the Council started exploring the possibility of prosecuting war crimes, having threatened to do so in resolutions 764 (1992) of 13 July 1992⁴⁴⁹ and 771(1992) of 13 August 1992⁴⁵⁰ respectively. While the killings continued in Bosnia, the UN Security Council adopted Resolution 780(1992) on 6 October 1992 in which it decided to “establish a ‘commission of experts’ to gather evidence of war crimes in the former Yugoslavia.”⁴⁵¹ The five members’

Bass J. Gary, *Stay the Hand of Vengeance: the politics of war crimes tribunals*, Princeton University Press, 2000, p. 210; see a narrative by Tatiana Vaksberg of the Bijeljina camp, “the first town in Bosnia to have fallen into the Serbian hands”, in Tatiana Vaksberg, “The Milosevic Trial: Writing History”, *East European Constitutional Review*, Vol. 12, 2003, pp. 120 - 125

⁴⁴⁵ Scharf P. Michael, *Balkan Justice: the story behind the First International War Crimes Trial since Nuremberg*, op. cit., p. 40

⁴⁴⁶ Kerr Rachel, *The International Criminal Tribunal for the former Yugoslavia: An exercise in Law, Politics, and Diplomacy*, op. cit., p. 33

⁴⁴⁷ Hochkammer K. Arthur, “The Yugoslav War Crimes Tribunal: the Compatibility of Peace, Politics and International Law”, op. cit., p. 129

⁴⁴⁸ Idem

⁴⁴⁹ Resolution 764 stated, among others “that persons who committed violations of ‘international humanitarian law’ (a fancy term meaning war crimes) in the former Yugoslavia would be held individually responsible”; Scharf M. P., “Balkan Justice: the story behind the first international war crimes tribunal since Nuremberg”, op. cit., p. 37

⁴⁵⁰ Resolution 771 “called upon states and international humanitarian organizations to submit to the Council ‘substantiated information’ in their possession concerning war crimes in the former Yugoslavia”; Scharf P. Michael, op. cit., p. 37

⁴⁵¹ Bass J. Gary, *Stay the Hand of Vengeance*, op. cit., p. 211; and Davis W. Jeffrey, “Two Wrongs do Make a Right: The International Criminal tribunal for the former Yugoslavia was established illegally – but it was the right thing to do...So who cares?”, *North Carolina Journal of International and Comparative Regulation*, Vol. 28, 2002 – 2003, pp. 395 – 420; pp. 403 - 406

commission of experts⁴⁵² was mandated to examine, *inter alia*, information submitted pursuant to Resolution 771(1992) and to advise the UN Secretary General on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.⁴⁵³

Despite the obstacles⁴⁵⁴ under which the Commission worked, it produced significant results in its Final Report of May 1994.⁴⁵⁵ In an appraisal of the Commission's work, Scharf highlights that the particular circumstance of the crimes committed in the former Yugoslavia, as documented by the Commission, required nothing less than the creation of an *ad hoc* tribunal "for moral, practical, and legal reasons."⁴⁵⁶ This was done when the UN Security Council adopted Resolution 827 (1993) on 25 May 1993 establishing the ICTY. Hochkammer labelled the tribunal "an empty gesture through which Europe and the United States hope to assuage their guilt for failing to act when the war erupted, thereby permitting the carnage."⁴⁵⁷

In concluding with this background to the ICTY establishment, it is instructive to highlight two important issues. The first is the fact that the tribunal was established as a so-called effective means for the restoration and maintenance of international peace and security in the Balkans.

⁴⁵² The commission of experts was initially composed of Frits Kalshoven, a retired law professor at Leiden, in Holland; Mohamed Cherif Bassiouni, an Egyptian-American law professor at DePaul University in Chicago. In August 1993, he took up the chairmanship of the commission after the resignation of professor Kalshoven; see in this respect Bass J. Gary, *Stay the Hand of Vengeance*, op. cit., p. 211. The other members of the commission were Commander William Fenrick, Director of Law for Operations and Training in the Department of Defense of Canada and NATO, and later Legal advisor to Prosecutor Louise Arbour at the ICTY; Justice Keba M'baye, former President of the Supreme Court of Senegal and former President of the International Court of Justice (Senegal); Torkel Opsahl, professor of Human Rights Law at Oslo University and a former member of the European Commission on Human Rights (Norway). This complement is from Scharf P. Michael, *Balkan Justice: the story behind the First International War Crimes Trial since Nuremberg*, op. cit., p. 42

⁴⁵³ Kerr Rachel, *The International Criminal Tribunal for the former Yugoslavia: An Exercise in Law, Politics, and Diplomacy*, op. cit., p. 34

⁴⁵⁴ Among the obstacles that the commission encountered, it was not given adequate staff, sufficient financial resources and lacked the political support needed to enable it to carry out its mandate.

⁴⁵⁵ Beigbeder Yves, *Judging War Criminals: The Politics of International Justice*, Palgrave, 1999, p.148

⁴⁵⁶ Scharf P. Michael, "Cherif Bassiouni and the 780 Commission: the gateway to the era of accountability", in Sadat L. Nadya & Scharf P. Michael, (eds), *The Theory and Practice of International Criminal Law*, op. cit., p. 284; see also Bailey D. Sydney who declares that "the main characteristic of these events was their arbitrary nature: the use of torture, rape, the mutilation of corpses and other forms of instilling terror, the wanton destruction of churches and mosques, of homes, shops, farms, and places of business, attacks on hospitals and other medical institutions, and the mass expulsion of civilians." Bailey D. Sydney, *The UN Security Council and Human Rights*, op. cit., p. 121

⁴⁵⁷ Hochkammer K. Arthur, "The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics and International Law", op. cit., p. 121

The second fact is the actual knowledge that Milosevic (and many others) was the most wanted criminal. Yet, Milosevic was only arrested in April 2001 on allegations of corruption and abuse of power by authorities in Belgrade, not directly by the ICTY itself. Williams and Taft underscore that this slowness to act and the reluctance to assert a robust role for justice through strong statements demanding accountability limited the Yugoslav Tribunal's effectiveness and established a questionable precedent for the operation of future tribunals.⁴⁵⁸ Had Prime Minister Zoran Djindjic⁴⁵⁹ not surrendered Milosevic to the tribunal's investigators on 28 June of 2001 who took him to The Hague⁴⁶⁰, Milosevic could have died a free man. Neither the international tribunal nor NATO alliance has ever attempted to arrest the person they believed to be the mastermind of the atrocities in the Balkans. President Vojislav Koštunica, the Serbian President and successor of Milosevic, was himself unwilling to surrender Milosevic for international trial.⁴⁶¹ This was also the position of Western Governments⁴⁶², according to Goldstone, former ICTY Chief Prosecutor.

⁴⁵⁸ Williams R.Paul & Taft Patricia, "The role of justice in the former Yugoslavia: antidote or Placebo for coercive appeasement", *Case Western Reserve Journal of International Law*, Vol. 35, Iss. 2, 2003, pp. 219 - 255, p. 255

⁴⁵⁹ Writing on the arrest and transfer of President Slobodan Milosevic, Florence Hartman speaks of a pact between Djindjic (the Prime Minister of Serbia) and Del – Ponte (the ICTY Prosecutor), Hartman Florence, *Paix et Châtiment: Les guerres secretes de la politique et de la Justice Internationale*, ed. Flammarion, 2007, pp. 40 – 56; Scharf adds that newly elected President of the Federal republic of Yugoslavia Vojislav Kostunica, backed by a federal court ruling, refused to permit the extradition of Milosevic to The Hague; but that in the late-night move that caught everyone off guard, Kostunica's political rival, Prime Minister Zoran Djindjic, instructed the Serb Police under his command to secretly take Milosevic to an American air base in Tuzla, Bosnia, from which Milosevic was transferred by military jet to The Hague on July 28, 2001; Scharf M. P., "The International Trial of Slobodan Milosevic: Real justice or Realpolitik?", op. cit., p. 396; also Scharf P. Michael & Schabas A. William., *Slobodan Milosevic on Trial*, op. cit., pp. 106 – 107 and Scharf M. P., *The legacy of the Milosevic Trial*, op. cit.

⁴⁶⁰ Williams R.Paul & Taft Patricia, "The role of justice in the former Yugoslavia: antidote or placebo for coercive appeasement", op. cit., see also Maogoto who writes that "after a decade of first trying to contain and then capture the former Yugoslav leader, on 28 June 2001, a disbelieving Slobodan Milosevic was hustled out of Belgrade's main prison on a journey that ended in the UN-controlled Scheveningen prison", Maogoto N. Jackson, "Presiding over the ex-President: A look at superior responsibility in light of the Kosovo indictment", *Deakin Law Review*, Vol. 7, 2002, pp. 173 – 199, p. 176; and Tatiana Vaksberg writing that "Without the cooperation of the Yugoslav authorities, the former president would never have appeared before the International Tribunal", Vaksberg Tatian, "Milosevic between Crime and Punishment", *East European Constitutional Review*, Vol. 11, Iss.3, 2002, pp. 75 – 79, p. 75

⁴⁶¹ See Goldstone Richard, "The role of the United nations in the prosecution of International War Criminals", *Washington University Journal of Law and Policy*, Vol. 5, 2001, pp. 119 – 127, p. 124; also Budding A. Helfant, "The man who overthrew Milosevic: Vojislav Kostunica, one year later", *The Fletcher Forum of World Affairs*, Vol. 26, Iss.1, 2002, pp. 159 – 165; Slobodan Antonic, "Serbia after Djindjic", *East European Constitutional Review*, Vol. 12, Iss.2&3, 2003, pp. 114 - 118

⁴⁶² Goldstone Richard, "The role of the United Nations in the prosecution of International War Criminals", *ibidem*.

Like in other conflict hotspots, the situation in Kosovo was well known to the international community⁴⁶³ particularly the Conference on Security and Cooperation in Europe [now the Organisation for Security and Cooperation in Europe (OSCE), the European Union (EU), the UN General Assembly, the UN High Commissioner for Human Rights, the UN Security Council and powerful States, including the USA.⁴⁶⁴ International media also covered extensively the way events unfolded in Kosovo as early as January 1998. Despite this knowledge however, “the violations of human rights and fundamental freedoms in Kosovo, in particular the repression of the ethnic Albanian population, continued unabated.”⁴⁶⁵

The situation and procedures of establishing the ICTY is not far different from the one adopted for Rwanda. On 8 November 1994, the UN Security Council, following the same scenario, adopted Resolution 955(1994) aimed at prosecuting genocide, crimes against humanity and war crimes committed in Rwanda. The background to this resolution follows.

3.3. The situation in Rwanda (1990 – 1994) and the establishment of the ICTR

It would require volumes of books if one were to write on the events which are at the heart of the idea of establishing an international criminal tribunal for Rwanda. The armed conflict that erupted in Rwanda from Uganda on October 1, 1990 is the direct beginning of the crisis. The

⁴⁶³ For an illustrative list of institutions and governments which had information on the worsening of the situation in Kosovo, see Ellis S.Mark, “The Consequences of the Kosovo conflict on Southern Europe”, *International Lawyer*, Vol. 34, No. 4, 2000, pp. 1193 – 1221. Generally on Kosovo and atrocities committed there, see Ugo Caruso, “Kosovo declaration of Independence and the International Community – an assessment by the Kosovo Monitoring Task Force”, *Jemie*, Vol. 7, 2008, pp. 1 – 33; Sterio M., “The Kosovar Declaration of Independence: Botching the Balkans or respecting International Law?”, *Ga. J. Int’l & Comp. L.*, Vol. 37, 2008 – 2009, pp.267 – 304; Baggett T., “Human rights abuses in Yugoslavia: to bring an end to political oppression, the International community should assist in establishing an independent Kosovo”, *Ga. J. Int’l & Comp. L.*, Vol. 27, 1998 – 1999, pp. 457 – 476; Steven Freeland, “The bombing of Kosovo and the Milosevic Trial: Reflections on some legal issues”, *Australian International Law Journal*, 2002, pp. 150 – 175; Barutciski M., “Peut-on justifier l’intervention de l’OTAN au Kosovo sur le plan humanitaire? Analyse de la politique occidentale et ses consequences en Macédoine”, *Canadian Yearbook of International Law*, Vol. 38, 2000, pp. 121 – 154; Jerrold P. M. and Panis, Lara. K. wrote in “Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan and Saddam Hussein” that “The NATO alliance now faces the delicate and awkward task of creating a lasting peace in Kosovo on the basis of an agreement negotiated with an indicted international war criminal”, *Cornell International Law Journal*, Vol. 38, 2005, pp. 823 – 836

⁴⁶⁴ Richard Holbrooke noted that “American diplomats had always viewed Kosovo as the most explosive tinderbox in the region.... An eruption in Kosovo...could trigger a wider war, involving Albania and Macedonia and perhaps even Greece”, Holbrooke Richard, *To End a War*, New York, Random House, 1998, p. 357, cited in Ball Hall, *Prosecuting War Crimes and Genocide: the twentieth experience*, op. cit., p. 150

⁴⁶⁵ Ellis S.Mark, “The Consequences of the Kosovo conflict on Southern Europe”, op. cit., p. 1220

war opposed an aggressive movement codenamed Rwandese Patriotic Front (RPF) and the Rwandan Government armed forces. The RPF movement originated mainly from the Republic of Uganda. The war lasted for almost four years.

Like any war, this conflict was no exception in terms of mass violations of human rights committed by both warring parties. Belligerents with the assistance of the international community undertook negotiations for a peaceful settlement of the crisis.⁴⁶⁶ It is, however, a fact that the Rwandese Patriotic Front⁴⁶⁷ (RPF) which was the invading force, took advantage of many misdeeds and weaknesses of the then Government of Rwanda to surround itself with ingredients⁴⁶⁸ and intransigence⁴⁶⁹ that later led to the abortion of all peaceful undertakings and facilitated the resumption of the war in April 1994 and the mass killings that ensued⁴⁷⁰, including the commission of genocide.

⁴⁶⁶ A peaceful agreement between the then Government of Rwanda and the invading force, named the Rwandese Patriotic Front (RPF), termed “*Arusha Accords*” was concluded in the northern Tanzanian Town of Arusha, the future seat of the International Criminal Tribunal for Rwanda; on August 4, 1993.

⁴⁶⁷ The RPF was the so-called rebellious movement which attacked Rwanda from Uganda on October 1, 1990. The author does not agree with the term “rebellion” that was used to qualify the attackers. He is of the opinion that the invasion was an aggression in terms of Resolution 3319 defining “aggression”, GA RES 3319(XXIX) 1974.

⁴⁶⁸ Because RPF was mainly composed of Tutsi ethnic group, the attack sparked a situation of mistrust among Rwandans and sometimes it ended up in ethnic violence that was curbed by the Rwandan authorities at the time, see for instance the massacres of *Bagogwe* in *Gisenyi* and *Ruhengeri*, and the ethnic violence in *Kibuye* and *Bugesera*. These massacres were not intended, as some believed, at wiping out Tutsis; and they were investigated, and documents to that effect exist.

⁴⁶⁹ Refer to point 6. D of the UNAMIR Cable dated February 14, 1994 (MIR – 345) “*Continued political impasse in Rwanda*”. The Special Representative of the UN Secretary General pointed out that:

The Rwandese Patriotic Front dismissed outright the ‘*Code of Conduct*’ document arguing it would take two years to discuss it. The intransigence shown by the RPF on other points of negotiations did not help either in facilitating a rapprochement between it and the MRND in particular. The position adopted by the RPF does not take into consideration the MRND concerns and it was considered to be unrealistic by both the Special representative and the Representative of the facilitator;

see also a Code Cable from the US Embassy in Kigali on March 04, 1994 in which the ambassador suggests that “the Rwandan Patriotic Front (RPF) has publicly and firmly rejected of all – party meetings 2/25 and 2/27 chaired by President Habyarimana [...]”; also *Second Progress Report of The Secretary General on the UN Assistance Mission for Rwanda*, S/1994/360, March 30, 1994, para. 15

⁴⁷⁰ See for instance para 10 of the *Letter from the Chargé d’Affaires a.i of the Permanent Mission of the United Republic of Tanzania to the United Nations addressed to the president of the Security Council, transmitting a statement by the Tanzanian President*, dated May 1, 1994, on the situation in Rwanda, S/1994/527, May 2, 1994; the then President of Tanzania stated that “Tanzania believes that failure to implement the Arusha Peace Agreement signed in Arusha last year is what led to the present tragedy”.

An analysis of archives of the United Nations Assistance Mission for Rwanda (UNAMIR)⁴⁷¹ and of the Embassy of the United States of America⁴⁷² accredited in Kigali in 1993 and 1994, and other such contemporaneous documents show clearly that the RPF was not interested in a peaceful resolution of the conflict. It was rather determined to continue the fighting⁴⁷³ in order to seize power at any cost. The Broad Based Transitional Government and Transitional Assembly composed of all political parties and the RPF provided for in the Arusha peace agreement, could not be set up until 06 April 1994. On this day the RPF deliberately shot down the Rwandan President's plane plunging the whole country into chaos. It would be tantamount to ignoring reality if one tried to isolate this grave incident⁴⁷⁴ when arguing that there was a

⁴⁷¹ The UN Assistance Mission for Rwanda was established by Security Council Resolution 872 (1993) to assist the belligerents, namely the Rwandan Armed Forces and the Rwandese Patriotic Front to implement the Arusha Peace Agreement, signed on August 4, 1993. Important Code cables of the UNAMIR are listed here: MIR – 441, “*Efforts to break the Impasse on Installation of Transitional Institutions*”, dated February 28, 1994; MIR – 451, “*Report of the meeting of the SRSG [Special Representative of the Secretary General] with the RPF in Mulindi on 1.3.94*”; MIR – 501, “*Joint Communiqué*” between President Habyarimana of Rwanda and President Museveni of Uganda, dated March 8, 1994; MIR – 465, “*Meeting with Ambassadors of Belgium, France, Germany and the United States on 2 March 1994*”, dated March 2, 1994; MIR – 540, “*Poursuite des négociations pour la mise en place des institutions de la transition*”, dated March 11, 1994; MIR – 607, “*Mise en place des institutions de la transition*”, dated March 19, 1994; MIR – 655, “*Efforts to Install the Transitional Institutions*”, dated March 24, 1994. The author will rely on such cables tendered into evidence in the proceedings before the ICTR and that can be accessible to the public. The ICTR transcripts are available online at <http://www.ictr.org/>

⁴⁷² US Embassy Code cable of March 4, 1994 “*RPF questions President's Political Will*”; March 28, 1994 “*CDR Issue proves Intractable*”; March 31, 1994, “*Render Tells RPF to take 'High Road' on CDR Issue*”; April 1, 1994 “*Negotiations slide into Long weekend*”; March 25, 1994 “*Demarches Request on CDR participation*”

⁴⁷³ The SRSG wrote to Headquarters in New York on March 1, 1994 reporting on a meeting that he held with the RPF leadership that:

I left the meeting very pessimistic about the present state of mind of the RPF leadership. They appeared to be seriously considering the war option which I very strongly tried to dissuade them from pursuing. I am however still hopeful that reason will prevail and the party leadership will seriously reconsider their position and continue finding a peaceful solution to the impasse.

MIR – 451, Idem, at para. 6

⁴⁷⁴ Refer generally to Sapru who notes that Habyarimana [the President] “death triggered the wave of violence that the world came to recognize as the worst humanitarian disaster since World War II.”, Sapru Tara, “Into the heart of darkness: the case against the foray of the Security Council Tribunal into the Rwanda crisis”, *Texas International Law Journal*, Vol. 32, 1997, pp. 329 – 354, at p.334; the death of the president is also qualified as a “disaster” in the *Final Report of the Commission of Experts established pursuant to Security Council Resolution 935(1994)*, S/1994/1405, 9 December 1994, para. 58 & 62, para. 56; an “immediate cause of the grievous and tragic events which Rwanda is undergoing” in *Report on the Situation of Human Rights in Rwanda, by Mr. R. Degni Segui, Special Rapporteur of the Commission on Human Rights under para 20 of Comm. Resolution E/CN.4/S-3/1 of May 25, 1994*, E/CN.4/1995/7, 28 June 1994, para. 18; “tragic incident [that] set off a torrent of widespread killings in the *Special Report of the Secretary General on the United Nations Assistance Mission for Rwanda*, S/1994/470, 20 April 1994, para. 2.; Laughland considers that “the reason why the responsibility for the shooting down of the plane is so important is that, if it is demonstrated that the order was in fact given by the Tutsis, then the theory of a pre-planned genocide, central to the original charge against the Hutus, collapses.”, Laughland John, *A history of political trials: From Charles I to Saddam Hussein*, Peter Lang Oxford, 2008, p. 213; *The prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T; Paragraph 1 of the Indictment reads “On April 6, 1994, a plane carrying President Juvénal

civil war in Rwanda. Others would also support the idea that there was a plan to eliminate the Tutsis. Evidence on records before the ICTR suggests that the RPF, which is now ruling Rwanda, allegedly shot down President Juvénal Habyarimana's plane.⁴⁷⁵

The President was the only legal institution set up pursuant to the accords. After his death, there was a power *vacuum* on the side of what could then be called the Government; the Peace Accords were not yet operational.⁴⁷⁶ An explosive climate prevailed at that time. The assassination of the President triggered the explosion.

The scale of the human rights violations, particularly the right to life, and their intensity culminated in the unprecedented horrors that the end of the twentieth century witnessed. Laughland observes that “the killing sparked off was a huge scare. It is not known how many people died and it is not known what percentage of Hutus and Tutsis were killed. One figure which has gained currency is that 800,000 were killed but even the human rights activists who advance this figure say that they do not know the real tally.”⁴⁷⁷

Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi crashed at Kigali airport, killing all on board. Following the deaths of the two Presidents, widespread killings, having both political and ethnic dimensions, began in Kigali and spread to other parts of Rwanda.”

⁴⁷⁵ Michael Hourigan, an Australian Queen's Counselor, testified under oath before the International Criminal Tribunal for Rwanda under Rules 92 bis of the tribunal's Rules of Procedure and Evidence (see Trial Chamber One records of November 27, 2006 in *Bagosora et al.*). He stated that he was employed as a Prosecutor at the ICTR in 1996 – 97 with primary responsibility for the investigation of the assassination of President Habyarimana. He, and Amadou Deme, a former intelligence officer with the UNAMIR collaborated on the investigation and concluded that Paul Kagame, current President of Rwanda, ordered the downing of the president's plane. He reported to then Chief Prosecutor Louise Arbour, in 1997, that the Rwandese Patriotic Army, under the orders of Paul Kagame, was responsible for the killing of President Habyarimana on April 6, 1994. The Chief Prosecutor ordered him to cease the investigation. The substance of the 1997 report has later been corroborated by the November 2006 Report by Judge Bruguière (“*Délivrance de mandats d'arrêt internationaux*”, Tribunal de Grand Instance de Paris, [Ordonnance de soit communiqué or order to execute] (hereinafter, the ‘*Judge Bruguiere Report*’); the international arrest warrants issued on February 6, 2008 by Spanish Judge Fernando Andreu Merelles at the Tribunal Central d'Instruction No.4, Cour National, Administration de la Justice, Kingdom of Spain (the Merelles Arrest Warrants); the Book (Lieutenant Ruzibiza Abdul Joshua, *Rwanda: l'histoire secrète*, Editions du Panama, Paris, 2005, 494 pages) and Testimony of Abdul Joshua Ruzibiza (see Trial Chamber records of March 09, 2006 in *Military One Case* on April 6, 2006, Case No: ICTR – 98 – 41 – T), a former RPF intelligence Officer and witness BRA – 1, a former RPF soldier and personal guard of General Paul Kagame, held by Trial chamber One in *Military One Case* on April 6, 2006, Case No: ICTR – 98 – 41 – T; See also Major Aloys Ntabakuze Final Trial Brief submitted on April 23, 2007, par 35 and 36; Mugabe Jean – Pierre (former RPF Intelligence Officer), “Explosive Leak on Rwanda Genocide”, *National Post*, March 1st, 2000.

⁴⁷⁶ Rawson suggests that “with Habyarimana's death, the only established institution in Rwanda, and the peace process itself, perished.”; Rawson P. David, “Prosecuting Genocide: Founding the International Tribunal for Rwanda”, *Ohio Northern University Law Review*, Vol. 33, Iss.2, 2007, pp. 641 – 663, p. 642.

⁴⁷⁷ Laughland John, *A history of political trials*, op. cit., p. 209

After this serious incident which RPF was clearly responsible for, this invading movement refused to recognise the Interim Government. It was hardly set up on 09 April 1994,⁴⁷⁸ and was viewed as legitimate by the UN at that time.⁴⁷⁹ RPF opposed any ceasefire that would have allowed the armed forces to restore law and order.⁴⁸⁰ It instead wanted the “genocide” to be consumed.⁴⁸¹ The RPF ensured that the international forces that were present in Rwanda and elsewhere, which came for the rescue missions, left as early as 09 April 1994.⁴⁸²

⁴⁷⁸ RPF Press release dated May 23, 1994 in which the RPF Director for External and Representative to the UN stated that: “The Rwandese Patriotic Front wishes to restate that it does not recognise the so called interim government in Rwanda and it has nothing to do with a bunch of murderers that have turned our entire country into a graveyard”

⁴⁷⁹ UN Code Cable of May 25, 1994 “*Clarification on legal issues.*” The question was posed as to whether the “interim Government in *Gitarama*” (was) a successor Government to the legitimate Government of Rwanda. The legal Counsel of the UN was of the opinion that:

Although the Arusha Agreement, by its terms, had come into effect upon signature, and President Habyarimana was subsequently sworn in as President, the Transitional Assembly and the other organs of the Transitional Government were never established. Therefore, the Government of Rwanda, which ceased to exist shortly after the death of the President on 6 April 1994, was not the Transitional Government. Consequently the Arusha Agreement, including its succession provisions, are not applicable to the succession issue. That question would therefore be governed by the constitutional law of Rwanda. Moreover, the factual situation inside Rwanda has yet to stabilize with de facto authority apparently being exercised by several competitors for power. The ‘interim Government’ seems, nevertheless, to be operating, at least in some parts of Rwanda, as the de facto authority. As such, it can, in our opinion, legally be contacted and dealt with by the UN in the same manner as other potential contributors to the peace process in Rwanda.

⁴⁸⁰ Ref. Code Cable from the Special Representative Secretary General in Rwanda, dated April 16, 1994 on the ceasefire in Rwanda (MIR - 777) and its annex containing the preconditions of the Rwandese Patriotic Front for a possible ceasefire agreement and a letter dated April 18, 1994 authored by colonel Alexis *Kanyarengwe*, the then Chairman of the Rwandese Patriotic Front in which he rejects any attempt of mediating a ceasefire agreement.

⁴⁸¹ As earlier as April 12, 1994 (a week after the downing of the president plane), RPF Director for External Relations and Representative to the UN wrote: “A crime of genocide has been committed against the Rwandese people in the presence of a UN International Force... calling for ceasefires (...) would allow the criminals in Rwanda to continue committing atrocities”, *Letter addressed to Ambassador Collin Keating, President of the United Nations Security Council*, UN, New York, April 13, 1994; same topic was raised by the same representative in a further letter to the President of the Security Council on April 26, 1994 while the massacres continued; by the RPF Representative in Brussels on April 29, 1994; and Statement to Members of the Security Council on June 7, 1994; Testimony of Dr Alison Desforges before the Belgian Senatorial Commission on May 16, 1997 (Commission Parlementaire concernant les Evenements au Rwanda, *Compte rendu analytique des auditions*, Audition de Madame Desforges, Human Rights Watch, 16.05.1997, p. 542

⁴⁸² For illustration, see Sénat de Belgique, Commission d’enquête Rwanda, *Compte rendu analytique des auditions*, 24 Juin 1997, Audition de M. Willy Claes, Ministre d’Etat, « Je vous rappelle que le FPR nous avait lancé un ultimatum. Si nous n’étions pas partis le jeudi, ils attaquaient. Ils étaient d’accord pour une opération humanitaire de courte durée mais pas pour une opération de ‘peace making’, p 822, see also at page 522, 561; Testimony of Dr Alison Desforges before the Belgian Senate on 16 May 1997, p 524 ; Brigadier Henry Kwami Anyidoho, Deputy Force Commander and Chief of Staff of UNAMIR Forces in Rwanda writes in his book *Guns over Kigali: The Rwandese Civil War – 1994*, Fountain Publishers, Kampala, Uganda, 1998, 131 pages : « While the advance proceeded on the east flank, General Kagame on 10 April warned UNAMIR to withdraw its troops from Byumba to enable him to carry out retaliatory bombardment. After a vain attempt to stop the RPF command for three days, we withdrew our DMZ Sector troops [...]” (p. 32); “the first major problem was an ultimatum we received from RPF High Command to withdraw our troops from the DMZ”, p. 41

What was to be later called “genocide” had not yet started. If one were to call the massacres “genocide” at that particular moment, it was at its early beginning, and could have been halted. This required RPF to cease the fighting. It also required a reinforced UNAMIR presence and determined military action. Rather than reinforcing the UNAMIR operational capacity, the UNSC, by Resolution 912(1994)⁴⁸³ and in response to the countries that provided troops⁴⁸⁴ request, downsized the UNAMIR in the climax of the killings. On one hand the RPF claimed that massacre should be halted⁴⁸⁵ before any ceasefire negotiation could take place. On the other hand, some elements of the governmental forces were directly participating in the massacres mainly committed by the common populace and militias.

The then Rwandan Armed Forces High Command requested a ceasefire as of 12 April 1994⁴⁸⁶ which the RPF refused. This attitude did not change until 14 July 1994. The UN and other role players⁴⁸⁷ also called for a ceasefire that could have allowed the cessation of the massacres and the resumption of negotiations. A part from the calls for ceasefire, the UN and the international

⁴⁸³ Security Council resolution adjusting UNAMIR’s mandate and authorizing a reduction in its strength, S/RES/912 (1994), April 21, 1994

⁴⁸⁴ See Document 44: *Letter from the Representative of Belgium to the United Nations addressed to the President of the Security Council, stating the view of the Belgian government that it is imperative to suspend the activities of the UNAMIR force without delay*, S/1994/430, 13 April 1994; Document 45: *Letter dated 13 April 1994 from the Secretary General to the President of the Security Council concerning developments which may necessitate the withdrawal of UNAMIR* [not issued as a United Nations document]; Document 47: *Letter from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, transmitting similar letters dated 15 April 1994 to the President of the Security Council and to the Secretary General from the Deputy Prime Minister and Minister of Foreign Affairs of Belgium recommending the suspension of UNAMIR and conveying the decision of the Belgium Government to immediately withdraw the Belgian battalion*, S/1994/446, 15 April 1994; in Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, The United Nations Books Series, Volume X, United Nations, New York, 1996, p. 258 - 262

⁴⁸⁵ US Kigali Embassy Code Cable dated April 18, 1994 “RPF Lists Conditions for Talks on Cease-Fire”, Approved for release in August 2001.

⁴⁸⁶ See a Communiqué issued by the Command of the Rwandan Armed Forces, dated 12 April 1994, co-signed by 10 officers including the interim chief of Staff of the Rwandan Army, Colonel Marcel Gatsinzi.

⁴⁸⁷ Document 41: *Letter dated 8 April 1994 from the Secretary General to the President of the Security Council concerning the role of UNAMIR in the crisis situation in Rwanda* [not issued as a United Nations document]; Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, op. cit., p. 255; Text of President Clinton’s Radio Message on Rwanda, April 30, 1994: “On behalf of all the American people, I call on the Rwandan Army and the Rwandan Patriotic Front to agree to an immediate cease-fire and return to negotiations aimed at a lasting peace in their country.”

community as a whole⁴⁸⁸ did nothing else to stop the massive killings and left Rwanda on its own.

When the RPF seized power in July 1994, the attitude changed. The RPF continuously pressurised the international community to call the massacre “genocide” and to consider its belligerence as a salutary action. The UN lost completely its supposed neutrality. Instead of looking into all the crimes that were committed during this period and allocating responsibilities accordingly, the UN openly started siding with the newly established government, supporting the idea that there was a plan to exterminate Tutsis. The UN attitude aimed apparently at not embarrassing the new government and eventually weakening it.⁴⁸⁹ The UN Secretariat suppressed information gathered by a consultant acting under the mandate of the High Commissioner for Refugees where evidence showed that the RPF killed civilians in a widespread and systematic manner because the newly established Government of Rwanda simply denied those massacres.⁴⁹⁰

It should once again be overemphasised that the issue of “planning” genocide has never featured in the two year negotiation period between the then Government of Rwanda and the

⁴⁸⁸ Combs notes that:

The international community made no effort to stop the killings, even though it has been estimated that as few as a thousand troops could have brought the violence to an end. Indeed, a U.N. peacekeeping force was stationed in Rwanda when the killing began, and rather than enlarging it, the S.C. reduced it from 1,515 to 270. The international community was likewise reluctant at first to become involved in bringing the perpetrators of the bloodshed to justice.

Combs N. Amory, *Guilty Pleas in International Criminal Law*, op. cit., p.15

⁴⁸⁹ Desforges notes in this respect:

Leading authorities at the U.N. and in national governments were troubled by this information [of a massacre and other killings and existence of RPF mass graves of civilian population]. They wanted the slaughter to end but they were reluctant to make any criticisms that might weaken the new Rwandan government. As one U.S. policymaker described the situation: We have three choices. Support the former genocidal government. That is impossible. Support the RPF. That is possible. Support neither. That is unacceptable because it might result in those responsible for the genocide coming back to win.

Desforges, op. cit., p.556

⁴⁹⁰ *Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council*, U.N Doc. S/1994/1115. For substance on the atrocities committed by the RPF and the undisclosed Robert Guersony Report, see Desforges Alison and others, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, Paris, 1999

RPF. The UN also denied any knowledge of such a “plan.”⁴⁹¹ In adjudicating the widely mediatised *Military One*⁴⁹² case, the ICTR likewise failed to establish any plan or conspiracy to wipe out Tutsis.⁴⁹³

Prosecuting the leaders of the defeated government was not really a search for truth and justice⁴⁹⁴ but vested a great deal of political agenda aimed at regime change. In the course of the war, the UN High Commissioner for Human Rights appointed Mr. René Degni Ségui to investigate the massacres.⁴⁹⁵ He concluded that genocide, war crimes and crimes against humanity have been committed in Rwanda. In response to the information he provided, the UNSC adopted Resolution 935(1994) of 1 July 1994 requesting the Secretary General to establish a Commission of Experts to review the evidence of grave violation of international humanitarian law in Rwanda, including possible acts of genocide.⁴⁹⁶ The commission presented

⁴⁹¹ See MIR – 3961, a Code cable from Ambassador Shaharyar Khan, then Special Representative of the Secretary General in Rwanda who succeeded Dr. Jacques Roger Booh Booh, November 20, 1995 “Warnings of Genocide to UNAMIR”. The SRSG underlined that he:

appointed a committee consisting of Col. Fletcher, Mr. Tikoca who was Chief Military Observer and present in Rwanda throughout the period and Mr. Isel Rivero who was handling Rwanda from UNHQ at the time. [...] They confirm the view that there was no information or indication of planned genocide. There were of course, warning of armed clashes, violence and killings on an ethnic basis.

⁴⁹² *The prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, 18 December 2008

⁴⁹³ In this case, the Trial Chamber was of the view that:

When viewed against the backdrop of the targeted killings and massive slaughter perpetrated by civilian and military assailants between April and July 1994 as well as earlier cycles of violence, it is understandable why for many this evidence takes on new meaning and shows a prior conspiracy to commit genocide. However, they are also consistent with preparations for a political or military power struggle. The Chamber recalls that, when confronted with circumstantial evidence, it may only convict where it is the only reasonable inference. It cannot be excluded that the extended campaign of violence directed against Tutsis, as such, became an added or an altered component of these preparations.

The prosecutor v. Théoneste Bagosora et al, op. cit., para. 2110

⁴⁹⁴ See Maogoto N. Jackson, “International Justice under the shadow of Realpolitik: Revisiting the establishment of the *ad hoc* International Tribunals”, *Flinders Journal of Legal Reform*, Vol. 5, No. 2, 2001, pp. 161 - 198. The author, in his abstract, argues that the *ad hoc* tribunals (ICTY and ICTR):

were born out of a political desire to redeem the international community’s conscience rather than the primary commitment of the international community to guarantee international justice. In the early stages, there was a persistent lack of political will by Member States to act, or to act with enough assertiveness with regard to the conflicts, notwithstanding the exposition of deliberate and systematic patterns of massive violations of human rights (...) They were not established because of an intrinsic value on punishing war criminals or upholding the rule of law.

⁴⁹⁵ See *Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Rwanda including summaries of his missions of 9 – 20 June, 29-31 June and 14 – 25 October 1994 and 27 March – 3 April and 25 – 28 May 1995, A/50/709-S/1995/915, 2 November 1995*, The United Nations and Rwanda: 1993 – 1996, Document 154, p. 569

⁴⁹⁶ *The United Nations and Rwanda: 1993 – 1996*, op. cit., p. 63

its Preliminary Report on 1 October 1994 and a Final report on 9 December 1994.⁴⁹⁷ It concluded on the nature of the crimes committed by each part in the conflict and recommended that the Council amend the Statute of the ICTY to ensure that its jurisdiction covered crimes committed in Rwanda.⁴⁹⁸

By passing Resolution 955 (1994) of 8 November 1994, the Council alleged to be acting under Chapter VII of the UN Charter. It was resolved to initiate criminal trials for the alleged perpetrators of crimes. One would however argue that this “duty to punish rests ultimately on the duty to protect, that invocation of the former implicitly admits failure to discharge the latter.”⁴⁹⁹ The UNSC failed to discharge the duty to protect in the first instance.

Having covered the factual circumstances that brought about the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, it is now time to venture into their eventual legal foundations. Here again, the debate becomes wider, as some believe that establishing an *ad hoc* tribunal is not a proper function of the UNSC. Others craft legal arguments to support this political decision.

3.4. Legal foundations for the establishment of the ICTY and ICTR: analysis of Chapter VII of the UN Charter

Paragraph 10 of the Report of the Secretary General on Yugoslavia⁵⁰⁰ sets forth the reasons behind the framing of the ICTY Statute. It was pursuant to the UNSC’s determination that the situation in the former Yugoslavia constituted a threat to international peace and security. The Council believed that establishing a criminal tribunal was an effective measure to bring to justice the persons who were responsible for the crimes. The action would also end those crimes. The UNSC further stated that it was its conviction that, in the particular circumstances of the former Yugoslavia, the establishment of an international tribunal would contribute to the restoration and maintenance of peace.

⁴⁹⁷ *The United Nations and Rwanda: 1993 – 1996*, op. cit., p. 64

⁴⁹⁸ *The United Nations and Rwanda: 1993 – 1996*, op. cit., p. 64

⁴⁹⁹ Haque A. Ahmad, *Group Violence and Group Vengeance*, op. cit., p. 276

⁵⁰⁰ *Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808(1993)*, op. cit.

Goldstone supports the idea that “the establishment of the Yugoslav Tribunal was the most appropriate way of dealing with”⁵⁰¹ the threat to international peace and security. In the case of Rwanda, “justice would help and hasten the return of refugees to their former homes.”⁵⁰² Goldstone also suggests that there was “only one way to curb criminal conduct that is through good policing and the implementation of efficient criminal justice.”⁵⁰³ Prosecution exposes “the nature and extent of human rights violations that frequently reveals a systematic and institutional pattern of gross human rights violations.”⁵⁰⁴

The views of Goldstone are contradicted in many respects by the approach taken by Howland and Calathes.⁵⁰⁵ According to them, and in general terms, the “creation of an international justice system may or may not enhance respect for human rights.”⁵⁰⁶ They find this assumption to be wrong and naïve.⁵⁰⁷ They base their extreme pessimism on the fact that many states use the apparatus of state power, such as courts and the justice system, to violate rather than to protect human rights. Their theory is what some call the conflict paradigm in law. Sometimes, law becomes an “euphemism for inaction.”⁵⁰⁸ “Rather than viewing law as representative, this perspective sees law as a tool of power holders, which they use for their own purposes, to maintain and control the *status quo*. [...] law is perceived as restrictive or repressive rather than representative, and as an instrument of special interests.”⁵⁰⁹ Judicial institutions in some parts of the world also act in this way.⁵¹⁰ Justice may be a casualty of political interests. In the words

⁵⁰¹ Goldstone J. Richard, “Justice as a tool for Peace –making: Truth Commissions and International Criminal Tribunals”, *New York University Journal of International Law & Politics*, Vol. 28, 1995 – 1996, pp. 485 - 503, p. 488

⁵⁰² *Idem*

⁵⁰³ *Idem*, p. 490

⁵⁰⁴ *Idem*, p. 491

⁵⁰⁵ Howland T. & Calathes W., “The U.N.’s International Criminal Tribunal, Is it Justice or Jingoism for Rwanda? A Call for Transformation”, *Virginia Journal of International Law*, Vol. 39, 1998, pp. 135 - 155

⁵⁰⁶ Howland and Calathes, *idem*, p. 139

⁵⁰⁷ *Idem*, p. 139

⁵⁰⁸ Bass J. Gary, *Stay the Hands of Vengeance*, *op. cit.*, p. 215

⁵⁰⁹ Pollock M. Jocelyn, *Ethics in Crime and Justice: Dilemmas and Decisions*, Brooks/Cole Publishing Company, Pacific Grove, California, 1989, p. 56; see also Telford Taylor, *The Anatomy of the Nuremberg Trials*, Little Brown and Company, Boston/ New York /Toronto /London, 1992. He says that the Soviets conceive law as the servant of the political leadership, p. 53

⁵¹⁰ In El Salvador, the *Retting Commission* found on 15 March 1993, that a number of civilian officials in the civil service and the judiciary covered up serious acts of violence, or failed to discharge their responsibilities in the investigation of such acts. The report of the commission attributed tremendous responsibility to the judiciary for the impunity with which serious acts of violence occurred. It denounced the glaring inability of the judicial system

of Beigbeder “national justice is often influenced by political considerations leading to both extremes of too harsh or too lenient sentences, or even impunity.”⁵¹¹ This is not absent in international legal setting. The reality of the *ad hoc* tribunals was that they were established:

because of the United Nations, or the powerful states that control it. They were not established because of an intrinsic value of punishing war criminals or upholding the rule of law. Rather, the mobilization of shame by non-governmental organizations and especially the grisly pictures beamed to the world by the television camera created a public relations nightmare and made liars of the centers of Western civilizations.⁵¹²

Their establishment was a *post facto* substitute for an effective, timely, military intervention by the UNSC. In both cases, the major powers showed their incapacity or unwillingness to prevent a man-made disaster of which warning signals had been given by the UN, their own diplomatic services, and/or by international and human rights organizations – or to stop its continuation.⁵¹³ *Ad hoc* tribunals were “a substitute, or an alibi for the lack of a timely, forceful intervention, or the lack of a credible threat of intervention.”⁵¹⁴ In attempting to justify that the ICTY was established legally, the report of the Secretary General reveals that there was no genuine or moral reason to take such an action. Reliance was only placed on the binding force of any decision taken by the security council.⁵¹⁵

A thorough reading of Resolution 808(1993) of 22 February 1993⁵¹⁶ clearly indicates that the concerns of the UNSC during the war period in Yugoslavia were not about finding means and ways to put an end to that war, as a primary responsibility. Nowhere in the resolution does the Council request the parties to stop the war.⁵¹⁷ The council only reminded the belligerents that,

either to investigate crimes committed or to enforce the law, especially when it came to crimes committed with the direct or indirect support of state institutions, quoted from Beigbeder Yves, *Judging War Criminals: The politics of International Justice*, Palgrave, Hampshire, 1999, p. 111

⁵¹¹ *Ibidem*, p135

⁵¹² Mutua Makau, “Never Again: Questioning the Yugoslav and Rwanda Tribunals”, *Temple International and Comparative Law Journal*, Vol. 11, pp. 167 – 187, at p. 174; reprinted in Simpson Gerry (ed.), *War Crimes Law*, Vol II, Ashgate, Dartmouth, 2004, pp. 355 - 375

⁵¹³ Beigbeder Yves, *op. cit.*, p. 183

⁵¹⁴ *Id.*; for a complete legal analysis of the legal foundation of the ICTY, see Rowe Peter, “War Crimes and the Former Yugoslavia: the legal difficulties”, *Military Law and the law of war Review*, Vol. 32, Iss.4, 1993, pp. 317 - 363

⁵¹⁵ Laughland observes that though “the United Nations Lawyers fully understood the constitutional implications of what they were when they created the ICTY and the ICTR, they decided to create these tribunals by executive fiat for reasons of pure political expediency”, Laughland John, *A history of political trials*, *op. cit.*, p. 211

⁵¹⁶ Resolution 808(1993), adopted by the Security Council at its 3175th Meeting, on 22 February 1993, S/RES/808 (1993), 22 February 1993

⁵¹⁷ Compare with its demand for immediate cessation of hostilities in Rwanda in resolution 912(1994). At paragraph 6 of the resolution the Security Council “Demands an immediate cessation of hostilities between the forces of the

in their fighting they were “bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949.”⁵¹⁸ All parties were only requested to immediately cease all breaches of international humanitarian law. In a simple mathematical formula, one may say that the Security Council’s action would be presented as follow. “Do the war, we will not intervene. If you violate international humanitarian law, then we will intervene.” Who then will intervene to stop the war? Was the Security Council not abdicating its primary responsibility by resorting to a more sensational action of judicial intervention?

Maogoto answers this question by arguing that “by establishing the tribunal, the Security Council hoped to deflect criticism for its reluctance to take more decisive action to stop the bloodshed in the former Yugoslavia.”⁵¹⁹

By contrast, when the conflict broke out in Rwanda in 1994, the Secretary General of the UN advised the Security Council in his Report of 20 April 1994⁵²⁰ that the most urgent action was a cease-fire.⁵²¹ This position was also echoed by the Nigerian representative to the Security Council, who, furthermore, was worried that it would be impossible to raise a military force immediately to intervene.⁵²² The Secretary General did not advise for a strong military action, but his concern was on the cessation of hostilities in the very first instance. The Djibouti

Government of Rwanda and the Rwandese Patriotic Front and for an end to the mindless violence and carnage which are engulfing Rwanda”; see *Security Council Resolution 912(1994)* adopted by the Security Council at its 3368th meeting, on 21 April 1994, S/RES/912(1994), 21 April 1994

⁵¹⁸ Resolution 764(1992) of 13 July 1992, para. 10

⁵¹⁹ Maogoto J. Nyamuya, *War Crimes and Realpolitik: international Justice from World War I to the 21st Century*, Lynne Rienner Publishers, Boulder – London, 2004, p. 144

⁵²⁰ Special Report of the Secretary General on the United Nations Assistance Mission for Rwanda, S/1994/470, 20 April 1994, paras. 4(a) and 5

⁵²¹ See also reference to “immediate cease-fire” from the statements of representatives of Nigeria, Oman, Djibouti, Rwanda and France, Provisional Verbatim Record of the Security Council Forty-ninth year, 3368th meeting, Thursday, 21 April 1994, 9:35 P.M., New York, S/PV. 3368, 21 April 1994, in Morris Virginia & Scharf P. Michael, *The International Criminal Tribunal for Rwanda*, Transnational Publishers, Inc. Irvington-on-Hudson, New York, 1998, pp. 240 – 244; Security Council Resolution 918(1994), adopted by the Security Council at its 3377th meeting, on 17 May 1994, S/RES/918(1994), 17 May 1994, para. 1; para. 6 of Security Council Resolution 925(1994), adopted by the Security Council at its 3388th meeting, on 8 June 1994, S/RES/925(1994), 8 June 1994, in Morris Virginia & Scharf P. Michael, op. cit. p. 264. particularly the SC “demands that all parties to the conflict cease hostilities, agree to a cease-fire and immediately take steps to bring an end to systematic killings in areas under their control;”

⁵²² Morris Virginia & Scharf P. Michael, *Ibidem*, p. 241

representative likewise stressed that the Rwandan case was “a situation in which the United Nations is perhaps the only entity capable of preserving some order and saving lives, while bringing about a halt to the fighting [...]”⁵²³

In the case of former Yugoslavia, it is therefore quite surprising that the Council did not firmly order the parties to stop the war. It was the war that was fuelling the violations of international humanitarian law. A judicial action while the war was still ravaging was unrealistic because there is no war that can be fought without making casualties. “Things are never as simple as we would like them to be! The use of an army is never as selective as it would be wished. An army on active service is not a gun with sights”⁵²⁴, remarks Mack. Recalling the words of General Sherman, a military professional, Bailey suggests that “war was hell for the boys who had to do the fighting. Today we would have to say that war can be an even greater hell for non-combatants.”⁵²⁵ Quoting a discussion he had in the early 1990s with a senior UK military lawyer, Anderson writes the gruesome phrase that “Nuremberg was a lovely hood ornament on the ungainly vehicle that liberated Western Europe, but it was not a substitute for D-Day.”⁵²⁶ He continues by interpreting this sentence to mean that “a military victory is ‘not simply a practical prerequisite to a trial...but a moral necessity.’”⁵²⁷

The rhetoric that parties should observe international humanitarian law while continuing to fight is very disappointing. The mandate of the Security Council is clearly enshrined in article 1 of the UN Charter which spells out the purposes of the organisation. The first purpose is:

⁵²³ Idem, p. 242; but other diplomats were of a diametrically opposed view. Al-Khussaiby of Oman said that “the achievement of peace in Rwanda lies in the hands of the Rwandese parties themselves.”(p.254) while Mr. Inderfurth of the United States said: “...whatever efforts the United Nations may undertake, the true key to the problems in Rwanda is in the hands of the Rwandese people” (p. 258), Provisional Verbatim record of the Security Council, Forty-ninth year, 3377th meeting, Monday, 16 May 1994, 11:10 P.M., New York, S/PV.3377, 16 May 1994, in Morris Virginia & Michael P. Scharf, op. cit.

⁵²⁴ Mack, E., *Rights, Just War and National Defense*, in *Liberty for the 21st Century*, ed. T. Machan and D. Rasmussen, Rowman and Littlefield Inc., 1995, cited in Lemennicier, op. cit., p. 10

⁵²⁵ Bailey D. Sydney., *The UN Security Council and Human Rights*, op. cit., p. 125

⁵²⁶ Anderson Kenneth, “The Rise of International Criminal Law: Intended and Unintended Consequences”, op. cit., p. 335

⁵²⁷ Anderson, ‘Nuremberg Sensitivity: Telford Taylor’s memoir of the Nuremberg Trials’, 7 *Harvard Human Rights J*(1994)281, cited in Anderson Kenneth, “The Rise of International Criminal Law: Intended and Unintended Consequences”, op. cit., p. 335. He underscores this issue even further in writing that: “what did the UK military lawyer argue, back in 1992? As a moral and legal matter, he insisted, military victory is not just a practical prerequisite for trial – it is a moral prerequisite as well.” Anderson Kenneth, op. cit., p. 337

To maintain international peace and security, and to that end:
to take *effective collective measures*⁵²⁸ for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace

Respect for human rights appears in principle 3 of the Charter, as follows:

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

There is no way to confuse by inclusion or exclusion the mandate of the UNSC. On first sight, the Security Council is basically and principally the world security agent's organ, and does not have any legislative⁵²⁹ or judicial powers. This assertion flows from the Preamble to the Charter of the UN that reads that its objective is "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind." The component of human rights and justice come second and third in the hierarchy. To this point of view, Österdahl notes

as to the question of the relative importance of the goal of maintaining or restoring international peace and security (Article 1(1) and the goal of encouraging respect for human rights (Article 1(3) respectively, to the extent that the two can be separated, there is no doubt that the former was considered to be superior to the latter when the Charter was drafted. This concerns the UN as a whole, as well as the function of the Security Council more specifically. Everything seems to indicate that the balance has swung towards human rights, though it is difficult to say how far.⁵³⁰

Bailey finds however that the Security Council may consider the issue of human rights in exceptional circumstances, for example when 'the denial of rights creates a situation in which

⁵²⁸ The Collective Security mechanism, as outlined in Chapter VII of the UN Charter under Art. 41 and 42 includes three elements: condemnation, imposing non-military sanctions, and then direct military intervention. The council may choose one of them or combine them successively or simultaneously as the case may be. This was what happened in the Kuwait-Iraq case; Center for Research and Studies on Kuwait, *United Nations Role in Maintaining International Peace and Security: Kuwait – Iraq Case Study*, Kuwait 1995, p. 31

⁵²⁹ See in this respect Goldstone, "in establishing the ICTY, the Security Council correctly recognized that it had no law-making powers, as it was not a legislature", Goldstone Richard, "The role of the United nations in the prosecution of International War Criminals", *Washington University Journal of Law and Policy*, Vol. 5, 2001, pp. 119 – 127, p. 121

⁵³⁰ Österdahl I., *Threat to the peace: the interpretation by the Security Council of Article 39 of the UN Charter*, Iustus Förlag, Uppsala, 1998, p. 25; this approach is also adopted by Moore who supports the classic idea of collective security giving examples of the Korean War before the cold war and Iraq aggression of Kuwait in 1991. Moore revolts against the death of this "euphoria" due to the chaos in Somalia, Bosnia and Rwanda. He also remarks that currently the U.N. avoids "mission creep" through careful differentiation of peacekeeping and peace enforcing missions, Moore J. Norton, "Toward a new paradigm: Enhanced effectiveness in United Nations peacekeeping, collective security, and war avoidance", *Virginia Journal of International Law*, Vol. 37, Iss. 4, 1997, pp. 811 – 890, pp. 4 - 5

international peace and security are threatened or breached or aggression occurs, and the Council applies enforcement measures under Chapter VII of the Charter.”⁵³¹

An illustration of a prompt and effective intervention of the UNSC is its action in restoring legitimacy in Kuwait after the Iraq invasion of 2 August 1990 which “seems to have revived the text of the UN Charter which are pertinent to restoring international peace and security in their correct form under Chapter VII of the Charter.”⁵³² The UN action in the Kuwait-Iraq crisis was one of a kind because of the pressure the U.S exercised to “a number of member states, including the ones that enjoy permanent membership in the Security Council and which control the process of passing its resolutions.”⁵³³ This was not only unique but it was also selective. This may lead to and revive the conclusion reached by the *Center for Research and Studies on Kuwait* that:

Upholding international legitimacy in the Kuwait-Iraq case and discarding it in other cases, casts heavy doubt on the independence of the UNO, and transforms it into an additional diplomatic tool in the hands of those states that have the actual power to direct its activities in a way that serves their interests.⁵³⁴

⁵³¹ Bailey D. Sydney, *The UN Security Council and Human Rights*, op. cit., p. 123 - 125

⁵³² A chronology of Iraq’s invasion of Kuwait proves how effective the action of the UNSC was. The invasion started on 2 August 1990 when the Iraqi armed forces crossed into Kuwait territory and occupying that country. The very same day the Council passed Resolution 660(1990) condemning the invasion and ordering an immediate and unconditional withdrawal of Iraq’s forces. On 6 August the council voted resolution 661(1990) imposing economic sanctions except for necessary supplies. Over the period between 2 August 1990 and 29 November 1990, the Council passed 12 resolutions in relation to the situation. One of them specified that if Iraq had not complied by 15 January 1991 with all the SC’s resolutions, Member States cooperating with Kuwait’s legitimate Government were authorized to use “all necessary means” to compel Iraq to do so and restore international peace and security in the area. Iraq failed to comply despite diplomatic efforts. When the deadline expired on 16 January 1991, the coalition began the invasion; and on 27 January 1991 after weeks of intensive air and ground action, Kuwait City was liberated. The very same day Iraq withdrew all its armed forces and informed the SC that it had decided to fully comply with Resolution 660(1990) and all subsequent resolutions related. On 28 February 1991 offensive operations were suspended; Center for Research and Studies on Kuwait, *United Nations Role in Maintaining International Peace and Security: Kuwait – Iraq Case Study*, Kuwait 1995, pp. 80 – 81 for the whole story and SC resolutions annexed thereto; in the Kosovo case as well it is only pursuant to NATO resolve to use air power that President Milosevic withdrew his troops from the province and accepted all other Conditions. Hosmer described the situation as follows: “it was the cumulative air power and the future threat it posed that most influenced Milosevic’s eventual decision to come to terms. Air power made three crucial contributions to the conflict’s successful outcome”, Hosmer T. Stephen, *The Conflict over Kosovo: Why Milosevic decided to settle when he did*, Rand, 2001, p.123

⁵³³ *Ibidem*, p. 14

⁵³⁴ *Idem*, p. 13. Österdahl also observes this phenomenon. In his words:

it is not illegal on the part of the Council to be arbitrary, but if it becomes apparent that its choice of situations in which to intervene is arbitrary, both in the sense that some situations, or precisely what makes these situations worthy of Security Council consideration, then the decision and possible follow-up action of the Security Council risk losing a large measure of legitimacy.

Österdahl I., *Threat to the Peace...*, op. cit., p. 105

This conclusion applies *mutatis mutandis* to the attitude that the Council adopted with regard to the establishment and work of the *ad hoc* tribunals.

Coming back to Yugoslavia, when Resolution 780(1992) was adopted on 6 October 1992, Mr. Arria, the then representative of Venezuela to the UN, made the deliberate following statement:

The draft resolution before us today is a specific reflection of the will and determination of the Security Council, as expressed in the preamble to the Charter of the United Nations, which begins, ‘We, the people of the [World], determined to save succeeding generations from the scourge of war [...] and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.’⁵³⁵

This statement, which Mr. Arria shared with his peers at the UNSC, contributed, one may assume, to entertaining the confusion about the appropriate, effective and most urgent action by the Council in situations of war accompanied by violations of international humanitarian law. Manusama argues however that the Council’s action is an innovative step to combat “threats to the peace by establishing two *ad hoc* tribunals.”⁵³⁶ According to Kerr the mandate of the ICTY “was the restoration and maintenance of peace and security.”⁵³⁷ This mandate was “to be achieved through the prosecution of individuals for serious violations of international humanitarian law.”⁵³⁸ Kerr maintains that “there was no change in the legal framework. The change was in the interpretation of the powers and responsibilities of the Security Council under the Charter, and was a product of political will.”⁵³⁹

When investigated more carefully however there is still a dilemma. To arrive at an answer to this dilemma, there is a needed to look into the concrete objectives assigned to those tribunals and possibly also find out whether it was most probable that those objectives could reasonably and genuinely justify the UNSC Council’s action in fulfilling its primary mandate. These objectives will have to pass the test of sincerity on the part of the UNSC as one proper, efficient and convenient action, among others.

⁵³⁵ Resolution 780(1992) of 6 October 1992

⁵³⁶ Manusama Kenneth, *The United Nations Security Council in the Post-Cold War Era...*, op. cit., p. 119

⁵³⁷ Kerr Rachel, *The International Criminal Tribunal for the Former Yugoslavia: an exercise in Law, Politics, and Diplomacy*, op. cit., p. 13

⁵³⁸ Idem

⁵³⁹ Id.

Manusama sequenced this dilemma in three aspects. Firstly, he questions the appropriateness of judicial prosecution as a means of enforcement under Article 41 [of the UN Charter]. Secondly, he interrogates the competence of the Security Council to establish judicial organs. Thirdly, he inquires [into] the principles and rules of international law to be applied by these organs.⁵⁴⁰ The author considers and identifies different views behind the establishment of the two *ad hoc* tribunals and concludes that the difference is more apparent.⁵⁴¹

A progressive reading and understanding of Resolution 808(1993) demonstrates that there were other options that could better justify the establishment of an international Criminal tribunal. Paragraph 19 of the Secretary General report provides that “the approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute.”⁵⁴² This option was bypassed because as the situation stood, such an option would require time, a number of ratification of a negotiated treaty and that there was no guarantee that necessary ratification could be attained. The Counsel then moved ahead, ignored and violated the principle of sovereignty of member states as a matter of principle enshrined in article 2(1) of the Charter. It invoked article 24 (1) of the UN Charter which provides that:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

In addition to the disadvantages posed by time concerns and uncertainty as to ratification of a treaty based tribunal, the “Secretary General believes that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations.” According to the Report of the Secretary General, the decision “would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or an act of aggression.”⁵⁴³ This is an aim of a binding action but it does not justify its foundational legality. Again it is pure rhetoric because Resolution 808(1993) does not establish any link between the

⁵⁴⁰ Manusama Kenneth, op. cit., pp. 160 - 161

⁵⁴¹ Ibidem, p. 162

⁵⁴² Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808(1993), S/25704, 3 May 1993

⁵⁴³ Report of the Secretary General, 3 May 1993, para. 22

atrocities committed against the civilian population in Croatia, Bosnia and Herzegovina that can be relied on to arrive at a conclusion that those violations alone constituted a threat to the peace, a breach of the peace or an act of aggression altogether or individually. Maogoto also observes again that the tribunal:

was born out of a political desire to redeem the international community's conscience rather than the primary commitment of the international community to guarantee international justice. The ICTY was not established because of the intrinsic value of punishing war criminals or of upholding the rule of law; rather, it came about as a result of the mobilization of NGO.⁵⁴⁴

Article 39 of the United Nations Charter states that the UNSC “shall determine the existence of any threat to peace, breach of the peace, or act of aggression and shall make recommendation, or decide what measures shall be taken in accordance with article 41 and 42.” The assumption here is that the establishment of the ICTY and ICTR may better fit in article 41 as “measures not involving the use of armed force to give effect to its decision.”⁵⁴⁵ This provision must be read together with article 29 of the Charter of the United Nations that “the Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.”

Therefore it is correct to say that the creation of the two *ad hoc* tribunals was a UNSC's binding decision, not a simple recommendation. Article 41 of the Charter goes on to say that those measures may “include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

The word ‘may include’ obviously sets no limitation to the measures that the UNSC can rely on or take. “While the list of Article 41 responses is not exhaustive, establishing international tribunals to prosecute crimes does not automatically resonate as a method for maintaining or restoring peace and security under Chapter VII.”⁵⁴⁶

⁵⁴⁴ *Idem*, p. 145

⁵⁴⁵ Article 41 UN Charter

⁵⁴⁶ Geoff Gilbert, *op. cit.*, p. 442

Article 41 must be read with article 42 as they are complementary. The latter provision comes into play “should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate [...]” In fact, article 42 of the Charter is a prelude to the use of force. Properly construed, articles 39 through 45 are resorted to in a grading⁵⁴⁷ manner taking into account the evolution of the situation on the ground.

The establishment of *ad hoc* criminal tribunals in this regard derived from the implied powers⁵⁴⁸ of the Security Council. However, it poses some conceptual problems if attention is given to the broad understanding of article 41 of the Charter. When closely analysed, this provision relates to a sort of isolation of a state which may be engaged in hostilities bringing about a threat to peace, a breach of peace or an act of aggression, and it must be read in context.

3.4.1. The Security Council’s misconception of appropriate actions by establishing *ad hoc* international criminal tribunals

The UNSC decision of establishing *ad hoc* tribunals in the belief that, by apprehending some perpetrators could contribute to the restoration and maintenance of peace was inappropriate and misplaced in the particular circumstances of the former Yugoslavia and Rwanda. According to Fatic the establishment of ICTY was driven by a dual motive.⁵⁴⁹ There was a desire to deter further killing and torture, along with putting a lid on the conquering aspirations of the sides in

⁵⁴⁷ Bailey suggests that:

one could, indeed, envisage a graduated series of coercive measures, beginning with the simple act of placing a matter on the agenda of the Council, passing a resolution of condemnation, engaging in fact-finding or investigation (Article 34 of the Charter), imposing non-military sanctions (Article 41), undertaking military measures of enforcement (Article 42), or suspending or expelling a Member from the Organization (Articles 5 and 6)

Bailey D. Sydney, *The UN Security Council and Human Rights*, op. cit., p. 133

⁵⁴⁸ See Geoff Gilbert, op. cit, p 424 citing the Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 182 – 183; the Court held that:

Nevertheless, the necessities of international life may point to the need for organisations, in order to achieve their objectives, to possess subsidiary powers that are not expressly provided for in the basic instruments that govern their activities. It is generally accepted that international organisations can exercise such powers, known as “implied” powers. As far as the United Nations is concerned, the Court has expressed itself in the following terms in this respect: ‘Under international Law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.

⁵⁴⁹ Fatic Aleksander, *Reconciliation via the War Crimes Tribunal*, op.cit., p. 45

conflict.⁵⁵⁰ The tribunal was to respond to a frustration brought by the “inability of international players to contain the war in the former Yugoslavia, and a corresponding desire to restore trust in the international community.”⁵⁵¹ Yet, despite the existence of the tribunal, none of those aspirations was fulfilled. The killing continued and in fact, “some of the worst atrocities occurred between the establishment of the tribunal in 1993 and the conclusion of the Dayton Peace Accords in 1995.”⁵⁵² Having realised that the establishment of the ICTY did not bring a halt to the atrocities, the UNSC undertook no further actions to stop them. The reality is that the UNSC’s effort to bring about an end to gross human rights abuses in the former Yugoslavia have been rhetorical rather than real⁵⁵³, to concur with Laber and Nizich. This desperation transpires also in the case of Rwanda.

3.4.2. The UNSC neglected the war in Rwanda

The Rwandan situation presented two aspects. There was a war between two belligerents. That war facilitated the commission of the violations of international humanitarian law. The solution brought about by the establishment of an international criminal tribunal for Rwanda was inadequate to equally respond to both concerns. The establishment of the tribunal responded to the second leg of the problem but neglected the first leg, which, in many respects, was the real cause that needed to be addressed as a matter of urgency.⁵⁵⁴

The UNSC’s action here seems to be a “cheap alternative”⁵⁵⁵ to its failures to adequately and timely address the problem that the Rwandan crisis posed at that particular time. The conflict

⁵⁵⁰ Fatic Aleksander, *Ibiden*, p. 45

⁵⁵¹ *Idem*

⁵⁵² *Id.*; see also Penrose M. Margaret, “Lest we fail: The importance of enforcement in International Criminal Law”, *American University International Law Review*, Vol. 15, Iss. 2, 2000, pp. 321 – 394. This author suggests that the existence of *ad hoc* tribunals and their threats of punishment did not deter warring faction from committing atrocities. Elsewhere war was also still going on, like in The Congo, Iraq, Rwanda, the Balkans, Sierra Leone, Indonesia, Afghanistan, East Timor, Cambodia and in numerous other countries.

⁵⁵³ Laber Jeri & Nizich Ivana, “The war Crimes tribunal for the former Yugoslavia: problems and prospects”, *The Fletcher Forum World Affairs*, Vol. 18, No. 2, 1994, pp. 7 - 16

⁵⁵⁴ See Zolo who, from another perspective, argues that the scope of the *ad hoc* tribunals “jurisdiction has been strictly limited to international offences against *jus in bello*, excluding crimes against *jus ad bellum*”, Zolo Danilo, *Peace through Law?*, *Journal of International Criminal Justice*, Vol. 2, Iss.3, 2004, pp. 727 – 734, p. 731

⁵⁵⁵ Bang-Jensen Nina, Gjeltén Tom, Gutman Roy, Nizich Ivana & Warrick Thomas, “Tribunal Justice: The Challenges, the record, and the prospects”, *American University International Law Review*, Vol. 13, Iss. 6, 1998, pp. 1541 – 1577, p. 1557

was an invasion of Rwanda from October 1990 that constituted a violation of peace and which was not justified by objective criteria (*jus ad bellum*). Though making war is not a war crime as such, “waging an aggressive war is certainly recognized as a crime by international law.”⁵⁵⁶ War has always been considered as “the most serious violations of international law [...] the pillar of the UN Charter.”⁵⁵⁷ It must be addressed as such. Moreover, all violations of international humanitarian law committed in war must be dealt with at the appropriate time. Anderson suggests that “international criminal law focuses on criminal liability of individuals. War crimes, we say and following the teaching of Nuremberg, are committed by individuals. Wars, however, are fought between political communities and groups.”⁵⁵⁸ More generally, Anderson raises an issue which is often overlooked when the focus is only directed to individual responsibility and not to the effects of war as such. He argues that:

[...] the attention focused by international criminal law on individual criminal liability has the unintended consequence of reducing attention to the rest of the laws of war – the corpus of the laws of war not devoted to liability at all, let alone criminal liability for individuals. Indeed, to those of us who came to the laws of armed conflict not from a background in criminal law, the gradual emergence of international criminal law seems a little bit as though the individual penal liability aspects of the law have swallowed the laws of war whole.⁵⁵⁹

The UNSC had all the powers to address the war in Rwanda. Focusing attention on individual criminal liability as the mechanism of enforcement, “risks losing the connection to legitimacy upon which the law of armed conflict, and adherence to it, perhaps mostly rests.”⁵⁶⁰ This does not mean that individuals alleged to be responsible for crimes will remain unpunished. Yet, punishing individuals should not be the priority. Properly and timely addressing the war in Rwanda could have eliminated the threat to peace and security. It could have saved lives. The inadequate solution adopted or the inaction facilitated the outbreak of violence in the form of serious violations of international humanitarian law. The UN as a whole and the UNSC in particular were aware of this situation. The armed conflict was fueling violence that did not exist before. There was no active violation of international humanitarian law. A clear

⁵⁵⁶ Goldstone J. Richard, *op. cit.*, p. 107; Dr. Farooq also suggests that the goal of banning the war is unrealistic, and that international humanitarian law aims instead at establishing rules regulating the conduct of armed conflict. Farooq Hassan, “The theoretical basis of punishment in International Criminal Law”, *Case Western Reserve Journal of International Law*, Vol. 15, Iss.1, 1983, pp. 39 - 60, p. 52

⁵⁵⁷ Zolo Danilo, *Peace through Law?*, *op. cit.*, p. 731

⁵⁵⁸ Anderson Kenneth, “The Rise of International Criminal Law: Intended and Unintended Consequences”, *The European Journal of International Law*, Vol. 20, No. 2, 2009, pp. 331 – 358, p. 346

⁵⁵⁹ *Idem*, pp. 346 - 347

⁵⁶⁰ *Idem*, p. 348

distinction at this stage could have been made between actions that violated peace and security in the region and actions that violated humanitarian law in Rwanda.

The UNSC is empowered under Chapter VII of the UN Charter to investigate any “dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”⁵⁶¹ This is its primary responsibility at least when the council is aware of a breach of peace or a threat thereof. It may be argued that this responsibility arises when two or more states engage in a situation that likely leads to dispute. For instance the UN in general and the UNSC in particular was aware of a breach of peace in Rwanda.⁵⁶² They were aware of a misunderstanding between Rwanda and Uganda as far as their common border was concerned.⁵⁶³ In this regard, the UN deployed in June 1993 a mission “intended to monitor the border between Uganda and Rwanda in order to verify that no military supplies were being transported across it.”⁵⁶⁴ However, it is unclear what was done with the findings of this mission or if any findings were obtained.

⁵⁶¹ Article 34 of the UN Charter

⁵⁶² See in this respect the following documents from the UN Secretariat or from the Security Council: *Letter dated 6 August 1992 from the Secretary General of the Organisation of African Unity (OAU), Salim Ahmed Salim, to the Secretary – General of the United Nations concerning implementation of the 14 July 1992 cease-fire agreement* [not a United Nations document], in which the situation in Rwanda is referred to as a “war” and wherein the OAU detailed the beginning of the conflict and all the actions undertaken to put an end to it; *Letter dated 13 August 1992 from the Secretary – General of the United Nations to the Secretary – General of the Organisation of African Unity expressing full cooperation for OAU efforts to help achieve a comprehensive and lasting peace in Rwanda* [not a United Nations document], Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, p 149; where the UN Secretary – General acknowledges the appraisal of “recent developments relating to the situation in Rwanda.”

⁵⁶³ This is illustrated in a *Letter dated 22 February 1993 from the Permanent Representative of Uganda [Pr. Perezi Kamunamwire, Ambassador and Permanent Representative] to the United Nations addressed to the President of the Security Council, requesting establishment of a United Nations observer force on the Uganda side of the border with Rwanda*, S/25356, 3 March 1993, Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, p. 151. Though the ambassador spoke of an internal conflict, he acknowledged that “the resumption of the hostilities between the Rwandese Government Army and the Forces of the Rwandese Patriotic Front as a disturbing and serious development [...] likely to poison and jeopardize the atmosphere in the region” as well as the *Letter dated 28 February 1993 from the Permanent Representative of Rwanda [Jean – Damascène Bizimana, Ambassador and Permanent Representative] to the United Nations addressed to the President of the Security Council, requesting circulation of his letter of 22 February 1993 requesting deployment of United Nations military observer to the Rwanda – Uganda border*, S/25355, 3 March 1993; Department of Public Information (Publisher), *op. cit.*, p.152. The ambassador cautioned that the border between both countries has been, for two years, “the theatre of hostilities that constitute a threat to regional and international peace and security.”

⁵⁶⁴ Fenton Neil, *Understanding the UN Security Council: Coercion or Consent?*, Ashgate, Burlington, USA, 2004, p. 125; See also *Interim report of the Secretary – General on Rwanda, recommending the establishment of a United Nations Observer Mission Uganda-Rwanda (UNOMIR)*, S/25810, 20 May 1993, and Addendum: S/25810/Add.1, 2

The resolutions adopted by the Council during this period also indicate that it knew about the war but chose to do nothing to stop it. In resolution 812(1993), the UNSC was “gravely concerned by the fighting in Rwanda and its consequences regarding international peace and security.” It called “upon the Government of Rwanda and the Rwandese Patriotic Front to respect the cease-fire which took effect on 9 March 1993[...].”⁵⁶⁵ At the same time the Council invited the Secretary General

to examine in consultation with the Organization of African Unity the contribution that the United Nations could bring to strengthen the peace process in Rwanda, in support of the efforts of the Organization of African Unity, in particular through the possible establishment, under the aegis of the Organizations of African Unity and the United Nations, of an international force entrusted, *inter alia*, with humanitarian assistance and the protection of the civilian population and support of the Organization of African unity force for the monitoring of the cease-fire, and to report to the Council most urgently on the matter.⁵⁶⁶

The Secretary General of the African Unity regretted that the SC remained idle to his call.⁵⁶⁷ In his proper terms, “the Security Council did not prescribe a time frame for implementing the resolution. It rather confined the matter to our two organizations to consult upon and see how best we can advance the cause of peace in Rwanda.”⁵⁶⁸ This was reiterated in resolution 846(1993) in which the UNSC referred to the adverse consequences the fighting could have on international peace and security.⁵⁶⁹ The rhetoric of the UNSC continued when violence had already erupted in Rwanda. In resolution 918(1994), the council “strongly condemned the

June 1993, particularly paragraphs 6, 10, 12, 19, 20 and 23 thereof; Department of Public Information (Publisher), op. cit., pp. 162 – 166; *Security Council resolution establishing the United Nations Observer Mission Uganda-Rwanda (UNOMIR), to be deployed on the Ugandan side of the Uganda-Rwanda border for an initial period of six months*, S/RES/846 (1993), 22 June 1993, Ibidem, pp.167 – 168

⁵⁶⁵ S/RES/812(1993), 12 March 1993

⁵⁶⁶ S/RES/812(1993), 12 March 1993

⁵⁶⁷ Though the Council requested from the Secretary – General of the United Nations “to examine in consultation with the OAU the contributions that the United Nations, in support of the OAU’s efforts, could bring to strengthen the peace process in Rwanda and to report to it urgently”, extract from the *Letter dated 1 April 1993 from the Secretary – General of the United Nations to the Secretary – General of the Organization of African Unity concerning cooperation between the United Nations and the OAU pursuant to resolution 812(1993)*, Department of Public Information (Publisher), op. cit., p. 159

⁵⁶⁸ Though the Council requested from the Secretary – General of the United Nations “to examine in consultation with the OAU the contributions that the United Nations, in support of the OAU’s efforts, could bring to strengthen the peace process in Rwanda and to report to it urgently”, extract from the *Letter dated 1 April 1993 from the Secretary – General of the United Nations to the Secretary – General of the Organization of African Unity concerning cooperation between the United Nations and the OAU pursuant to resolution 812(1993)*, Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, p. 159

⁵⁶⁹ S/Res 846(1993), 22 June 1993, preamble, cited in Scheweigman David, *The Authority of the Security Council under Chapter VII of the UN Charter : legal Limits and the Role of the International Court of Justice*, Kluwer Law international, The Hague /London/Boston, 2001, p. 126

ongoing violence in Rwanda, and in particular the very numerous killings of civilians which have taken place in Rwanda and the impunity with which armed individuals have been able to operate and continue to operating therein.”⁵⁷⁰ One may only concur with Yarwood who suggests that:

regardless of the intention in its undertaking, an *ex post facto* international intervention [as was the establishment of the *ad hoc* tribunals] will fail to compensate for the consequences of delay and the degree to which the deficit in assistance facilitated or acquiesced in the crimes. Distrust, due to the perceived hypocrisy in a subsequent but paternalistic determination of the justice process, may even pre-empt its success from the outset.⁵⁷¹

The Security Council should review its intervention strategies and priorities to ensure effectiveness and consistency.

3.4.3. Toward an easy but ineffective approach to the conflict in the former Yugoslavia and Rwanda

In both Rwanda and the former Yugoslavia, the conflict was ravaging and there was also a massive violation of international humanitarian law. Much emphasis was placed on violations of international humanitarian law and the issue of war was set aside or diluted while one would expect that both aspects be addressed altogether. In fact, the ICTY “had been set up as a substitute, an alternative, to the kind of tough political action which would put an end to the ethnic cleansing that was taking place and the horrors that were being perpetrated by the Serbs. It wasn’t serious.”⁵⁷²

While the UNSC was of the view that the cease-fire was a precondition to halt atrocities, it did nothing to persuade or force the RPF to cease the hostilities in Rwanda. In the former Yugoslavia, there was no determined action by the Council aimed at ending the war as well. Major Smidt, a military expert and legal scholar puts this argument right in the following:

⁵⁷⁰ Ibidem, p. 126

⁵⁷¹ Yarwood Lisa, “Willing and able: the domestication of international justice”, *African Yearbook of International Law*, Vol. 14, Iss.1, 2006, pp. 193 – 215, p. 204

⁵⁷² Intervention by Ian Guest of the United States Institute for Peace, *The War Crimes Trials for the Former Yugoslavia: Prospects and Problems*”, Briefing of the Commission on Security and Cooperation in Europe, Washington, DC, May 28, 1996, Basket III Hearings Before the U.S., Commission on Security and Cooperation in Europe and Other Selected Congressional Hearings, Reports and Prints I 1995 – 1996, p. 12

In reality, both the law enforcement and the military responses add to the concept of system-wide deterrence. However, each modality plays a distinct role, and neither should be permitted to negatively impact the other. [...] the present theory, which assumes that the answers for world peace derive primarily from judicial sources, is being overemphasized to the detriment of the potential ability, and occasional requirement, to use military force. First, over-reliance on justice ignores the obvious fact that potential victims are best served if they are not allowed to become victims in the first place. Courts may be effective in handling situations after the facts, but until they possess the deterrent capabilities needed to control rogue regimes, they should not be permitted to displace or weaken the military option. Second, if a court lacks the ability to actually enforce its pronouncements, rogue regimes will simply ignore the court and will not be deterred.⁵⁷³

In resolution 918(1994) for example, the Council expressed “deep disturbance at the magnitude of the human suffering caused by the conflict.”⁵⁷⁴ The Council eventually imposed an arm embargo on the Government of Rwanda.⁵⁷⁵ But again, it was a short view in imposing sanctions to one belligerent perpetrator and not to the other as well. This would mean that what has now become most urgent was the scale of the massacres not the war that was igniting them. The Council also determined that “the situation in Rwanda constitutes a threat to peace and security in the region.”⁵⁷⁶

Any action at this stage could have showed where the intervention of the UNSC was most appropriate. Orakhelashvili argues that “according to the widespread doctrinal approach, the concept of a threat to the peace is subjective and depends on discretionary determinations of the Security Council.”⁵⁷⁷ Yet, he concludes:

The process of determining threats to the peace and ensuring measures of response includes some logically indispensable elements. Even if the Council possesses discretion in determinations under Article 39 in using such discretion, it must clearly identify a threat to the peace in its resolution as an objective fact. If that fact is targeted with enforcement measures, the Council has to demonstrate that it is of sufficient gravity and the use of enforcement powers to tackle it is both necessary and adequate. In deciding on the measures to be applied in response to the identified threat, the Council should direct the measures to eliminate this threat in the objective sense. In other words, the measures applied by the Council should be directed to eliminate or reduce the identified threat, they should be logically required for countering the identified threat and be proportional.⁵⁷⁸

It is therefore correct to say that rather than taking a military action to stop the war, the UNSC ordered the UNAMIR to keep “the force firmly based on traditional peacekeeping methods.

⁵⁷³ Smidt L. Michael, *The International Criminal Court: An effective means of deterrence?* Op. cit., p. 157

⁵⁷⁴ *Idem*

⁵⁷⁵ Pursuant to part B of Resolution 918(1994), S/RES/918(1994), 17 May 1994

⁵⁷⁶ *Id.*

⁵⁷⁷ Orakhelashvili Alexander, *The power of the UN Security Council to determine the existence of a threat to the Peace*, *Irish Yearbook of International Law*, Vol. 1, 2006, pp. 61 – 99, p. 61

⁵⁷⁸ *Ibidem*, p. 98 - 99

Even in the face of direct attacks on UN personnel and the systematic killing of Rwandan civilians, the members of the UNSC were initially unwilling to authorize the use of force under Chapter VII to counter the violence.”⁵⁷⁹

A firm threat to use force under Chapter VII of the Charter could eventually have prevented the tragedy in Rwanda and the former Yugoslavia. Such action was provided for in Resolution 812(1993), particularly where it refers to the protection of the civilian population by the international force which was present when the massacre began in April 1994 in Rwanda. “Though the chaos in Rwanda began on the 7th April [1994], the UNSC did not take action in response to the situation until 20 April [1994]. Immediate international efforts were focused on the evacuation of expatriates from Kigali.”⁵⁸⁰ The UNSC did not even attempt to lobby the use of the various international forces that came for the evacuation of foreign nationals to restore peace and secure the civilian population of Rwanda.⁵⁸¹ The UN Secretariat and the SC were fully aware of the magnitude and scale of war and violence and adopted a quite surprising attitude.⁵⁸²

This seems to be a selective legendary, but regrettable UNSC approach in conflict situations. It is not a legal issue here. In the case of Somalia, for illustration:

When the civil war swept into Mogadishu in December 1990 – January 1991, the United Nations closed its offices in Somalia and, along with most diplomatic missions and international organizations, evacuated its personnel from the country. The office in Mogadishu was closed again in November 1991 when fighting broke out in the city between the rival factions of the USC.⁵⁸³

Yet there is no international criminal tribunal created for Somalia despite the violations committed during the conflict. In the Balkans, however:

⁵⁷⁹ Fenton Neil, op. cit., p. 125

⁵⁸⁰ Fenton Neil, op. cit., p. 129

⁵⁸¹ “To this end, the French, Belgian, and American governments launched separate rescue missions to remove their expatriates from Kigali. The French deployed 190 paratroopers, under the auspices Operation Amaryllis on 9 April, and Belgians sent 250 troops the next day”, Fenton Neil, op. cit., p 129; also Italy sent troops to evacuate its nationals.

⁵⁸² See for instance the *Report of the Secretary General on the Situation in Rwanda, S/1994/256*, 13 May 1994, para 2, 3, in which is referred to resumption and continuation of civil conflict and ensuing violence and massacres as well as the inability to get the parties agree on a ceasefire, and that “the situation in Rwanda remains highly unstable and insecure with widespread violence”

⁵⁸³ Department of Public Information (Publisher), *The United Nations and Somalia 1992 – 1996*, The United Nations Books Series, Volume VIII, United Nations, New York, 1996, p. 15

most observers believe that the Security Council could have put an early halt to the Balkan conflict, but that at the time the members of the council lacked the political will to take the necessary measures, such as committing troops to a combat situation. Some commentators even argue that the war could have been avoided had the international community committed to recognizing the Yugoslav republics and the dissolution in the summer of 1991 and thereby a clear signal that the use of force to maintain Yugoslavia would be unacceptable.⁵⁸⁴

In Cambodia “the deteriorating security situation and the continuing refusal of the PDK to participate in the demobilization of forces made it necessary to redeploy UNTAC’s military component.”⁵⁸⁵ Although UNITAC comprised 15,500 troops⁵⁸⁶ compared to UNAMIR’s 2,500 or so, if the same political will had prevailed, the tragedy in Rwanda could have been avoided. Likewise in the former Yugoslavia, the UNSC was “unwilling to take strong military action to control the bitter conflict then tearing Bosnia apart.”⁵⁸⁷ Laber and Nizich remark that in the former Yugoslavia “inter-ethnic conflict was the result of the war, not its cause.”⁵⁸⁸ So the most urgent issue was to stop the war with a strong and determined military action. In White’s opinion, “military enforcement has the purpose of coercing a resisting state or party to accept UN policy.”⁵⁸⁹ Smidt concurs that military action “remains the most credible and effective form of deterrence in the international arsenal of weapons to prevent war and massive human rights abuses.”⁵⁹⁰ This does not mean that crimes committed must go unpunished, but it is a matter of priority and effectiveness. Unfortunately, the United Nations, particularly the SC was unable to act effectively and contented instead to utter pious words.⁵⁹¹ Anderson finds that the UNSC lacks such a moral stand.⁵⁹²

⁵⁸⁴ Williams R. Paul & Scharf P. Michael, *Peace with Justice...*, op. cit., p. 43

⁵⁸⁵ Department of Public Information (Publisher), *The United Nations and Cambodia 1991 – 1995*, The United Nations Book Series, Volume II, United Nations, New York, 1995, para 85, p. 35

⁵⁸⁶ Ibidem, para 136, p. 54

⁵⁸⁷ David Wippman, op. cit., p. 473

⁵⁸⁸ Laber J. & Nizich I., “The war Crimes tribunal for the former Yugoslavia: problems and prospects”, op. cit., p. 14

⁵⁸⁹ White D. Nigel, *United Nations System: Toward International Justice*, Lynne Rienner Publishers, Boulder – London, 2002, p. 161

⁵⁹⁰ Smidt L. Michael, *The International Criminal Court...*, op. cit., p. 157

⁵⁹¹ Bailey D. Sydney, *The UN Security Council and Human Rights*, op. cit., p. xi

⁵⁹² Anderson puts it as follows:

Our contemporary understanding, the one that allows us not to intervene but then to arrest and try people afterwards, depends, on the contrary, upon an assertion of universality, universal jurisdiction. But it depends still more importantly on the strict logical separation, the independence, of obligations to intervene from the right to conduct trials. Can this really be morally right? You didn’t intervene – but you still have the right to conduct a trial? On what moral basis, pray? Your prudence or your cowardice?

Anderson Kenneth, “The Rise of International Criminal Law: Intended and Unintended Consequences”, *The European Journal of International Law*, Vol. 20 No. 2, 2009, pp. 331 – 358, p. 339

The following case study will demonstrate how lawyers understand the action of the Security Council. It is however regrettable that the ICTR and ICTY Chambers aligned their actions to that of the UNSC and avoided invading its province. Yet the legal arguments the judges advanced are not convincing, neither are they conclusive.

3.5. Case study questioning the jurisdiction of the tribunals based on their creation by the UNSC: ICTR' *Tadic* and *Milosevic*; and ICTR *Kanyabashi, Nzirorera et al.*

3.5.1. *Tadic* challenge on the illegal establishment of the ICTY

Dusko Tadic is a Bosnian Serb who was the first indictee of the ICTY. In a preliminary motion⁵⁹³, he challenged the jurisdiction of the ICTY based, among others, on its establishment by the UNSC. His argument was that the establishment of the tribunal by the Security Council was unlawful.⁵⁹⁴ Because the decision of the Trial Chamber has been appealed against by the defendant, reliance will be had on the decision of the Appeals Chamber. It set a precedent for subsequent challenges on jurisdiction before the ICTY and the ICTR.

In adjudicating the point raised, the Appeals Chamber first assessed its own competence before assessing the lawfulness of the Security Council's actions. Having passed the test, the Appeals Chamber "found that the Security Council's decision to establish the Tribunal was a legitimate measure aimed at the restoration of peace and security authorized under the United Nations Charter."⁵⁹⁵ The Appeals Chamber based its finding on Articles 25, 29, 39 and 41 of the UN Charter.

3.5.2. *Milosevic* preliminary motion on jurisdiction

Slobodan Milosevic also challenged the legitimacy of the ICTY. He contended that the tribunal should have been established by the UN General Assembly and not by the Security Council. On

⁵⁹³ *Prosecutor v Dusko Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction, Case No. IT-94-41-A, 2 October 1995

⁵⁹⁴ ICTY Press Release, "Appeals Chamber judges unanimously confirm the Tribunal's jurisdiction", Case No. IT-94-1-T, The Hague, 2 October 1995

⁵⁹⁵ *Idem*

this contention, “the Trial Chamber ruled that although its creation was without precedent, it was a valid product of the SC in the exercise of its broader powers to maintain international peace and security.”⁵⁹⁶ Milosevic, through his counsel, also submitted that the court needed an advisory opinion on its legitimacy from the International Court of Justice (ICJ). Likewise, this contention was rejected by the ICTY on the grounds that the tribunal had no power to seek such an advisory opinion and that the matter may be better settled by the SC or the General Assembly. It is also a fact that in another unrelated issue the ICJ has endorsed the legitimacy of the ICTY.⁵⁹⁷

3.5.3. *Kanyabashi* objections on the legal foundations of the ICTR

Kanyabashi was a mayor in Rwanda indicted by the ICTR. In a preliminary motion contesting the jurisdiction of the ICTR, Kanyabashi raised a number of objections. Among them, the main was that “the Security Council lacked competence to establish an *ad hoc* tribunal under Chapter VII of the UN Charter.”⁵⁹⁸ This objection, on its own comprised five meritorious sub-objections.⁵⁹⁹ The first sub-objection was that “the conflict in Rwanda did not pose any threat to international peace and security.”⁶⁰⁰ The Trial Chamber decided that the question of whether a threat to international peace and security exists is a matter to be decided exclusively by the UNSC. The Chamber argued further that: “in Congo, Somalia and Liberia, the Security Council has established that such a sudden migration of refugees across the border to neighboring countries and extension or diffusion of an internal armed conflict into foreign territory may constitute a threat to international peace and security.”⁶⁰¹

The second sub-objection was that “there was no international conflict to warrant any action by the UN Security Council.”⁶⁰² The Trial Chamber replied that:

the decisive pre-requisite for the UN Security Council’s prerogative under Article 39 and 41 of the UN Charter is not whether there exists an international conflict, but whether the conflict at hands entails a

⁵⁹⁶ Scharf P. Michael & Schabas A. William, *Slobodan Milosevic on Trial...*, op. cit., pp. 98 - 99

⁵⁹⁷ *Ibidem*

⁵⁹⁸ *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR -96-15-T, 18 June 1997, B.2, para. 17 et ss.

⁵⁹⁹ See further comments on these arguments in Damgaard Ciara, *Individual Criminal Responsibility for Core International Crimes: selected pertinent issues*, op. cit., pp. 302 - 303

⁶⁰⁰ *The Prosecutor v. Joseph Kanyabashi*, op. cit., B.2, para. 18(i)

⁶⁰¹ *The Prosecutor v. Joseph Kanyabashi*, op. cit., para. 19

⁶⁰² *Ibidem*, para. 23

threat to international peace and security. Internal conflict, too, may well have international implications which can justify Security Council action.⁶⁰³

The third sub-objection reflects that the UNSC could not act within Chapter VII as international peace and security had already been re-established by the time it decided to create the ICTR.⁶⁰⁴

The Trial Chamber's response was that, this again, was something within the exclusive domain of the UNSC. Particularly to note, is the Chamber's ruling that:

The Trial Chamber observes, once again, that this argument entails a finding of fact based on evidence and that in any case, the question of whether or not the Security Council was justified in taking actions under Chapter VII when it did, is a matter to be determined by the Security Council itself.⁶⁰⁵

The Chamber added that just because atrocities have ceased, it does not mean that international peace and security have been restored, "because peace and security cannot be said to be re-established adequately without justice being done."⁶⁰⁶

The fourth sub-objection was that the establishment of an *ad hoc* tribunal was never a measure contemplated by Article 41 of the UN Charter.⁶⁰⁷ The Trial Chamber ruled that while it was not expressly mentioned in the actions mentioned in Article 41 of the Charter, the establishment of such tribunals' falls within the ambit of measures to satisfy the goal of restoration and maintenance of peace. Moreover, the list of Article 41 was not limited.

The last contention by the defense was that the UNSC had no authority to deal with human rights.⁶⁰⁸ The Chamber ruled that though there existed specialised institutions to deal with human rights, this did not preclude the UNSC to also get involved, nor did it exclude any other UN organs.

⁶⁰³ Idem, para. 24

⁶⁰⁴ Idem, para. 25

⁶⁰⁵ Idem, para. 26

⁶⁰⁶ Idem, para.

⁶⁰⁷ *The Prosecutor v. Joseph Kanyabashi*, op. cit., para. 27

⁶⁰⁸ *Ibidem*, para. 28

3.5.4. *Nzirorera et al.* case

In *Nzirorera et al.*⁶⁰⁹, the defence submitted that the ICTR lacked jurisdiction in 2004 to bring new charges relating to the events that took place in Rwanda in 1994.⁶¹⁰ The defence contended that the powers of the Security Council under Chapter VII of the Charter apply only to situations constituting a threat to peace, breach of the peace or acts of aggression and are limited to measures necessary to maintain international peace and security.⁶¹¹ The defense requested the Trial Chamber to dismiss new charges contained in the amended indictment.⁶¹² The defence further suggested that to prosecute persons responsible for crimes committed in Rwanda in 1994 was no longer necessary, since there was no threat to the peace in that country.⁶¹³ In its reply, the Prosecution contended among other arguments, that it is not for the Chamber but for the Security Council to determine whether in 2004, there exists a threat to peace, a breach of the peace, or act of aggression.⁶¹⁴ The prosecution also added the argument that the cessation of atrocities does not necessarily imply that peace had been restored, since peace and security imply that justice has been done.⁶¹⁵

The chamber, after recalling how resolution 955(1994) of 8 November 1994 was arrived at, ruled that “the organ which determined the existence of the threats to the peace has exclusive power to decide, still pursuant to Chapter VII, if and when the measures taken in 1994 – without stating when such measures would no longer be in force, insofar as their outcome is unpredictable, will have attained the set goals, namely to restore and ensure the stability necessary for the maintenance of such peace.”⁶¹⁶

⁶⁰⁹ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Decision on Nzirorera’s preliminary motion to dismiss the Indictment for lack of Jurisdiction: Chapter VII of the United Nations Charter: Rule 73 of the Rules of Procedure and Evidence, Case No. ICTR-98-44-T, 29 March 2004

⁶¹⁰ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, para. 1

⁶¹¹ *Ibidem*, para. 1(i)

⁶¹² *Idem*, para. 1(ii)

⁶¹³ *Id.*, para. 1(iv)

⁶¹⁴ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, op. cit., para. 2(ii)

⁶¹⁵ *Ibidem*, para. 2(vii)

⁶¹⁶ *Idem*, para. 7

Lastly, the Chamber ruled that it was “in the exercise of its absolute jurisdiction that [it] granted the Prosecutor leave to amend the indictment in February 2004[...].”⁶¹⁷ On 13 and 16 May 2005, the Defence for Joseph *Nzirora*, joined by that of Mathieu *Ngirumpatse* filed a “renewed motion to dismiss for lack of jurisdiction: United Nations Charter, Chapter VII Powers” under Rule 73 of the Rules of Procedure and Evidence of the ICTR. The defence teams challenged “the jurisdiction of the Tribunal to bring and confirm new charges against the accused, as well as the continued exercise of criminal jurisdiction over crimes committed in 1994, because there is no longer a ‘threat to peace’ that continues to exist in Rwanda.”⁶¹⁸ The defence contended also that “Chapter VII measures must be proportionate in relation to the threat of peace concerned and must stop when the threat has ended.”⁶¹⁹

Before ruling on the motion, again the Trial Chamber referred to reports and documents that were used by the UNSC to establish the Tribunal. The Chamber decided that “the functions and jurisdiction of the Tribunal are not related to the continued existence of a threat to international peace and security in Rwanda.”⁶²⁰ On the proportionality of measures under Chapter VII, the Chamber adopted the reasoning and findings in the decisions in *Tadic* and *Kanyabashi*⁶²¹ and dismissed the motion.

Though the Chamber did not refer to any paragraph(s) of the decision in *Tadic*, one may easily believe that it was a confirmation that the tribunal was legally established by the UNSC under its power pursuant to Article 41 of the Charter. In regard to the decision in *Kanyabashi*, it is also apparent that the Chamber was referring to paragraph 26 of the *Kanyabashi* decision. This paragraph sits on two major ideas. The first idea being that it is up to the UNSC to determine when there is a threat to peace and security and when such a threat ends. The second idea is that peace could not be said to have been restored until justice is done.

⁶¹⁷ *Id.*, para. 16

⁶¹⁸ *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Decision on Renewed motion to dismiss for lack of Jurisdiction: United Nations Charter, Chapter VII Powers, Case No. ICTR-98-44-R73, 5 August 2005

⁶¹⁹ *Ibidem*, para. 6

⁶²⁰ *Idem*, para. 5

⁶²¹ *Id.*, para. 6

It is quite clear that the Chamber was very cautious in not touching on a domain reserved to the UNSC. Namely, the Chamber avoided ruling on whether peace and security had been re-established in Rwanda. The Chamber only followed the UNSC's decision as it was on 8 November 1994. The Chamber further said that its functions and jurisdiction were not related to the continued existence of a threat to international peace and security in Rwanda.

This statement poses problems if it is read together with paragraph 28 of the Secretary General's Report⁶²² on the establishment of the ICTY. This paragraph provides that "the life-span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto."⁶²³ The decision of the Trial Chamber lacks objectivity and sincerity. The reality is that peace and security were restored in the former Yugoslavia after the declaration of independence of the Republics, who were previously members of the SFRY. Rwanda was also at peace since the RPF assumed power in July 1994.

3.5.5. Assessment on the merit of the Chambers' ruling on jurisdiction

The Appeals Chamber decision in *Tadic* may be characterized as a *petitio principii*. The judges undertook to legally find reasons that could justify the existence of the tribunal, its jurisdictions and the continuation of its work. It may further be suggested that the decision was aimed at not embarrassing the powerful UN organ. In *Milosevic* case the ICTY acknowledged that establishing a criminal tribunal was not expressly provided for in the UN Charter. However, the Chamber made a wide interpretation of what the mandate of the UNSC could be, including establishing an international criminal tribunal for the purpose of discharging its mandate of maintaining international peace and security.

The preliminary contentious issue in *Kanyabashi* was the introduction of facts that were not pleaded by either the Prosecution or the Defense. The issue of refugees' influx in neighboring countries was brought in without apparent basis. There were no contentions that the influxes of

⁶²² Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808(1993), 3 May 1993, (S/25/25704)

⁶²³ Ibidem

Rwandan refugees, let alone in other referred to situations, constituted a threat to international peace and security. This argument tended to justify why the UNSC determined that there was a threat to peace in the region. Even in the cited cases of Congo, Somalia and Liberia, the UNSC had established that the influxes of refugees may constitute a threat to international peace and security. It did not establish whether it actually did in those three referenced cases. It is true that the Council relied on the report of the *Special Rapporteur on Rwanda of the United Nations Commission for Human Rights* (S/1994/1157) and on the *Preliminary Report on violation of international humanitarian law in Rwanda* transmitted by the Secretary General in his letter of 1 October 1994 (S/1994/1125). But none of these two reports refer to “refugees” in neighbouring states or to the eventual insecurity they might have caused.

There was no allegation that the crimes falling in the tribunal’s mandate were being committed in the refugees’ camps:

The report of the UN Secretary General of November 18, 1994, expressed concerns at the plight of the millions of Rwandan Refugees and displaced persons and deplored the continuing acts of intimidation and violence within the refugees’ camps, which were designed to prevent the refugee population there from returning to Rwanda.⁶²⁴

The decision of the Chamber was quite surprising because there was no “finding of fact” as it suggested, warranting a determination that there was a threat to international peace and security demanding the establishment of the Tribunal. At the UN Headquarters the contrary position was that:

as a practical matter and quite apart from the question of whether the establishment of a Tribunal by means of a Chapter VII resolution was the most appropriate mode of establishing an international jurisdiction, at issue was whether in the circumstances of Rwanda, there were any other viable

⁶²⁴ Mutabazi Etienne, *The International Criminal Tribunal for Rwanda’s Approach to Serious Violation of Humanitarian Law*, Masters’ Thesis, UNISA, 2005, p. 78 – 79 referring to the *Report of the Secretary General on Security in the Rwandan Refugees Camp*, S/1994/1308, 18 November 1994, para. 1

alternatives which could offer an expeditious mode of establishment and powers to enforce compliance. The answer clearly was no.⁶²⁵

This was echoing the report of the Secretary General that:

The establishment of the International Tribunal under Chapter VII, notwithstanding the request received from the Government of Rwanda, was necessary to ensure not only the cooperation of Rwanda throughout the life-span of the Tribunal, but the cooperation of all States in whose territory persons alleged to have committed serious violations of international humanitarian law and acts of genocide in Rwanda might be situated. A Tribunal based on a Chapter VII resolution was also necessary to ensure a speedy and expeditious method of establishing the Tribunal.⁶²⁶

It is clear that sometimes judges declined, without giving reasons, to intervene in very sensitive matters like the one in Rwanda and the former Yugoslavia to avoid confronting powerful individuals' decisions whether those decisions were legally justified or not. The judges may also wish to not get very involved in highly complex political matters. This suggestion transpires quite clearly in the *Nzirorera et al.* case in which the Chamber failed to acknowledge that in 2004 peace had been restored in Rwanda, and that an amendment of the indictment was not warranted. The judicial intervention however is seen, and obviously must be, one of the solutions to at least some of the problems it is seized with.

Another point to emphasise is that whereas the UNSC established the ICTY in 1993 and the ICTR a year later, it did not expressly explain the legal basis upon which it did so. In most instances, the Security Council generally refrains from specifying the exact legal basis for its

⁶²⁵ Shraga Daphna & Zacklin Ralph, op. cit., p. 507. One needs to understand that the authors of this article, namely Daphna Shraga and Ralph Zacklin were respectively Legal Officer and Director and Deputy to the Under-Secretary General, Office of the Legal Counsel, Office of the legal Affairs, United Nations; see also the Representative of United Kingdom of Great Britain and Northern Ireland, Mr. Richardson who suggests "Whatever mechanism is proposed to give effect to this resolution should reflect this and should have jurisdiction over all the parties.", Provisional verbatim record of the three thousand one hundred and seventy-fifth meeting, held at Headquarters, New York, on Monday, 22 February 1993, at 11 a.m., S/PV.3175, 22 February 1993. [on Resolution 808(1993), of 22 February 1993], in *Scharf P. Michael. & Morris Virginia, An insider guide's guide to the International criminal tribunal for the Former Yugoslavia: a documentary history and analysis*, op. cit., p. 167; Statement of Mr. Arria, the Representative of Venezuela: "We must put an end to the interminable legal discussions that, in delaying the establishment of international jurisdiction, are merely encouraging impunity. That is the reality.", Provisional verbatim record of the three thousand two hundred and seventeenth meeting, held at headquarters, New York, on Tuesday, 25 May 1993, at 9 P.M., S/PV. 3217, 25 May 1993, in *Scharf P. Michael & Morris Virginia, An insider guide's guide to the International criminal tribunal for the Former Yugoslavia: a documentary history and analysis*, op. cit., p. 184

⁶²⁶ *Report of the Secretary General pursuant to paragraph 5 of Security Council Resolution 955 (1994)*, S/1994/134, 13 February 1995, para. 6

actions⁶²⁷ because the determination that a situation constitutes a threat to international peace and security seems to be enough grounding for adopting enforcing measures under Chapter VII.

In the report of the Secretary General establishing the ICTY⁶²⁸, he explained the reasons why traditional modes of establishing institutions of the tribunal's caliber were not considered at the appropriate time. The Secretary General was of the view that in the normal course of events, the conclusion of a treaty would be the approach to follow. In the case of the ICTR, in addition to the precedent set by the establishment of the ICTY, the expressed request of the Republic of Rwanda was added.⁶²⁹ Yet, the question of legality was not resolved.

As a matter of fact, it is self-evident that were the Security Council willing to rely on Article 41 of the Charter as a means of enforcement, not involving the use of force, this could have transpired in the Secretary General's Report. As a more detailed instrument for the understanding of all legal tenets aimed at establishing the ICTY, the Report could not have missed such an opportunity. Moreover, delegates at the Security Council could not have emphasised strong concerns about the legal difficulties that the resolutions raised.

In fact, there are no clauses in the UN Charter providing for the establishment of an international criminal tribunal. In the words of Emeritus Distinguished Professor of International Law, Rubin, "nothing in the Charter gives the Security Council the authority to erect a tribunal at all."⁶³⁰ Establishing such tribunals was, in the opinion of Anderson, "a policy alternative to direct intervention – so that an intended consequence (for some, anyway) of this

⁶²⁷ Schweigman D., *The authority of the Security Council under Chapter VII of the UN Charter...*, op. cit., p. 111

⁶²⁸ Ibidem

⁶²⁹ Desforges argues that the fact that the ICTY already existed made a very easy route for the Security Council, and they adopted exactly the same procedures as the ICTY", Desforges Alison, Remarks at the Berkeley Human Rights Center Conference Justice in the Balance: Military Commissions and International Criminal Tribunals (Mar. 16, 2002), http://www.hrwberkeley.org/download/justice_alisondesforges.pdf, accessed on 21 december 2005), cited in Bingham Laura, Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda, *Berkeley Journal of International Law*, Vol. 24, No. 2, pp. 687 – 717, p. 694

⁶³⁰ Rubin P. Alfred, Milosevic on Trial", *International Journal for the Semiotics of Law*, Vol. 19, Iss.4, 2006, pp. 347 – 354, pp. 350 - 351

new activity was to reduce the pressure to intervene.”⁶³¹ It is therefore modest and humble to say that the establishment of *ad hoc* tribunals was a *sui generis* and exceptional undertaking. As such, it falls out of the ambit of Chapter VII, particularly of Article 41 of the Charter. Mr. Barnuevo, who represented Spain at the time, clearly indicated the rationale of the UNSC decision. He stated:

We understand that some harbour certain doubts about the competence of the Council to take this step, for it is a novel one. However, we do not share these doubts. We understand that this is a limited and precise action with the clear objective of restoring peace, which is perfectly in keeping with the competence of the Council.⁶³²

Were there any specific and precise provision in the Charter, these legal difficulties could not have been raised. It is obvious that the representatives at the UNSC debates could not ignore that the Charter comprises provisions that allow the Council to set up *ad hoc* tribunals. In fact

⁶³¹ Anderson Kenneth, “The Rise of International Criminal Law: Intended and Unintended Consequences”, *The European Journal of International Law*, Vol. 20 No. 2, 2009, pp. 331 – 358, p. 334. This author says so as a direct witness of discussions that were held before the ICTY was established. He writes that:

In my experience at Human Rights watch and subsequently at the Open Society Institute in the 1990s, the ICTY as an alternative to intervention was discussed with senior officials in NATO countries openly, if off the record. *I took part in such discussions* [Emphasis added] in those years, seeking to encourage the process of forming the tribunal. Some NATO officials (not all; some favoured the tribunal for its own sake, and some thought it a terrible idea) were candid with me about just how much they saw the ICTY as a way of avoiding military intervention. In the early days, the Europeans and the Clinton administration were each internally divided on the Bosnia war and about the tribunal. Avoiding intervention was not the only pressure, or the most important one, to be sure, driving forward the agreement of the United States and other NATO countries to the formation of the tribunal under Security Council auspices. My point is far more modest than suggesting such: it is merely an observation about a political force internal to the formation of the ICTY. But tribunals-as-avoidance-behaviour was part of background discussions in trying to encourage the formation of the ICTY, with Clinton administration officials and with their NATO counterparts.

Anderson Kenneth, *Idem*

⁶³² Scharf P. Michael & Morris Virginia, *An insider guide's guide to the International criminal tribunal for the Former Yugoslavia: a documentary history and analysis*, op. cit., p. 172; Mr. Snoussi, who represented Morocco also spoke of a “special measure”, Scharf P. Michael & Morris Virginia, op. cit., p. 195; Mr. Li Zhaoxing, Representative of China spoke of “the particular circumstances in the former Yugoslavia and the urgency of restoring and maintaining world peace”, and “we have always held that, to avoid setting any precedent for abusing Chapter VII of the Charter, a prudent attitude should be adopted with regard to the establishment of an international tribunal by means of Security Council resolution under Chapter VII [...], [an International Tribunal established] in the current manner can only be an *ad hoc* arrangement suite to the special circumstances of the Former Yugoslavia and shall not constitute any precedent, *Ibidem*, pp. 199- 200; also Mr. Sardenberg who represented Brazil expressed concerns that “sometimes grave circumstances may demand exceptional action on the part of the United Nations and of Member States”, *Ibidem*, p. 200; or “unique and exceptionally serious circumstances in the former Yugoslavia”, *Ibidem*, p. 201; the judges held a same argument in *The prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Jugement*, Case No. It-96-21-T, 16 November 1998. At paragraphs 170 and 173, the Trial Chamber held that:

The International Tribunal is an *ad hoc* international court, established with a specific, limited jurisdiction. It is *sui generis*, with its own appellate structure. The interpretation of the provisions of the Statute and Rules must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to its creation.

the reasons provided in the Secretary General Report are aimed at explaining the *ad hoc* nature⁶³³ of the tribunals in the absence of clear provisions to that effect.

Zolo argues more generally that:

the United Nations Charter does not – indeed, cannot – endow the Security Council with the power to set up an *ad hoc* judicial body for the defence of human rights. The *ad hoc* nature of a criminal court and the retroactive character of its sanctions contradict the doctrine of the rights of man and the rule of law. These doctrines call first and foremost for respect of the principle *nullum crimen sine lege*. They prescribe that all individuals shall be subjected to the jurisdiction of ordinary courts, according to the rule of the legal predetermination of jurisdictional competence.⁶³⁴

As has already been shown, the UNSC’s legal bases for establishing the tribunals were very problematic. Currently, moreover, there is no consistent practice suggesting that this is a settled law. Were it the case, states could not have met to negotiate the Rome Statute of the ICC. It also needs to be recalled that most of the representatives at the UNSC frequently referred to the treaty mode as the only appropriate, effective and viable recourse to establish an international criminal tribunal. No one may forget that *Tadic* and *Kanyabashi* were decided at a time when the tribunals were battling for their survival⁶³⁵, or at least when they were struggling to find work.

Where some legalistic arguments facilitated the advancement of the work of the tribunals, such arguments were raised. But where they complicated the matter, the tribunals ruled that judges did not have power to assess the decision of the Security Council. The judges alleged that such decisions were based on political considerations which, by their very nature, are not justiciable. This is completely laughable that international judges consider that some issues are not

⁶³³ Zolo advances a counterargument as follows:

one wonder(s) whether the Council had any authority to impose upon the sovereign states of the Balkan area a drastic limitation on their jurisdiction. Challenges by the Defence attorneys (as in the famous case of *Dusko Tadic*), the Hague Tribunal took upon itself the competence to judge whether its own authority rested on a legal foundation. Its conclusion, not surprisingly, was affirmative. But it can be argued, more in general, that the United Nations Charter does not – indeed, cannot – endow the Security Council with the power to set up an *ad hoc* judicial body for the defence of human rights.

Zolo Danilo, *Invoking humanity: war, law and global order*, Continuum, London, New York, 2002, p. 107, see also pp. 108 – 109

⁶³⁴ Zolo Danilo, *Invoking humanity: war, law and global order*, op. cit., p. 107, see also pp. 108 – 109.

⁶³⁵ Antonio Cassese, formerly judge and President of the ICTY suggests that in June 1994 at The Hague, judges had just adopted their rules of procedure and evidence and were “anxiously awaiting the start of trials. He added that “it was an anguish wait”, in Cassese Antonio, “Clemency Versus Retribution in Post-Conflict Situations (Friedman Award Address)”, *Columbia Journal of Transitional Law*, Vol. 46, No.1, 2007 – 2008, pp. 1 – 13, p. 3

justiciable. The judges' action is a simple loyalty to the decision of the UNSC; one that puts their independence in jeopardy. The judges' concerns should have gone beyond the concerns of the UNSC. In this respect, Reeves argues that "even where the institutional arrangements of a polity do warrant deference from judges concerning some matters, a judge must still determine whether the regulating institution acted within the scope of its legitimate authority."⁶³⁶

In *Kanyabashi*, the Chamber went even further and acted *ultra vires*. It supported its decision by bringing matters of facts which were not at issue and which were neither raised by the defence nor by the prosecution (like the influx of refugees, them being armed and some related to populations where they took refuge). While a court of law always provides factual findings, it only does so at looking to the facts before it as tendered in evidence by the parties. The court, cannot, on its own, bring new facts and provide findings regarding them. The parties did not have an opportunity to challenge the Chamber on its invocation of the influx of refugees, and there was no way that this matter alone could have been appealed against.

It is therefore fair to disagree with Schabas who suggests that because the decision in *Kanyabashi* has not been appealed against,⁶³⁷ that the General Assembly backed the tribunal or that the Rome Statute recognised the referral role of the Security Council that the UNSC is legally and legitimately empowered to establish "international tribunals."⁶³⁸ Surely, Schabas

⁶³⁶ Reeves R. Anthony, "Do judges have an obligation to enforce the law?: Moral responsibility and judicial-reasoning", *Law and Philosophy*, Vol.29, No. 2, 2010, pp. 159 – 187, p.167

⁶³⁷ In Schabas' opinion:

The ruling was never appealed. Despite recognition of the authority of the Security Council to establish international tribunals, the judgments have nevertheless drawn attention to the importance of consent by the States concerned. In *Tadic*, for example, the ICTY Appeals Chamber noted that the Republic of Bosnia and Herzegovina had not only contested the jurisdiction of the Tribunal but had actually approved of it and offered its cooperation. Similarly, the ICTR Trial Chamber in *Kanyabashi* remarked upon the facts that 'the establishment of the ICTR was called for by the Government of Rwanda itself, which maintained that an international criminal tribunal could assist in prosecuting those responsible for acts of genocide and crimes against humanity and in this way promote the restoration of peace and reconciliation in Rwanda.

Schabas A. William, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, 1Pst edition, 2006, p. 53

⁶³⁸ Schabas further suggests that:

Further confirmation of this authority within the Security Council can now be found in the Rome Statute of the International Criminal Court. Obviously it does not purport to authorize the creation of a new tribunal, but it does recognize the power of the Security Council to refer cases to the Court and moreover, to block prosecution under certain circumstances, all pursuant to its powers under Chapter VII. The Council's authority was never questioned during the drafting of the Rome Statute, in which most states participated,

has learned and may be preaching that “necessarily, every legal system which is in force anywhere [...] either claims that it possesses legitimate authority or is held to possess it, or both. In other words, a claim – rather than the reality – of legitimate authority is necessarily a part of the social practice of law.”⁶³⁹ It will therefore be very simplistic to say that the question is beyond doubt as Schabas suggests. In his opinion “it seems now to be beyond any doubt that the Security Council is empowered to establish an international criminal tribunal.”⁶⁴⁰ It is candid to suggest, as Rabkin did, that “each tribunal risks becoming a precedent to the next”⁶⁴¹ because of frequent inconsistencies in the actions of the Security Council and of the respective tribunals.⁶⁴²

3.6. Summary

This chapter has highlighted the armed conflicts that took place in the former Yugoslavia and caused the breakdown of the federation in independent States. The wars were accompanied by serious violations of international humanitarian law. In Rwanda likewise, a war was initiated from Uganda in October 1990. It brought about crimes of unimaginable cruelty, culminating in the 1994 genocide. Whether in the former Yugoslavia or Rwanda, the crimes committed were a result of the war, not its causes. The UNSC was aware of the magnitude of the war and the human sufferings, destruction of properties and all other damages that came with any armed conflict.

something that confirms the interpretation by which criminal prosecution belongs within the scope of Chapter VII.

Schabas A. William, op. cit. p. 53

⁶³⁹ Steinitz Maya, “The Milosevic Trial – Live’: An iconical analysis of international law’s claim of legitimate authority”, *Journal of International Criminal Justice*, Vol. 3, Iss.1, 2005, pp. 103 – 123, p. 104. The author cites Raz Joseph, *Ethics in the public domain: Essays in the Morality of Law & Politics*, New York, Oxford University Press, 1994, p. 6.

⁶⁴⁰ Schabas A. William, op. cit., p. 53

⁶⁴¹ Rabkin Jeremy, “The UN Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?”, in Driscoll William, Zompetti Joseph & Zompetti Suzette W. (eds), *The International Criminal Court...*, op. cit., p. 74; also Goldstone Richard, “The role of the United nations in the prosecution of International War Criminals”, op. cit.

⁶⁴² In *Kanyabashi*, the trial Chamber’s argument to dismiss the Defence submission on the violation of Rwandan sovereignty was that the express request by Rwanda was a sufficient indication that its sovereignty was not violated.

The UNSC did not address those wars in a resolute manner aimed at halting them, and by the same token it did not address their effects and consequences. By establishing the *ad hoc* tribunals, the UNSC imposed an easy way, yet the least effective to maintain and restore international peace and security. The establishment of *ad hoc* tribunals lacked genuineness and sincerity. The establishment of *ad hoc* tribunals could not be read in Article 41 of the United Nations Charter. The cases studied attempted to challenge the power of the UNSC to establish judicial institutions. The scholarship and judicial rulings that support that the UNSC is empowered to set up criminal tribunals under Chapter VII of the UN Charter as an enforcement measure are not convincing or conclusive. Treaty based tribunals, like the ICC enjoy, at least, more legality and legitimacy. The UNSC should revisit its mandate and mission of maintaining international peace and security and adopt proper, effective and efficient mechanisms to respond to a situation that requires immediate action. Judicial institutions cannot respond to the urgency that war situations necessitate. The judicial route is ineffective, and becomes very weak if it is frustrated by political calculations.

CHAPTER 4: OBJECTIVES OF THE *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS

4.1. Introduction

The objectives of the *ad hoc* tribunals appear in the constitutive UNSC resolutions. For the ICTY it is Resolution 827(1993) of 25 May 1993 which stipulates that the Council was determined to put an end to the crimes, take effective measures to bring perpetrators to justice, and end the impunity that prevailed thereby contributing to the restoration and maintenance of peace.⁶⁴³ Council's Resolution 955(1994) of 8 November 1994 pertaining to Rwanda is similarly worded but adds that the prosecution of genocide and other violations of international humanitarian law "would contribute to the process of national reconciliation."⁶⁴⁴

To be consistent and effective in their work, as Scully argues, the goals and purposes which underlie international tribunals ground the understanding of a tribunal's success or failure.⁶⁴⁵ Therefore, those tribunals should only consider objectives that are achievable and normal functions of a criminal tribunal irrespective of the expectations of the mother body. In the case under consideration, it is the UNSC. There is also a need to understand which objectives may call for the UNSC's action and meet or contribute to its mandate of maintaining international peace and security. In addition to the lack of clear definitions, the objectives assigned to *ad hoc* tribunals were unnecessarily overabundant. Such overabundance, according to Scully, may undermine the tribunals' broader attempt to address violations of international humanitarian law.⁶⁴⁶ For example, "terms like 'justice', 'effective redress', and 'ending impunity' – though popular rhetorical devices – are too vague to guide the appropriate selection of institutions of

⁶⁴³ Preamble of Resolution 827(1993), adopted by the Security Council at its 3217th meeting, on 25 May 1993, S/RES/827(1993, 25 May 1993

⁶⁴⁴ Preamble of Resolution 955(1994), adopted by the Security Council at its 3453rd meeting, on 8 November 1994, S/RES/955, 8 November 1994

⁶⁴⁵ Scully Seeta, "Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia", *Asian-Pacific Law & Policy Journal*, Vol. 13, No. 1, 2011, pp. 300 – 353, p. 302

⁶⁴⁶ Developments in the Law: International Criminal Law, *Harvard Law Review*, Vol. 114, Iss.7, 2000 – 2001, pp. 1943 – 2073, p. 1961

accountability.”⁶⁴⁷ Reisman concurs with the idea of clarifying goals when particularly “our passions are engaged, as indeed they should be, upon encountering atrocities such as those of Rwanda.”⁶⁴⁸ Shany⁶⁴⁹ groups the goals of international prosecution into four categories. The first category is punishment, deterrence, and crime prevention to end impunity.⁶⁵⁰ The second category consists of political goals such as the promotion of peace, stability and reconciliation.⁶⁵¹ Conveying a message of international condemnation as a symbolic goal⁶⁵² makes the third category, while the fourth is about “developing international criminal law and other branches of international law.”⁶⁵³ Shany also highlights “some additional goals, which influence the operations of the ICTs, such as offering a role model for local courts, encouraging capacity building at the national level, encouraging local trials, and developing a long-term legacy.”⁶⁵⁴ The list is already too long for a criminal court to operate effectively. Can a criminal tribunal follow Shany’s categorisation and still be effective? The answer will flow from the analysis of the objectives assigned to the *ad hoc* tribunals.

The UN as a system is built on a legal order, which strives to achieve justice, among other values. Justice is not only a legal aspiration, but it is also a moral one. Law and justice go hand in hand. However, justice remains superior to law; that is in fact why the Council believed that it was appropriate to bring perpetrators to the might of justice. A proper understanding of the meaning of “justice” is therefore warranted as will be the other key objectives that were expected to be achieved by the *ad hoc* tribunals.

⁶⁴⁷ *Ibidem*, p. 1960

⁶⁴⁸ Reisman W. Michael, *Institutions and Practices and Maintaining Public order*, 6 *Duke J. Comp. & INT’L. L.* 175(1995), cited in Smidt L. Michael, *The International Criminal Court: An effective means of deterrence?*, *Military Law Review*, Vol. 167, 2001, pp. 156 – 240, p. 182

⁶⁴⁹ Shany Yuval, “The Role of National Courts in advancing the goals of International Criminal Tribunals, Symposium on The impact of International Criminal proceedings on national prosecutions in mass atrocity cases”, *American Society of International Law Proceedings*, Vol. 103, 2009, pp. 210 - 215

⁶⁵⁰ *Ibidem*, p. 212

⁶⁵¹ *Idem*, p. 212

⁶⁵² *Id.*

⁶⁵³ *Id.*

⁶⁵⁴ *Id.*

4.2. Justice

It is often heard that a court judgment, ruling or any other court decision was made “in the interest of justice”. Justice appears in most social events. People talk of social justice, distributive justice, commutative justice, and many other qualifications of justice. Yet few are familiar with the meaning of ‘justice’ alone. Explaining what justice means in international prosecution is of utmost importance to measure the effectiveness of the *ad hoc* tribunals.

4.2.1. The concept of justice in international crimes prosecutions

In its Policy Paper on the interest of justice, the Prosecutor of the (ICC) notes, commenting on Article 53 of the Rome Statute, that the interests of justice represents the most complex aspects of the Treaty. Moreover the prosecutor acknowledges the lack of a clear guidance on what the content of the idea is. The phrase “in the interests of justice” appears in several places in the ICC Statute and Rules of Procedure and Evidence but it is never defined.⁶⁵⁵ In addition to the lack of a clear guidance and definition, Singh finds that “we usually talk about justice but we don’t practice it all the time.”⁶⁵⁶ Souryal instead suggests that “in contemporary literature, justice has been defined in numerous ways as ‘fairness’, ‘due process’, ‘equal protection’, ‘impartial treatment’, ‘assignment of merited rewards or punishments’, among others.”⁶⁵⁷ Delsol even believes that “only the existence of multiple definitions of justice can allow us to escape the dictatorship of a single one.”⁶⁵⁸ Dubber opines, however, that “the sense of justice is as ubiquitous as it is ill-defined.

Without a clearer understanding of its operation and function, the sense of justice is easily misunderstood as a vague reference to the unsettling role of emotions, or even of sentimentality, in law, and thus may be used to subvert justice rather than do justice.”⁶⁵⁹

⁶⁵⁵ ICC – OTP, *ICC Policy Paper on the interest of Justice*, September 2007, p. 2

⁶⁵⁶ Singh J. Narain, *International Justice: jurisprudence of the World Courts (PCIJ & ICJ)*, Harnam Publications, New Delhi, 1991, Preface

⁶⁵⁷ Souryal Sam, *Ethics in Criminal Justice: In search for the truth*, op. cit., p. 185

⁶⁵⁸ Delsol Chantal, *Unjust Justice: Against the tyranny of International Law*, (translated with an introduction by Paul Seaton), ISI Books, Wilmington, Delaware, 2008, p. 67

⁶⁵⁹ Dubber M. Dirk, *The sense of Justice: Empathy in Law and Punishment*, New York University Press, 2006, p.7; see also Katshung Y. Joseph, “The relationship between the International court and Truth Commissions: Some

Souryal also remarks that not enough effort has been given to clarifying the meaning of justice itself. According to him, there is more interest in the criminal than in criminal justice research.⁶⁶⁰ For example, in America, “criminal justice education has been increasingly scientific, methods-driven, technologically preoccupied, and pragmatic in focus.”⁶⁶¹ Such a reform was not accompanied by a clear ethical position and a principled purpose oriented towards justice.⁶⁶² According to Souryal, “the better we understand justice, the better able we are to cope with crime [...]. Only through the light of justice can we distinguish between what is right and wrong, ideal and barbaric and of course criminal and non-criminal.”⁶⁶³

Souryal talks about the American domestic criminal justice system. What he says pertaining to America, is, however, of universal application. This origin does not therefore matter. The search for justice is still lacking in international criminal prosecution, which is a still-born system. It is even inappropriate to say that there exists a system of international criminal justice.⁶⁶⁴ Fichtelberg posits that “international criminal justice as a system is not as neatly or clearly defined as domestic criminal justice.”⁶⁶⁵ The rationale behind this statement is that “systems of criminal justice are designed to do more than merely punish violators of the law.”⁶⁶⁶ The aspiration to justice is everyone’s concern. So everyone must work to ensure that justice materialises. For Singh, justice:

can be understood, realized and materialized in a particular situation. It can be appreciated of its parameters in a situation with its own specific circumstances. When justice is done or achieved in a certain situation, it is really something else, concrete or abstract in form, which is realized or achieved but

thoughts on how to build a bridge across Retributive and Restorative Justices”, paper presented at Transitional Justice and Human Security Conference organised at the Lord Charles Hotel /Cape Town/South Africa (28 March-1 April 2005) by the International Center for Transitional Justice and sponsored by the Japan International Cooperation Agency (JICA)/Japanese Government. He says that “defining justice is a difficult task”

⁶⁶⁰ Souryal Sam, op. cit., p. vii

⁶⁶¹ Ibidem, p. vii

⁶⁶² Idem, p. viii

⁶⁶³ Id., p. xi

⁶⁶⁴ In the view of Fichtelberg, “strictly speaking, there is no international criminal justice system if we think of it as analogous to the system in the United States. Traditionally, a criminal justice system consists of four interconnected parts: a legal system to define criminal behaviour, a police system to enforce these laws, a court system to apply the laws to a particular case, and a corrections system to either punish or reform convicted criminals”, Fichtelberg Aaron, *Crime without borders: An Introduction to International Criminal Justice*, Pearson Education, Inc. Upper Saddle River, New Jersey, USA, 2008, p. 8

⁶⁶⁵ Ibidem, p. 8

⁶⁶⁶ Smidt L. Michael, *The International Criminal Court: An effective means of deterrence?*, op cit., p. 185

which reflects justice or lies in the interest of justice. It demands that one must get what one is entitled to.⁶⁶⁷

Bassiouni overemphasises this aspiration to justice by arguing that:

The exigency of justice is part of humankind's social values, and its course is inexorable. How far and fast we progress on this journey will depend on individual and collective commitments to attain this laudable goal in which we all have a stake, and in which we all have a role to play. Everyone of us can bring a grain of sand to the hill and can thus contribute to the overall result.⁶⁶⁸

This encompasses many factors such as “historical, political, socio-economic, and even military [...]”. The solution must take into account both the nature of [a society's] past illness as well as the present and future needs of such a society.”⁶⁶⁹ It is true that one cannot expect too much from justice. Moreover, what justice is for me might not be justice for someone else. Yet, the “merit in securing justice... is that it provides a procedure for exposing the truth and it matters not whether this procedure is by way of war crimes trial or a truth commission. Such an exposure of the truth [...] enables a society to move beyond the pain and horror of the past.”⁶⁷⁰ In this understanding, justice has one sense whether universal or particular.⁶⁷¹ According to Singh, “justice inheres everyone in the sense that every normal human being which can distinguish between right and wrong has at least some sense of justice.”⁶⁷²

Delivering justice through *ad hoc* international tribunals is no different from justice as commonly understood in its virtuous meaning. Singh maintains that “justice is justice, immaterial of the level at which it is operating or is being administered.”⁶⁷³ If understood in this manner, justice becomes a combination of two worlds: the world of ideas and the world of objects. Chaturvedi explains that “the world of ideas is an extension of the entity known as mind whereas the world of objects is an extension of one single substance known as matter.”⁶⁷⁴

⁶⁶⁷ Singh NJ, op. cit., p. 3

⁶⁶⁸ Bassiouni M. C., “Perspectives on International Criminal Justice”, op. cit., p. 322

⁶⁶⁹ Goldstone J. Richard, “Justice as a tool for Peace –making: Truth Commissions and International Criminal Tribunals”, *New York University Journal of International Law & Politics*, op. cit., p. 486

⁶⁷⁰ Idem

⁶⁷¹ De Blois argues that “justice in a universal sense is a comprehensive notion referring to virtue in general as far as the relationship between human beings is concerned. Justice in a particular sense is part of virtue.” De Blois Matthijs, “Justice: Retribution of Reconciliation: the Heart of the law versus the Heart of the Gospel”, *Law and justice*, 2005, Vol. 155, pp. 103 – 122, p. 105

⁶⁷² Singh, idem, p. 3

⁶⁷³ Ibidem, p. 2

⁶⁷⁴ Chaturvedi R. Gopal, *Philosophy of Justice*, Raj Publishing House, Govind Marg, Jaipur, 2007, p. 6

The philosophical concept of justice is also one, though Yarwood believes that “to expect all communities to share a common perception of justice is in polite terms utopian and in realistic terms naïve.”⁶⁷⁵ In *Plato’s Republic*, Plato defines the principle of justice as “the proper, the correct, or the most rational response to a given situation.”⁶⁷⁶ Plato’s sense of justice is “one’s capacity to think rationally and to be able to follow proper reasoning based on superior knowledge.”⁶⁷⁷

According to Souryal and in line with Plato’s thinking, criminal justice would mean:

a robust rule of principles by which we can arrest the suspect, try the accused, punish the guilty, and compensate the victims, without ill-will, prejudice, or offering an apology. In a civilized society, crime can increase or decrease, and criminals may be of higher or lower status, yet the foundation of justice must remain constant – even if we lose individually.⁶⁷⁸

Souryal further advises that “in the conduct of criminal justice, professional workers must realize that it is not the ‘principle of power’ that matters, but the ‘power of principle’.”⁶⁷⁹ This has been demonstrated above when the UNSC utilized its powers to establish *ad hoc* tribunals without considering appropriate procedures; and the tribunals followed suit. The criterion here, as Barry suggests, is to ask oneself “what reasonable persons would agree to under conditions of equality and the absence of coercion.”⁶⁸⁰ This is about an even justice. In international criminal justice, Malekian understands “those principles of the system of criminal law that must be respected in the examination of a given case and should not be selected or ignored by the tribunal.”⁶⁸¹

This is a theoretical and conceptual framework of ‘justice’. But:

⁶⁷⁵ Yarwood Lisa, “Willing and able: the domestication of international justice”, *op. cit.*, p. 203

⁶⁷⁶ *Idem*, p. 136

⁶⁷⁷ *Idem*, p. 136

⁶⁷⁸ *Id.*, p xi; see also Malekian Farhad, “Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal”, *op. cit.*, p. 275. This author argues in favor of achieving the essence of the rules or norms, not necessarily the rules or norms themselves. In his view, this means “equality before the law for all without any discrimination”. He emphasizes that:

When the system of international criminal law is applied to individuals who have committed illegal acts, all relevant provisions concerning those crimes including the proceedings, prosecution, and punishment should be applied. This is what I call the complete application of the principle of international tribunality of jurisdiction over persons accused of committing international crimes.

⁶⁷⁹ Souryal Sam, *op. cit.*, p 197

⁶⁸⁰ Barry, B., *Justice as Impartiality*, Clarendon Press, Oxford, 1995, cited in Tony Coates (ed.), *International Justice*, Ashgate, Adershot, Burlington, USA, Singapore and Sydney, 2000, p. 76

⁶⁸¹ Malekian Farhad, “Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal”, *op. cit.*, p. 676

from a practical standpoint, advances in the legal and technological aspects of criminal justice today, practitioners continue to face difficult moral choices. These include whether to arrest, use deadly force, prosecute, participate in plea bargaining, impose punishment and, from an organizational standpoint, whether to adhere to policy, support corrupt supervisors, or treat the public equitably.⁶⁸²

The call for the prosecution of perpetrators by *ad hoc* tribunals focuses on justice, “in its legal sense.”⁶⁸³ Those demands are “for accountability through the trial process. Justice is equated with retribution that is the punishment of wrongdoers in direct proportion to the harm inflicted. Omitted from this image of justice are its philosophical (or moral) and political dimensions.”⁶⁸⁴ This transpires from the statutes of *ad hoc* tribunals which do not explain what justice entails. This narrow understanding of justice is premised on the concept of justice as impartiality. It “does not, therefore, have a substantive answer to every question: in many cases it endorses whatever outcome emerges from a fair procedure.”⁶⁸⁵

In a comprehensible sequence, Braswell and his colleagues⁶⁸⁶ propose that “a way of understanding the idea of justice in human experience is to think of it as a process that moves within three contexts or concentric circles.”⁶⁸⁷ In their view the innermost circle is the personal understanding of the sense of justice which examines right and wrong, good and evil; while the second circle represents the social context of justice. The third context looks at the criminal justice process⁶⁸⁸ itself.

To sum up their idea of justice, Braswell and his colleagues are of the view that acting as ethical persons of integrity will increase the sense of responsible and caring communities where the chance for justice will be greater for all who live there.⁶⁸⁹ Without ignoring their specificity and complexity, international crimes occur in a similar fashion as they occur in domestic

⁶⁸² Id., p xii

⁶⁸³ Ustina Dolgopol, Redressing Partial Justice – A Possible Role for Civil Society, in Ustina Dolgopol and Judith Gardam, op. cit., p. 482

⁶⁸⁴ Dolgopol Ustina, op. cit., p. 482 citing Martha Minow, *Between Vengeance and Forgiveness, Facing History after Genocide and Mass Violence*, (Beacon Press 1998)

⁶⁸⁵ Barry, B., Justice as Impartiality, Clarendon Press, Oxford, 1995, cited in Tony Coates (ed.), *International Justice*, op. cit., p. 75

⁶⁸⁶ Braswell C. Michael, McCarthy R. Belinda and McCarthy J. Bernard, *Justice, Crime and Ethics*, 5th edition, Anderson Publishing, 2005

⁶⁸⁷ Braswell C. Michael and others, op. cit., p. 4

⁶⁸⁸ Idem, p.5

⁶⁸⁹ Id., p. 6

arenas. Those crimes may be distinct in their magnitude and reach as argued by Osuji, a former ICTR prosecutor.⁶⁹⁰ The legal reasoning however, for anyone who searches the truth of these crimes, is the same. Any international or domestic lawyer begins his or her reasoning “with a factual situation, and through some process, arriving at a conclusion about the rights and duties of the persons or entities involved in the situation.”⁶⁹¹

Like in domestic criminal courts, the international *ad hoc* tribunals have the same duty of deciding “precisely what the facts were, that gave rise to the dispute; second, what laws govern those facts; and thirdly, how the law applies to the facts.”⁶⁹² It is a simple exercise that only needs to be principled. The whole problem with international criminal prosecutions is their forceful creation of situational facts and events which in reality did not happen and are simply assumed or arrived at through linkages. International criminal justice may be blamed for attempting to go the easy way and by doing so it lost its way.

Fatic⁶⁹³ proposes an international criminal justice of a deontic type. It is a kind of justice “based on certain substantive moral principles that must be applied regardless of their practical consequences, for the sake of the moral values inherent in them. Deontic justice is usually discussed as the antipode of *consequentialist* justice, which discriminates between morally justified and unjustified actions on the basis of the actions’ consequences.”⁶⁹⁴

⁶⁹⁰ “I have always been an advocate of the distinction. Let me be clear about that. But I always understood that the point was to reflect that international crimes were crimes that shocked the conscience of humanity”, Geneva Symposium, 9 – 11 July 2009, Session 6, p. 46

⁶⁹¹ Vandeveld J. Kenneth, *Thinking Like a lawyer: An Introduction to Legal reasoning*, Westview Press, Boulder, Colorado, USA; and Cumnor Hill, Oxford, UK, 1996, p. 2

⁶⁹² *Ibidem*, p. 11; see also Malekian who posits that:

The function of the [International] court or tribunal is to examine the conditions and the circumstances of a given case, to judge the acts of the accused person in accordance with the existing law, and to find out whether or not the acts violate the governing international criminal regulations. The final duty of the tribunal is thus to arrive at a reasonable understanding of the rules of international criminal law, apply them to a given case, and if the person is found guilty of committing an international crime, impose an appropriate punishment.

Malekian Farhad, “Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal”, *op. cit.*, p. 676

⁶⁹³ Fatic Alexander, *Reconciliation via the War Crimes Tribunal?*, Ashgate, Aldershot, England, 2000

⁶⁹⁴ *Ibidem*, p. 29

Before the *ad hoc* tribunals, individuals stand accused of serious violations of international humanitarian law. In addition to that, there are State interests that come into play in the background. But justice will still play its role if in this system justice is understood as, no more and no less, “the contour between the actual acts of a person on one side and the understanding of the act by the international legal community on the other side.”⁶⁹⁵ To borrow from Fatic again;

allowing *consequentialism* into the picture of justice here would inevitably lead the individual being subjected to a web of state interests in the international arena, and thus sacrificed, or – probably more rarely – privileged and excused from responsibility, according to political considerations and state interests that have little or nothing to do with one’s actual actions and intentions, and thus with one’s actual guilt and responsibility according to accepted moral standards.⁶⁹⁶

This practice deeply offends the common sense of morality and individual rights, and erodes the practical pillars of feasibility and compliance whereupon the system of international justice is supposed to stand.⁶⁹⁷ Justice then, becomes a casualty of a political calculation.⁶⁹⁸ Fatic finally argues that:

it goes without saying, of course, that for international justice to be a true justice, to be morally justified, the real motives, should be right, namely charges should be brought up out of a sincere desire to fulfil moral justice and effect a true reconciliation between the peoples by assigning the blame for atrocities to those who are really guilty, thereby releasing from collective guilt those who are not guilty.⁶⁹⁹

Against this conclusion full of reason, realism and practicability, Fatic disappointedly remarks that in contemporary international politics such sincerity is scarce. The major actors at the international scene are acting much more out of particular political interests of their ruling elites, than on the basis of any authentic moral motives.⁷⁰⁰

Out of the pursuit of justice comes injustice in the philosophical thought of Aristotle. As far as the virtue of justice is concerned, the ‘mean’ virtue is the middle ground between two extreme

⁶⁹⁵ Malekian Farhad, op. cit., p. 676

⁶⁹⁶ Fatic Alexander, op. cit., p. 30

⁶⁹⁷ Id.

⁶⁹⁸ Jonathan Allen, “Balancing justice and social unity: Political theory and the idea of a truth and reconciliation commission”, *University of Toronto Law Journal*, Vol. 49, Iss.3, 1999, pp. 315 – 353, p. 315

⁶⁹⁹ Fatic Alexander, op. cit., p. 32 (footnote 4)

⁷⁰⁰ Id., p. 32

“injustices”: the “injustice” of insufficiency and the “injustice” of excessiveness. Aristotle advises that in making moral judgment, one should choose the middle ground value.⁷⁰¹

Some international practitioners will rhetorically argue that they are guided by codes of professional ethics. But when it comes to implement those codes, it appears that they have no value beyond being instruments of social and political propaganda.⁷⁰² Others do not comply with their oath of office, even though it is considered as sacred – presumably because it solicits God’s help, it becomes an insignificant formality.⁷⁰³ Finally, some practitioners are rewarded primarily for their loyalty to superiors and mentors, or financiers. Souryal offers a concluding remark to such behaviour by saying that “such observations, if true, are troubling because they are “inconsistent (if not outright contradictory) with the basic tenets of truth, professionalism, and moral responsibility.”⁷⁰⁴

4.2.2. Justice delivered at the ICTR

Choosing the ICTR to illustrate the issue of justice is not creating an imbalance between the two cases studied in this research. It is also not suggesting that the ICTY has been perfect in delivering justice for the former Yugoslavia in a consistent and sustainable manner. It is only an approach among others. Suffice to say, as remarks Peskin, that “the crimes committed in the Balkan and Rwandan conflicts have been overshadowed by the enormity of the crimes committed by the losers. Especially in the Rwandan context, the Tutsi are viewed internationally as victim, because they were the target of the genocide.”⁷⁰⁵ For the former Yugoslavia however, the message that a crime is a crime irrespective of who committed it has reached Muslims, Croats as well as Serbs. The tribunal took no sides.⁷⁰⁶ At the ICTR no such a thing happened.

⁷⁰¹ Souryal, op. cit., p. 143 – 144

⁷⁰² Idem, p. 200

⁷⁰³ Id.

⁷⁰⁴ Id.

⁷⁰⁵ Peskin Victor, “beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda”, op. cit., p.215

⁷⁰⁶ Scharf P. Michael & Schabas A. William, op. cit., p. 101

In 1994 and even before, the conflicting parties in Rwanda undisputedly committed serious violations of international humanitarian law punishable under the ICTR Statute. The ICTR delivered a partial justice because it failed to investigate and prosecute the crimes committed by the RPF. There is no acceptable reason why this happened. Even the Rwandan Government never denied that RPA soldiers committed serious human rights abuses in 1994.⁷⁰⁷ The violations have been widely documented by commissioned UN inquiries, governmental and nongovernmental organisations and other non-interested parties. According to Peskin:

in the common narratives of the genocide, there is relative silence about the extent of Hutu suffering and the role of the Tutsi-led Rwandan Patriotic Front army (RPF) in atrocities against Hutu civilians. The lack of international scrutiny of RPF war crimes has prevented a clear understanding of the extent of the killings and the possible role of the RPF leadership, including the current Rwandan President, Paul Kagame. In a real sense, therefore, the history of the 1994 conflict – as well as the role the RPF in Rwanda and neighbouring Congo since then – has not been written.⁷⁰⁸

The UNSC established the ICTR to prosecute persons responsible for serious violations of international humanitarian law committed in Rwanda or by Rwandan citizens committed outside Rwanda from 1st January 1994 until 31 December 1994. Nowhere in the Statute of the ICTR does the UNSC clearly indicate that the tribunal was specifically created for the only and sole purpose of prosecuting perpetrators of genocide. Making such a statement does not demean the seriousness and gravity of genocide as a crime of crimes that necessitated particular attention. The Statute provides for the prosecution of genocide, crimes against humanity and war crimes. Moreover, the persons who have been prosecuted by the Arusha-based tribunal were charged and answered to those three categories of crimes. Chief Prosecutor Jallow stated at a Geneva Symposium that: “We are mandated to prosecute on the three specific offences: genocide, war crimes, and crimes against humanity.”⁷⁰⁹

Some people have blindly insisted that there exists no evidence or that such evidence was insufficient to conclude that the RPF committed genocide against the Hutu population of Rwanda. Such an argument is regrettably founded on the unwillingness or partial investigations

⁷⁰⁷ Eltringham Nigel, *Accounting for horror: Post-Genocide Debates in Rwanda*, op. cit., p. 144

⁷⁰⁸ Peskin Victor, “beyond Victor’s Justice? Op. cit., p. 216

⁷⁰⁹ *International Criminal Tribunal for Rwanda: Model or counter model for International Criminal Justice?: The perspectives of the Stakeholders*, International Symposium, Geneva, 9 – 11 July 2009, Session Six, Intervention by Prosecutor Hassan B. Jallow, p. 12

of those crimes.⁷¹⁰ Investigators have acknowledged that they could not thoroughly gain access to RPF controlled zones for investigations. What they say is that crimes have been committed. What they do not know is the extent to which a proper legal characterisation was possible. There is therefore no sound base for ruling out that such crimes could, if properly investigated, be characterised as genocide. In this regard, Burke suggests that in social sciences it is common that:

people are incapable of evaluating the strength of evidence independent of their prior beliefs. People not only demonstrate search and recall preferences for information that tends to confirm their pre-existing theories, they also tend to devalue disconfirming evidence, even when presented with it. As a result of selective information processing, people weigh evidence that support their prior beliefs more heavily than that contradicts their beliefs.⁷¹¹

On one hand, the abundant evidence was collected to confirm and comfort the Tutsi genocide theory. On the other hand, the collection of evidence tending to prove that there could have been a genocide directed against the Hutu population was either frustrated or, where such evidence was available, it was not provided with thorough attention.

In any event, however, and only considering the situation as it now stands, the crimes committed can be characterised as crimes against humanity or war crimes. In addition, the practice of the diverse Trial and the Appeals Chambers of the ICTR is consistently that factual findings for the crime of genocide are almost the same as the ones for crimes against humanity and war crimes. The only difference being the special intention required for the crime of genocide.

The ICTR has been, on many occasions, reminded of its obligation under the Statute. For example, Nyemera complained that six years after the creation of the ICTR, it has only prosecuted those who lost power in Rwanda in 1994 and no one from the victorious RPF who continued to enjoy impunity for crimes committed in Rwanda and those being committed in the

⁷¹⁰ See for instance International Panel of Eminent Personalities (2000) Rwanda: The Preventable Genocide U/IPEP/PANEL, available online at <http://www.oau.oua.org/Documents/ipep/rwanda-e/EN.html>, Chapter 22, accessed on January 15, 2005; Gowen Nik "New Challenges and problems for Information Management in Complex emergencies" Background paper to "Dispatches from disaster zones : the reporting of humanitarian emergencies", conference, Westminster, London, 28 May 1998

⁷¹¹ Burke S. Alafair, "Improving prosecutorial decision making: some lessons of cognitive science", *William and Mary Law Review*, Vol. 47, Iss.4, 2006, pp. 1587 – 1633, pp. 1596 - 1597

DRC since 1996.⁷¹² In 2007, Amnesty International reiterated the call for justice for all parties. Amnesty observed that for any justice system to operate effectively, it must be impartial. Amnesty was however deeply concerned that no crimes committed by members of the Rwandese Patriotic Front (RPA) during 1994 have been adequately investigated and prosecuted by national authorities.⁷¹³ The ICTR has also failed to investigate these crimes promptly, thoroughly, independently and impartially.⁷¹⁴ No prosecution has so far taken place which undermines the credibility of the ICTR and its effectiveness.

One meritorious explanation, among others, of all ICTR successive prosecutors' failure "to indict any RPF members for atrocities against Hutu" is the "fear that they will lose the much-needed cooperation of Paul Kagame's government, a circumstance that may in fact have emboldened the Rwandan government to use the judicial process to eliminate political opponents by implicating them in the genocide."⁷¹⁵ Inside the Office of the Prosecutor, it will never transpire that fearing Rwandan refusal of cooperation is the sole reason of the ICTR inertia to prosecute RPF. Though the prosecution acknowledges that it falls in its mandate to investigate and prosecute crimes committed by the RPF⁷¹⁶, nothing visible has been done until the tribunal closed its doors.

⁷¹² Nyemera Emmanuel, One-Sided Justice at the Rwanda Tribunal, available at <http://www.emperors-clothes.com/analysis/rwanda2.htm>, accessed on August 10, 2009; see also Laughland who argues that "Indeed, no one from the RPF and no Tutsi has ever been prosecuted by the tribunal; all the defendants are from the defeated regime, even though the RPF undoubtedly also committed atrocities when it seized power"; Laughland J., *A History of Political trials: From Charles I to Saddam Hussein*, Peter Lang Oxford, 2008, p. 211

⁷¹³ Amnesty International, "Rwanda: Suspects must not be transferred to Rwandan courts for trial until it is demonstrated that trials will comply with international standards of justice", Amnesty International, November 2007, AI Index: AFR 47/013/2007

⁷¹⁴ Ibidem, footnote 2

⁷¹⁵ Lutz L. Ellen & Reiger Caitlin, Conclusion, in Lutz L. Ellen & Reiger Caitlin (ed.), *Prosecuting Heads of State*, Cambridge University Press, New York, 2009, p. 279

⁷¹⁶ *International Criminal Tribunal for Rwanda: Model or counter model for International Criminal Justice?: The perspectives of the Stakeholders*, International Symposium, Geneva, 9 – 11 July 2009, Session Six, Intervention by Prosecutor Hassan B. Jallow, at pp. 11- 12. According to Chief Prosecutor Jallow:

The OTP has never taken the position that it does not regard the investigation or prosecution of these allegations as falling outside its mandate. It's always been recognised by the OTP through Prosecutors and successive Prosecutors. And I have seized the opportunity within the Security Council to reiterate in several meetings that we do recognise this obligation and we intend to discharge it and we've been taking steps to help us discharge that obligation. The impression that there has been delaying tactics or nothing has been done is also not accurate. Obviously this is a very difficult area to deal with, but a lot of work, investigatory work has gone in, has taken place, over the years. And the Rwandan government is totally aware and is in the picture as to what is going on. Since the termination of the suspension of their cooperation during my

It is one possibility that the prosecution may have done nothing to investigate and prosecute any member of the RPF. It is not that evidence was lacking or that raising this issue bears any indication whatsoever that anyone was attempting to improperly influence the prosecutor. Had the prosecution wished to investigate and prosecute RPF crimes, it could not have lacked evidence. Another possibility is that the prosecutor had enough evidence to proceed; but chose not to prosecute on grounds alien to normal prosecution functions. Considering the interconnection between the OTP and the judges at the ICTR, particularly through the President of the Tribunal, the judges could not ignore that the tribunal's mandate includes the prosecution of crimes committed by the RPF. Yet they remained silent in the face of this revolting prosecution's tactics. Pursuant to this reality, it is really difficult to say that the ICTR, as an UNSC judicial institution, delivered justice effectively. This inaction has impact on other goals of criminal prosecution.

4.3. Traditional objectives of criminal prosecution attainable through *ad hoc* tribunals: crime deterrence, the fight against impunity, retribution and incapacitation

In domestic jurisdictions, “there exist several ideological bases which serve to justify the institutionalization of punishment, including justice, retribution, and deterrence.”⁷¹⁷ These theories and others have been tested in those same jurisdictions. It is a fact that on the international level, the meaning and quality of these theories are still poorly reflected. This, according to Zolo, “risks leading to an insufficient or even inconsistent elaboration on the general principles of international criminal law.”⁷¹⁸ Some of these theories may even be

predecessor's time, the investigations have resumed, and several matters have been looked at, and they are perfectly aware of that. But like all the cases we do, whatever we decide has to be based on the evidence that is available. We have to try and make sure information that is available is really converted into evidence that can be of use in court, evidence which gives us a reasonable chance of convincing a Court on whatever it is that we are proposing. That is the basis on which we have to proceed and no other considerations. And we have to proceed also having due regard and respect for the independence of the Office of the Prosecutor. It is not important just for the state, not just for Rwanda. It's independence in relation to states, to Organisations, to individuals. We can't accept any attempts to improperly influence the position of the Office of the Prosecutor in this respect.

⁷¹⁷ Brooker Frank, The deterrent effect of punishment, *Criminology*, Vol. 9, Iss.4, 1972, pp. 469 – 490, p. 469

⁷¹⁸ Zolo Danilo, “Peace through Law?”, *Journal of International Criminal Justice*, Vol. 2, Iss.3, 2004, pp. 727 – 734, p. 728. Zolo goes further suggesting that the “underdeveloped elaboration may, in turn, lead to uncertainty and

unnecessary in international criminal prosecutions. The inquiry here therefore, is to find out how they can serve as a basis of any discussion toward the goal of punishment in international criminal law.⁷¹⁹

One of the objectives the UNSC intended to achieve by prosecuting the perpetrators of crimes in the former Yugoslavia and Rwanda was to put an end to such crimes. The means to that end consisted in taking effective measures to bring to justice the persons who were responsible. This judicial approach, in the belief of the UNSC, could deter potential criminals from committing acts of aggression or massive human rights violations if they realise they cannot act with impunity.⁷²⁰ The assumption is that prosecution becomes a deterrent of crimes in situations of armed conflict. This section analyses what deterrence and the fight against impunity entail before exploring the contours of retribution and incapacitation in the perspectives of the *ad hoc* tribunals.

4.3.1. Crime deterrence and the fight against impunity

Deterrence and the fight against impunity go hand in hand, especially in the field of international criminal law. If deterrence succeeds, impunity may be eradicated. According to Farooq deterrence serves as a preventive measure for future mischief.⁷²¹ This is not absolutely granted. The reason is that even in domestic jurisdictions “punishment does not deter those whose lives are already no better than any punishment that society can devise: it does not improve the morals of those who are closed to change.”⁷²² Conversely, if the tiny effect of deterrence fails, impunity is cultivated and entertained. Theoretically, deterrence reminds us that “international law does not allow its most flagrant violators impunity.”⁷²³

confusion, both in constructing rules and the broad trend in the judicial making of substantive and procedural law that characterizes international criminal justice today. The outcome might be inconsistent sentences that are unsuitable to the goals of criminal justice.”, *Ibiden*, p. 728

⁷¹⁹ See generally Farooq Hassan, “The theoretical basis of punishment in International Criminal Law”, *Case Western Reserve Journal of International Law*, Vol. 15, Iss.1, 1983, pp. 39 - 60, p. 49

⁷²⁰ Smidt L. Michael, *The International Criminal Court: An effective means of deterrence?*, op. cit., p. 157

⁷²¹ Farooq Hassan, op. cit., p. 57

⁷²² Doleshal E., (1962), “The deterrent effect of legal punishment – a review of the literature.” *National Council and Crime and Delinquency* 1, 7: 1 – 17, cited in Brooker Frank, *The deterrent effect of punishment*, *Criminology*, Vol. 9, 1971 – 1972, pp. 469 – 490, p. 473

⁷²³ Farooq Hassan, “The theoretical basis of punishment in International Criminal Law”, op. cit., p. 60

By deterrence, criminal prosecutions seek to send a message that those who commit any crimes, especially serious crimes, will not go unpunished. Deterrence is also believed to be the widely advocated justification for punishment pursuant to a comparative analysis of different legal systems.⁷²⁴ Some literature suggests that “deterrence is the real motive behind the infliction of punishment.”⁷²⁵ On face value, the theory of deterrence goes as follows: “if one wrongdoer can be made uncomfortable with the infliction of evil or unpleasant consequences, it will deter others and thus keep the order of the society intact.”⁷²⁶ Deterrence is therefore aimed at maintaining social control. It is a utilitarian concept of punishment, though its shortcomings need to always be borne in mind.

The role of the criminal law is generally “to protect the public and to deter crime.”⁷²⁷ This is a positivist approach of criminal law legislators. There is, however, a moral assumption which is more hypothetical than real, which is that “the basis of deterrence has been considered to be fear of the severity of the sanctions”⁷²⁸ or the sanctions themselves. In fact, deterrence is most successful when the actual use of the force of law is not required.⁷²⁹ This means that any person who commits a particular serious crime resulting in extensive harm or damage calls for an action to deter a reoccurrence of such a crime to protect the public against him.⁷³⁰ Whether this sends a moral message to individuals or remains a positive assumption of the legislator, still remains to be tested.

⁷²⁴ Farooq Hassan, op. cit., p. 48

⁷²⁵ Farooq Hassan mentions writings of Kant, *Philosophy of Law in Reading in Jurisprudence and Legal Philosophy* 320 (Cohen & Cohen eds. 1951), O. W. Holmes, *Punishment, Morals and the External Standards (from Lecture II)* in *The Common Law* 43-45 (1881); Platt, *The meaning of Punishment*, 2 *Issues in Criminology* 79 (1966), cited in Farooq Hassan, op. cit., p. 49

⁷²⁶ *Ibidem*, p. 48

⁷²⁷ Nsereko N. Daniel, “Prosecutorial discretion before national courts and international tribunals”, *Journal of International Criminal Justice*, Vol. 3, Iss.1, 2005, pp 124 – 144, p. 130

⁷²⁸ Brooker Frank, *The deterrent effect of punishment*, op.cit., p. 477

⁷²⁹ Smidt L. Michael, “The International Criminal Court...” op. cit., p. 167

⁷³⁰ *Ibidem*, p. 130

Wippman suggests that prosecuting international crimes “can serve to deter the commission of future atrocities”⁷³¹ or as a means for the prevention of future atrocities.⁷³² According to Bassiouni, “for many, deterrence is the most important justification and the most important goal.”⁷³³ Deterrence is also the argument most often advanced by supporters of the ICC.⁷³⁴ However, Wippman dismisses this view because experience has proven that “the connection of international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption. Actual experience with efforts at deterrence is not encouraging.”⁷³⁵ Moreover, “in practice, the tribunals seem ill-equipped to satisfy this ambition.”⁷³⁶ Bassiouni believes that this “is based on the general assumptions of deterrence that exists in domestic criminal justice system.”⁷³⁷ What discourages is the lack of international prosecutions that have a deterrent goal in mind. Prosecution did not deter the commission of crimes either in the former Yugoslavia or in Rwanda.

As Bassiouni puts it, “the assumptions about deterrence and enforcement are substantially different, as are other factors regarding capacity. International prosecutions and their numbers will always be more restricted than their counterparts in national contexts”.⁷³⁸ Bassiouni does not say, however, why this must always be so, as if it was a matter of principle. One may nevertheless agree with him regarding the fact that all the international crimes perpetrators

⁷³¹ Wippman David, “Atrocities, deterrence, and the limits of international justice”, *Fordham International Law Journal*, Vol. 23, Iss.2, 1999, pp. 473 – 488, p. 473; also Ku Julian & Nzelibe Jide, Do international criminal tribunals deter or exacerbate humanitarian atrocities?, op. cit.

⁷³² Bassiouni M. Cherif, “Perspectives on International Criminal Justice”, op. cit., p. 285

⁷³³ Idem, p. 474

⁷³⁴ Bassiouni M. Cherif, *The statute of the International Criminal Court: a documentary history 1-2* (1998); Mark J. Ossiell, Never Again, Legal remembrance of Administrative Massacre, 144 U. PA. L. REV. 463 (1995); Accountability for International Crimes and Serious Violations of Fundamental Human Rights, 59 *LAW & CONTEMP. PROBL.* (1996), cited in Major Michael L. Smidt, “The International Criminal Court: An effective means of deterrence?”, *Military Law Review*, Vol. 167, 2001, pp. 156 – 240, p. 187

⁷³⁵ Id. Bassiouni finds nevertheless the existence of “anecdotal data that the prospects of international criminal prosecutions bring about some deterrent effect in a given conflict, as was the case in the conflict in the former Yugoslavia from 1991 to 1995”, Bassiouni M. Cherif, “Perspectives on International Criminal Justice”, op. cit., p. 294

⁷³⁶ *Developments in the Law: International Criminal Law*, op. cit., p. 1964

⁷³⁷ *Ibidem*, p. 294

⁷³⁸ Idem, p. 319; see also Boot-Matthijssen Machteld, “The International Criminal Court and International Peace and Security”, *Tilburg Foreign Law Review*, Vol. 11, Iss.2, pp. 517 – 536, p. 528. The question is:

whether the threat of punishment will refrain potential perpetrators from engaging in criminal conduct. While in national contexts these effects are relatively small, it can be expected that there are even less in the case of crimes such as genocide and war crimes – crimes that are committed regularly on the basis of political motives, and to that extent differ from ordinary theft and murder. “

cannot be prosecuted due to capacity constraints. Said differently, deterrence is more uncertain in international prosecutions. The reason may be that, according to Ku and Nzelibe, “international tribunals are not likely to have independent police powers in the foreseeable future” and that “the actors most likely to face prosecution are individuals in weak states who have failed politically. In other words, the likely pool will be composed of individuals in weak states who have been forced from political power by foreign forces.”⁷³⁹ Ku and Nzelibe’s opinion adds to the many other factors that bar the deterrent effects of international prosecutions. International prosecution lacks the will to deter; it lacks manpower capacity to enforce compliance. It cannot realise the full effects of deterrence.

To the extent that the deterrence goal is a key issue, there needs to be an effort to remove other impediments not related to capacity. For instance, Sudhakar places such impediments at the very foundation, namely that deterrence may be secured when appropriate attention is equally given to particular situations by the Security Council. Sudhakar recognises, however, that “if the Council members, or their allies, or their interest is involved in those situations the Council may or may not take any concrete action in establishing”⁷⁴⁰ or supporting *ad hoc* tribunals. This is the crucial knot that needs to be undone, and the Council has all the possibilities to this end. What lacks is the willingness because the so-called interests are not always legally and morally justified. Sudhakar pinpoints where the problem lies. According to him “the selective

⁷³⁹ Ku Julian & Nzelibe Jide, “Do international criminal tribunals deter or exacerbate humanitarian atrocities?” *op. cit.*, p. 778; Graham Blewitt, a former Deputy Prosecutor of the ICTY is also of the same opinion. He spoke at the early beginning of the proceedings but his predictions are relevant in the whole life of an international *ad hoc* tribunal. For him, at the beginning of the ICTY work there were not many suspects in custody of the tribunal and thus the prosecution had only to rely on the construct of the Statute establishing the tribunal. First the prosecutor must be satisfied by the existence of a *prima facie case* against an accused. The prosecutor will then draft an indictment that will be confirmed by a Trial judge, who will then issue an international arrest warrant. The warrant will be circulated anywhere the suspect is believed to be hiding. Because the tribunal was established under Chapter VII of the UN Charter, States have an obligation to comply. If the accused is not found or does not surrender, the prosecutor represents the indictment and calls evidence upon which the indictment is based. This evidence will be read in public. If the accused is a political figure and eventually manages to evade the court, he will be restricted in his movements locally or abroad or both. This may bar the accused from governing because of a lack of confidence. A political opponent who takes over may surrender the accused. Blewitt believes that this scenario is needed to set up a deterrent effect to stop future atrocities and crimes, see generally The Fifth Annual Ernest C. Stiefel Symposium: 1945 – 1995: Critical Perspectives on the Nuremberg Trials and State Accountability, Pane III: Identifying and prosecuting war crimes, *New York Law School Journal of Human Rights*, Vol. 12, 1994 – 1995, pp. 631 – 688, at pp. 635 - 639

⁷⁴⁰ Sudhakar T.V.G.N.S., “International Criminal Justice: an analysis of international criminal judicial institutions”, *op. cit.*, p. 18

application of international law by the UNSC is a cause for grave concern to the international community. It also undermines the quest for international justice.”⁷⁴¹

Optimistically, Groome suggests that, for international prosecutions to have or achieve their deterrent effect, “they must be conducted in a way that can leave no doubt that the international community’s resolve to end impunity is not larger than its capacity to do so.”⁷⁴² Such a resolve is still piecemeal. Groome additionally contends that ‘any consideration of trial methods must look further than the immediate considerations of individual trials incorporating larger strategic considerations of ensuring predictable accountability for all senior political, military or police officials likely to commit crimes.’⁷⁴³ The attitude of the UNSC unfortunately perpetuates the culture of impunity and does not facilitate the deterrent goal of criminal prosecution, to say the least.

The fight against impunity has also featured in the literature of international criminal prosecutions. The Preamble to the Rome Statute of the ICC recalls the determination “to put an end to impunity” for the perpetrators of “the most serious crimes of concern to the community as a whole.” It also states that those crimes must not go unpunished. Despite this firm determination, no attempt has been made to define the term “impunity.” The statutes of the *ad hoc* tribunals have also failed to provide a common understanding of this term. The lack of a definition creates unnecessary misunderstanding, controversy and confusion in implementation. Zolo stresses that “international criminal justice has not yet proven to be capable of remedying widespread impunity, except to a minor degree and with normative ambiguities.”⁷⁴⁴ A definition of this term is therefore warranted following the one of deterrence.

Impunity is the situation in which a person who has committed violations of international humanitarian law sheds himself or herself from being investigated, charged, prosecuted and punished to the extent of the crimes he or she has committed. In avoiding prosecution the person may be assisted by others or take advantage of the position of authority he or she holds

⁷⁴¹ Ibidem, p. 19

⁷⁴² Groome M. Dermot, “The Future of International Criminal Justice...”, op. cit., p. 800

⁷⁴³ Idem, p. 800

⁷⁴⁴ Zolo Danilo, “Peace through Law?”, op. cit., p. 730

at the time he or she commits the crime or thereafter. Harper adds that impunity can be achieved through amnesty laws or presidential pardons passed or decreed by governments under whose authority the crimes were committed or by a successive government. Impunity can also occur by default – the deliberate lack of any action.⁷⁴⁵

Joinet, a French expert, in his draft of the *UN Project of a Set of Principles on Impunity*⁷⁴⁶ suggests that:

Impunity means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subjects to any inquiry with a view to their inculpation, detention, indictment and, if found guilty, conviction, including their obligation of compensation to their victims for the damages caused.⁷⁴⁷

Crimes have been committed and authors have not been identified and/or punished. Perpetrators may have been identified, yet no actions have been taken against them. But impunity may also be the “*de facto* or *de jure* absence of criminal, administrative, disciplinary or civil responsibility and the ability to avoid investigation and punishment.”⁷⁴⁸ It is obvious that an individual cannot, by himself or herself avoid criminal accountability in a normally functioning democratic state. He or she must be covered under the umbrella of a system in which he or she has authority, influence or strong connections. It is an institutional failure to uphold the rights of the victims.

According to Harper, “the reasons for this failure may be a lack of political will or insufficient power to impose the rule of law upon powerful offending sectors of society, like the armed

⁷⁴⁵ Harper Charles, op. Cit. p. ix

⁷⁴⁶ Set of Principles for the protection and promotion of human rights through action to struggle against impunity, in UN Doc. E/CN.4/Sub.2/1997/20 (26 June 1997), cited in Mattarollo R., “Impunity and International Law”, *Revue Québécoise de Droit International*”, Vol. 11, 1998, pp. 81- 94, p. 89

⁷⁴⁷ Ibidem. More precisely, Principle 20 of the *Joinet Principles* emphasises that “Impunity is a failure of States to meet their obligations to investigate violations, take appropriate measures in respect of perpetrators, particularly in the area of justice, to ensure that they are prosecuted, tried and duly punished, to provide the victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.”

⁷⁴⁸ Agreement between the United Nations and the State of Guatemala on the Establishment of an International Commission Against Impunity in Guatemala (“CICIG”), U.N.-Guat., Dec. 12, 2006, available at http://www.un.org/Depts/dpa/CICIG_English.pdf, cited in Megan K. Donovan, “The International Commission Against Impunity in Guatemala: Will accountability prevail?”, *Arizona Journal of International & Comparative Law*, Vol. 25, No. 3, 2008, pp. 779 – 824, p. 781

forces.”⁷⁴⁹ Impunity may concern an individual, a group of people, or a system in a given timeframe. Eltringham is of the opinion that:

Ending impunity should not be confused with simply finding people guilty. Rather, it entails a consistent and coherent effort to respond to all allegations of human rights abuses in a dogmatic and transparent way. Demonstrating that allegations are untrue is as much a part of demonstrating that impunity has ended as convicting those found responsible.⁷⁵⁰

Penrose schematises impunity as “the torturer’s most relished tool. It is the dictator’s most potent weapon. It is the victim’s ultimate injury. And, it is the international community’s most conspicuous failure. Impunity continues to be one of the most prevalent causes of human rights violations in the world.”⁷⁵¹ Ideally, “holding perpetrators fully accountable would entail appropriate trial and punishment of each responsible individual for the actual crimes committed.”⁷⁵² This is when impunity may be said to be curbed. Unfortunately, as Morris observes “national and international efforts at achieving accountability for such offences typically resort to means designed to render fault without full accountability.”⁷⁵³

Morris points to three categories of constraints that jeopardize full accountability, then cultivating impunity. She cites political constraints, resources that are required and lack of will at national and international levels.⁷⁵⁴ Each of these constraints alone or altogether may be enough to facilitate impunity. However, globally what does impunity entail? Simply defined therefore, and as a principle, impunity is the opposite of accountability for serious violations of international humanitarian law. *Ad hoc* tribunals have been at odds to combat impunity in their areas of jurisdiction. Territorially, materially, personally and temporary, the tribunals have failed.

⁷⁴⁹ Ibidem, p. ix

⁷⁵⁰ Eltringham Nigel, *Accounting for horror: post-Genocide Debates in Rwanda*, Pluto Press, London, Sterling, Virginia, 2004, p. 146

⁷⁵¹ Penrose M. Margaret, “Impunity – Inertia, Inaction, and Invalidity: a literature review”, *Boston University International Law Journal*, Vol. 17, Iss.2., 1999, pp. 269 – 310, p. 270

⁷⁵² Morris H. Madeline, “International Guidelines against impunity: facilitating accountability”, *Law and Contemporary Problems*, Vol. 59, No. 4, 1996, pp. 29 – 39, p. 30. The article of Morris figures among many contributions towards combating impunity, all of which appeared in volume 59 of *Law and Contemporary Problems* in 1996. In her foreword Morris introduces the contributions that highlight the purposes of seeking accountability, the wide variety of mechanisms of accountability. She also put the question about “which of the available mechanisms for accountability should be used in which circumstances.” Morris H. Madeline, Foreword, *Law and Contemporary Problems*, Vol. 59, No. 4, 1996, pp. 1 – 3.

⁷⁵³ Morris H. Madeline, International Guidelines against impunity: facilitating accountability, op. cit., p. 30

⁷⁵⁴ Morris H. Madeline, op. cit., p. 30

4.3.2. Retribution and incapacitation

Besides deterrence and the fight against impunity, retribution is the other justification of punishment, though it is no longer considered as its main purpose.”⁷⁵⁵ De Blois suggests that “a human being should receive what he or she deserves. This can be termed as retribution or reciprocity. This idea is firmly established in the theory of the law since antiquity and in the practice of the law today.”⁷⁵⁶ This is true not only for criminal law, but also for private law and other sectors of law.⁷⁵⁷ Haque calls it a “proportionality principle.”⁷⁵⁸ In John Rawls’ theory, “the retributive view is that punishment is justified on the ground that wrongdoing merits punishment.”⁷⁵⁹ Retributive justice would be the proportional punishment of criminals according to the seriousness and gravity of their crimes. Justice ensures that everyone receives what he or she deserves.⁷⁶⁰ Zolo posits that this “afflictive punitive justice sees deviant behaviour as a breach of an objective order – a violation of the universal harmony of the cosmos. To punish, and to pay for, is to restore the ontological equilibrium undermined by illegal or immoral behaviour.”⁷⁶¹

Basing his argument in Grotius’ theory of criminal law, De Blois considers punishment as “an evil of suffering which is inflicted because of an evil in action. It is, in other words, evil for evil.”⁷⁶² When a person undertakes to do wrong, he or she must expect a punishment commensurate to the wrong he or she has done. Such a punishment is justified. Haque emphasizes that:

the offender’s violation of the victim’s right gives rise to a duty of the punishing agent, owed to the victim, to punish the offender. The legitimate authority of the punishing agent derives from its reciprocal

⁷⁵⁵ Swart , A.H.J, “Comments on teaching International Criminal Law”, *Touro Journal of Transitional Law*, Vol. 1, 1988 – 1990, pp. 335 – 352, p. 341

⁷⁵⁶ Posner A. Richard, “Retribution and Related Concepts of Punishment”, *Journal of Legal Studies*, Vol. 9, 1980, pp. 71 – 92

⁷⁵⁷ De Blois Matthijs, “Justice: Retribution of Reconciliation...”, op. cit., pp. 103 – 104; likewise Zolo traces the retributive view of punishment back to the Bible and that it was given its most typical form in Catholic medieval theology; Zolo Danilo, “Peace through Law?”, op. cit., p. 733

⁷⁵⁸ Haque A. Ahmad, *Group Violence and Group Vengeance....*, op. cit., p. 277

⁷⁵⁹ John Rawls, *two Concepts of Rules*, 1 *Philosophical Rev.* 3, 4 – 5 (1955), cited in Posner A. Richard, “Retribution and Related Concepts of Punishment”, op. cit., p. 71

⁷⁶⁰ De Blois Matthijs, *Justice*: op. cit., p. 104

⁷⁶¹ Zolo Danilo, “Peace through Law?”, op. cit., p. 733

⁷⁶² De Blois Matthijs, op. cit. p. 107

relations with the victim to whom the duty to punish is owed and with the offender from whose wrong the right to punish derives.⁷⁶³

Van den Haag maintains moreover that “according to just deserts theory, the seriousness of the crime alone should determine the punishment deserved. Seriousness, in turn, depends on the harm done and on the culpability of the offender. Surely both are relevant.”⁷⁶⁴ Be this as it may, Van den Haag questions what “just desert may be.”⁷⁶⁵ For him, “just desert fails even more fundamentally to tell us what is deserved for any crime. [...] just deserts seems to be a question masquerading as the answer. The question seems quite justified. Unfortunately no answer can be.”⁷⁶⁶ Van den Haag proposes a simple answer to the question he poses. He suggests that “to the extent to which a sentence is based on predicted recidivism, the sentence may not be what the crime deserves, if desert refers to the past, as it must.”⁷⁶⁷ This answer fails to cover the so-called just desert.

Just desert is probably covered by the suggestion that “retribution, like the associated concepts of retaliation, reprisal, reciprocation, and revenge, involves the idea of a victim whose rights the legal system seeks to vindicate.”⁷⁶⁸ This is a partial understanding, because “the just deserts theory tries to answer a moral question: what punishments are morally deserved?”⁷⁶⁹ Punishments are morally justified if they are proportional to the wrong done. But, Wootton rejects this idea of proportionality. His reason is that proportionality is premised on criminality as a “disease requiring treatment or as a condition requiring isolation”⁷⁷⁰ if it serves rehabilitation.

By analogy, Van den Haag argues that “diseases do not deserve blame; and treatments are neither just nor unjust, only effective or ineffective. Criminal behaviour obviously lacks the

⁷⁶³ Haque A. Ahmad, “Group Violence and Group Vengeance...”: op. cit., p. 278

⁷⁶⁴ Van den Haag Ernest, “Punishment: desert and crime control”, op. cit., p. 1253

⁷⁶⁵ Ibidem, p. 1253

⁷⁶⁶ Van den Haag Ernest, op. cit., pp. 1254-55

⁷⁶⁷ Ibidem, p. 1252

⁷⁶⁸ Haque A. Ahmad, op. cit., p. 280

⁷⁶⁹ Van den Haag Ernest, op. cit., p. 1256

⁷⁷⁰ Barbara Wootton, *Crime and the Criminal Law* 79 – 80 (1963), as quoted in Ernest van den Haag, *Punishment: desert and crime control*, *Michigan Law Review*, Vol. 85, 1986 – 1987, pp. 1250 – 1260, p. 1251

characteristics usually associated with disease, such as involuntariness and undesiredness.”⁷⁷¹ Zolo supports this view by suggesting that criminal punishment must neutralize dangerous deviant individuals and bring them back into society after disciplining and making them harmless.⁷⁷² Zolo dismisses however any suggestion that the retributive conception of criminal punishment may be reconciled with any project of social peace making.⁷⁷³

In the opinion of De Blois “retribution remains, however, a vital element, as long as only criminals are punished for their own faults and the seriousness of the crime is reflected in the nature and weight of the penalty.”⁷⁷⁴ In the view of Van den Haag “incapacitation here is not a punishment but a means of social protection. Although we cannot punish him or her for what he or she has not, as yet, done, we can incapacitate someone we know to be about to commit a murder.”⁷⁷⁵ There emerge therefore two ideas or aims of punishment, one aimed at the wrongdoer, and the other one aimed at protecting the society by the removal or confinement of the offender. But society still has other avenues to deal with the wrongdoer because “punishment is only one of several possible purposes of incapacitation, which can be imposed independently, as is done with the insane.”⁷⁷⁶

Cassese, once a judge at the ICTY, suggests that when the fighting and bloodshed have finally been brought to a close, one needs, among others, “to isolate those who have planned, ordered, or executed atrocities and to remove them from society so that they no longer exercise their pernicious influence.”⁷⁷⁷ But the enormity of crimes committed during the fighting engenders many offenders. Distinguishing those who bear the greatest responsibility becomes a difficult exercise. Which offenders must be dealt with first and to what extent should that be done? How to screen and be able to remove those most blameworthy? Selecting those to go after may miss the point.

⁷⁷¹ Ernest van den Haag, op. cit., p. 1251

⁷⁷² Zolo Danilo, “Peace through Law?”, op. cit., p. 733

⁷⁷³ Ibidem, p. 734

⁷⁷⁴ De Blois Matthijs, “Justice: Retribution of Reconciliation...”, p. 107

⁷⁷⁵ Van den Haag Ernest, op. cit., p. 1253

⁷⁷⁶ Ibidem, p. 1253

⁷⁷⁷ Cassese Antonio, “Clemency Versus Retribution in Post-Conflict Situations” (Friedman Award Address), *Columbia Journal of Transitional Law*, Vol. 46, 2007 – 2008, pp. 1 – 13, p. 3

Analyzing retribution through the prism of international criminal law, Farooq finds that retribution is not a significant part of the evolutionary trends of international criminal law. He nevertheless agrees that it was a definite component of at least the punishment awarded by the IMT of Nuremberg.⁷⁷⁸ Even if retribution could be justified in this context, it “does not appear to be the predominantly theory on the other post- World War II developments in this area.”⁷⁷⁹ This is probably the reason why “retributivist approaches to international criminal law are often dismissed for lack of fit with current practice.”⁷⁸⁰ This is more specifically so, because “international criminal prosecution seems too selective to satisfy the demands of retributive justice.”⁷⁸¹ Too many wrongdoers go unpunished; too many victims are forgotten or simply ignored, to borrow again from Haque.

Incapacitation likewise is “mitigated by the nature of the ICTY and ICTR’s political context. Prosecution is an inherently slow process.”⁷⁸² The design and practice of the *ad hoc* tribunals are also imperfectly suited to retributive ends.⁷⁸³

It is a fair assumption that the ICTR granted impunity for the crimes committed by the RPF in Rwanda to secure its cooperation in prosecuting genocide. This argument however falls short of balance if compared to the practice of the sister tribunal for the former Yugoslavia. The issue of state cooperation has been one of the most troublesome problems encountered by the

⁷⁷⁸ Farooq Hassan, *op. cit.*, p. 55

⁷⁷⁹ *Ibidem*, p. 55

⁷⁸⁰ Haque A. Ahmad, *op. cit.*, p. 275

⁷⁸¹ *Ibidem*, p. 275

⁷⁸² Developments in the Law: “International Criminal Law”, *op. cit.*, p. 1962. In this issue of the *Harvard Law Review*, the authors of the Developments remarked that:

if incapacitation is to be meaningful, tribunals must act quickly to have an effect before atrocities are essentially ‘complete.’ However, the political will to arrest – and therefore to incapacitate – indictees appears to depend of the existence of stable local conditions posing little risk for arresting troops. If local stability is a prerequisite to apprehension, prosecution may only proceed once the worst violations have already occurred.

⁷⁸³ The authors of this issue, moreover, citing other authorities, realise that:

If indictees are acquitted or excused on procedural grounds, the attempt to prosecute may not be sufficient to fulfill retributive purposes. Plea bargains may also compromise retributive aims, especially if the pleas appear to be motivated more by political concerns than by logistical necessity. Finally, given the moral magnitude of most violations of international humanitarian law, if effective retribution depends on the degree of punishment, then tribunal penalties deemed inadequate may not meet the mark.

Ibidem, p. 1970

Prosecutor of the ICTY. Despite this problem however, “the ICTY managed to issue 161 indictments against all factions in the Croatian, Bosnian and Kosovo wars.”⁷⁸⁴ The ICTY went as far as indicting highly placed individuals involved in the crimes, including President Slobodan Milosevic, Radovan Karadzic, General Ratko Mladic and Milan Milutinovic. Yet none of the highly placed criminals of the RPF in Rwanda has been indicted by the ICTR.

The ICTR’s failure to prosecute RPF crimes defeated the ends of deterrence, the fight against impunity, retribution and incapacitation. The consequences of this impunity did not take long to manifest. It proved that through the prosecution of crimes by the ICTR, the tribunal did not manage to deter future crimes. Renowned Yash⁷⁸⁵, appointed to look into the suitability of Rwanda to be admitted in the Commonwealth Community, reported that:

The RPF has used an extraordinary amount of violence, domestically and internationally. It has killed several thousand Hutus, citizens and others, and is responsible for the deaths of even more through displacement, malnutrition and hunger. It has denied hundreds of thousands of children the opportunity of education, and deprived millions of family and community life. It has conscripted child soldiers. The UN has voluminous documented these practices and repeatedly chastised Rwanda for its irresponsible behaviour in the DRC.⁷⁸⁶

The ICTR did not manage to deter RPF from expanding crimes to the Democratic Republic of Congo (DRC) where its army massacred tens and possibly hundreds of thousands of fugitive civilians from Rwanda.⁷⁸⁷ During those armed incursions, the RPA massacred Congolese civilians as well because of that sense of impunity. So the way in which justice has been miscarried in the ICTR has not contributed to peace in Rwanda and in the region.⁷⁸⁸ This is another UNSC objective that was hampered by the deliberate policy of the Rwanda Tribunal. The invasion of the DRC is a clear violation of international peace and security in the region of the Great Lakes of Africa. This, unfortunately, was a strategic objective that the tribunal was designed to achieve.

⁷⁸⁴ Haskell Leslie and Waldorf Lars, “The Impunity gap of the International Criminal Tribunal for Rwanda: Causes and Consequences”, *Hastings International and Comparative Law Review*, Vol. 34, 2011, pp. 49 – 85, p. 71

⁷⁸⁵ See his full report at [http://www.humanrightsinitiative.org/publications/hradvocacy/rwanda's application for membership of the commonwealth.pdf](http://www.humanrightsinitiative.org/publications/hradvocacy/rwanda's_application_for_membership_of_the_commonwealth.pdf)], accessed on 12 June 2013

⁷⁸⁶ Id.

⁷⁸⁷ Filip Reyntjens, *Prosecutorial Policies in the ICTR, op .cit.*

⁷⁸⁸ Filip Reyntjens, *Prosecutorial Policies in the ICTR, op .cit.*

4.4. Contribution to the restoration and maintenance of peace and security

4.4.1. Meaning of the terms “restoration” and “maintenance” of peace and security

As already seen in the introduction to this chapter, it was the UNSC’s conviction that the establishment of the *ad hoc* tribunals and their subsequent prosecution of “persons responsible for serious violations of international humanitarian law” would have an impact on the restoration and maintenance of peace and security. For the ICTY, such an impact was the tribunal’s intended contribution to the restoration of peace and security. The ICTR would contribute to such a process. The contention in this study is that *ad hoc* tribunals can hardly have such an impact. Indeed the ICTY and the ICTR did not contribute to the restoration and maintenance of peace or to the process thereof. The reasons for such a position follow.

Article 39 of the UN Charter empowers the UNSC to determine situations that constitute threats to peace and security. The Council may also decide measures in accordance with Articles 41 and 42 of the Charter to restore and maintain international peace and security. Yet, no clear definition is readily available for an understanding of the meaning of “restoration” and “maintenance” of peace and security. Without such a definition, it is impossible to assess the effectiveness of the ICTY and ICTR in this endeavour. What is peace? How does a process leading to peace look like? What role, if any, can an international criminal tribunal play in such a process? These are questions that are relevant to assess whether an international criminal tribunal can be effective in the process.

The word “peace” is “very simple and attractive.”⁷⁸⁹ Peace is not the antithesis of war. There are some legal ingredients that come into play to characterise a situation as “war.” However, “peace” becomes complicated somehow “as it involves many implications, actions, reactions and especially obligations.”⁷⁹⁰ Peace is therefore “to be thought of as a condition of absence of hostilities or the exercise of force, irrespective of the question whether a legal status of war prevails as between States and/ or other parties concerned.”⁷⁹¹ It will be correct to say that peace

⁷⁸⁹ Jalili Kasto, *International Peace and Disarmament*, 1st edition, PDC. Kingston, 1998, p. 4

⁷⁹⁰ Jalili Kasto, *op. cit.*, p. 4

⁷⁹¹ Starke J. Gabriel, Q.C., *The Science of Peace*, Legal Books Pty Ltd., 2nd edition, Sydney, 1986, p. 6

is the “absence of disputes and conflicts.”⁷⁹² In more philosophical terms peace is the “imperative of reason.”⁷⁹³

Practically, and to the extent that the UNSC is concerned, the definition that pertains to peace may be the one given by Boutros Boutros Ghali, the former UN Secretary General. He regarded “peace as a responsibility of the UN to take action to prevent war and to use its peaceful means to stop international conflicts which endanger peace to ask the parties to resort to peaceful means to regulate their differences.”⁷⁹⁴ The Former Secretary General also suggests that “armed conflicts today, as they have throughout, continue to bring fear and horror to humanity, requiring our urgent involvement to try to prevent, contain and bring them to an end.”⁷⁹⁵ This definition appears to be the opposite of a state of war, but it is not enough.

This leads to secondly consider Syring’s proposition that, peace, in a broader sense, indicates a state of harmony between people or groups; or law and order between states.⁷⁹⁶ Moreover, “peace alludes to the absence of anxiety, or even pure personal tranquillity, the feeling that everything is in its proper place.”⁷⁹⁷ This is not straightforward, “since ‘peace between man and man consists in regulated fellowship’⁷⁹⁸, therefore “true peace will require a peace of mind which is not attainable, so long as injustices continue.”⁷⁹⁹ Pennys envisages a peace that refers to the cessation of overt hostilities, widespread violence and international humanitarian law

⁷⁹² Parson Antony, *From Cold war to Hot Peace*, Penguin Books, 1995, cited in Jalil Kasto, op. cit., p. 4; see also Babu Ayindo and Janice Jenner, *Training of trainers’ Manual, Conflict transformation and peace building in Rwanda*, USAID, June 2008, pp. 2 -3, defining peace as not meaning “the total absence of any conflict. It means the absence of *violence* in all its forms and the unfolding of conflict in a constructive way. Peace therefore exists where people are interacting non-violently and are managing their conflict positively—with respectful attention to the legitimate needs and interests of all concerned.”

⁷⁹³ Delmas Claude, *Disarmament*, Presses Universitaire de France, 1979, cited in Jalil Kasto, op. cit., p. 4

⁷⁹⁴ Ghali Boutros Boutros, UNSG Report, 1994, *Building Peace and Development*, UN, New York, cited in Jalil Kasto, op. cit., p. 4

⁷⁹⁵ Ghali Boutros Boutros, *An Agenda for Peace*, 2nd edition, United Nations, New York, 1995, p 42

⁷⁹⁶ Syring Tom, “Truth versus Peace: A tale of two cities”, op. cit., p. 146

⁷⁹⁷ Syring Tom, op. cit., p. 146

⁷⁹⁸ Syring Tom, op. cit., p. 147 citing Augustin, in R. W. Dyson, *The City of God against the Pagans/ Augustin*, Cambridge: Cambridge University Press, 1998, p. 938

⁷⁹⁹ Idem

violations, and the prevention of their re-emergence at a later date through the peaceful consolidation of post-conflict societies.⁸⁰⁰

Proponents of international prosecutions may argue that through international criminal adjudications, peace can be maintained, restored and consolidated. The invocation of peace has in fact become the key argument put forward by the UNSC to enable it to resort to Chapter VII to establish *ad hoc* tribunals. Was it really a genuine approach or was it instead a way of covering up its failure in using force to restore and maintain peace and security? International prosecution has in fact been used as a tool for the restoration and maintenance of peace. How does it work? Kofi Annan, former UN Secretary General attempted to provide an answer. He stated:

there are times when we are told that justice must be set aside in the interests of peace. It is true that justice can only be dispensed when the peaceful order of society is secure. But we have come to understand that the reverse is also true: without justice, there can be no lasting peace.⁸⁰¹

Annan's formula is that when prosecution is realised, justice is attained. In the same logic, when justice is attained peace is restored and maintained. Buchanan is of the other view that

It is wrong to assume that justice and peace are somehow essentially in conflict. On the contrary, justice subsumes peace. Justice requires the prohibition of wars of aggression (understood as morally unjustifiable attacks as opposed to justified wars of self-defence or of humanitarian intervention) because wars of aggression inherently violate human rights. To that extent the pursuit of justice is the pursuit of peace.⁸⁰²

This has not always been the case in the circles of the UN. The search for peace has in most cases, been a concern of warring parties and intervening negotiators. There is no set of international conventions and treaties regulating how peace negotiations must be conducted. There is however a set of international law that regulate armed conflicts, be they international or internal. Those laws compose the body of international humanitarian law and others are contained in human rights laws. In the latter two sets of laws, non-negotiable criminal clauses are provided as far as humanitarian law has been violated, namely when genocide, crimes

⁸⁰⁰ Penny K. Christopher, 'No Justice, No Peace?': A political and legal analysis of the International Criminal Tribunal for the Former Yugoslavia, *Ottawa Law Review*, Vol. 30, Iss.2, 1999, pp. 259 – 313, p. 262

⁸⁰¹ Kofi Annan, Former United Nations Secretary - General, addressing the judges of the International Criminal Court at their inauguration, 11 March 2003, Press Release SG/SM/8628 L/3027

⁸⁰² Buchanan Allan, *Justice, Legitimacy, and self-Determination: Moral foundations for International Law*, Oxford University Press, 2003, p. 79

against humanity or war crimes have been committed. The peace process is quite different from the justice process and both must not be confused with each other.

The terms “restoration” and “maintenance” of peace and security, are also two terminologies which are quite distinct. According to Starke:

The expression ‘restoration of peace’ necessarily signifies that there has been a prior breach or rupture of the peace, while by contrast the expression ‘maintenance of peace’ implies that peace is subsisting, but that some action is requisite to ensure that it is not disturbed, the possibility of such disturbance may be due to the prevalence of tension between States, or to some threat to the peace, or other circumstances in danger of being aggravated, or it may be felt that, on a long-term view, the possibility of peace being disturbed ought to be anticipated some time beforehand, and steps taken to promote general conditions for its preservation.⁸⁰³

Starke notes moreover that:

the phrase ‘restoration of peace may be used (1) to denote the cessation of hostilities or the exercise of armed force, coupled with the consequent re-establishment of a peaceful equilibrium between the contesting parties; (2) [or] as meaning the termination, by treaty of peace or other legal act, of a technical status of war between the contestants, which status may have continued for quite some time after the cessation of hostilities or of the exercise of armed force, and after the re-establishment of a peaceful equilibrium.⁸⁰⁴

In both case studies of the ICTY and in line with these definitions, a question arises about whether the establishment of a criminal tribunal is the appropriate step to restore peace and security. The answer to this question will depend on all other available means at the disposal of the UNSC to fulfil its main mandate of maintaining or restoring peace and security.

Before answering the question however, it is necessary to better comprehend the issue raised here. This can be done through an illustration:

In 1998 and 1999, despite fifty-nine pending ICTY indictments, two well-publicised convictions, and explicit warning against further wrongdoing, both Serbian and Kosovar forces within the ICTY’s jurisdiction allegedly violated international humanitarian law. Though the U. N. Security Council established the ICTY as an immediate measure to restore and maintain the peace, it is clear that the establishment of the Tribunal has not prevented further atrocities in the region.⁸⁰⁵

The Rwandan case falls outside of Starke’s second leg of definition even if it may partially cover some aspects of the situation. This may be the case only if justice sought is to serve the peaceful equilibrium between the former conflicting parties or is simply that other “legal act.” If it is still difficult to discern the difference, it may be assumed that the UNSC relied on “a general

⁸⁰³ Starke J. G. Q. C., *The Science of Peace*, op.cit., p. 67

⁸⁰⁴ *Ibidem*, p. 90

⁸⁰⁵ Editors, *Developments in the Law: International Criminal Law*, op. cit., p. 1966

conception of conflicts, as including not only those in which armed force has actually been used, but also those in which the parties in conflict have stopped short of recourse to hostilities, thus focusing on the central aspect of peace itself than upon the problem of the resolution of conflicts.”⁸⁰⁶ The question here is whether the UNSC could establish a tribunal with other objectives instead of maintenance and restoration of peace.⁸⁰⁷ The failure to attain even the objective of maintenance of peace may result from this conceptual error.

4.4.2. The UNSC expectations by establishing the ICTY and ICTR as instruments contributing to the restoration and maintenance of peace and security

The powers of the Security Council to restore and maintain international peace and security stem from the UN Charter as earlier discussed. The Preamble of the Charter aims “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.” This citation refers to the experience of World War I and II.

The aims of the *ad hoc* tribunals are a consequence of the Security Council’s determination that the situations in the former Yugoslavia and Rwanda continued “to constitute a threat to international peace and security.”⁸⁰⁸ Therefore “the prosecution of persons responsible for serious violations of international humanitarian law (...) would contribute “to the restoration and maintenance of peace.”⁸⁰⁹

Futamora identifies⁸¹⁰ and characterises the objectives of restoration and maintenance of peace as strategic, which he qualifies as “enforcement measures.” By their nature, these objectives are

⁸⁰⁶ Ibidem, pp. 67 - 68

⁸⁰⁷ See in this respect Akhavan Payam, “ Justice in the Great Lakes Region of Africa: the contribution of the International Criminal Tribunal for Rwanda” , *Duke Journal of Comparative and International Law*, Vol. 7, Iss.2, pp. 325 – 348 who argues that:

it was not the massive and systematic scale of the human rights violations as such which triggered Security Council action, but rather the determination that such violation, in particular circumstances of the former Yugoslavia and Rwanda, constituted a ‘threat to international peace and security’ as required by Chapter VII of the Charter” even though he further posits that the “linkage between international criminal justice and the maintenance of peace should not be disparaged” and that there is an indivisibility of ‘peace and respect for human rights.

⁸⁰⁸ See Preamble to resolution 827(1993) of 25 May 1993 establishing the ICTY and Preamble to resolution 955(1994) establishing the ICTR

⁸⁰⁹ Idem

⁸¹⁰ Futamora Madoka, *War Crimes Tribunals and Transitional Justice: the Tokyo Trial and the Nuremberg legacy*, Contemporary Security Studies, 2008

political though they may be explained legally. Futamura is moreover of the opinion that “the legal basis for invoking Chapter VII to establish an international criminal tribunal was that the serious and widespread violence occurring [...] was regarded as ‘threat to international peace and security.’”⁸¹¹

Article 41 of the UN Charter contains an unlimited list of enforcement measures that the UNSC may resort to. Those measures involve traditionally “the economic and military arms blockade and sanctions which affect the ability of the State concerned to resist the implementation of the SC resolutions on the dispute and may finally accept the implementations of the resolutions without the need to use military force.”⁸¹² Also in the ICTY’s *Tadic* decision on jurisdiction, the Appeals Chamber held that “the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.”⁸¹³ This is hardly a convincing argument unless the powers of the UNSC are unlimited. It is fair to argue that the establishment of an international criminal tribunal is not one of these measures. It is a by-product of fishing in troubled waters, or an easy but binding solution to a very complex situation.

What is even more striking is Manusama’s view that “prosecution *per se* was not the aim for which the tribunal was established; it was a means to achieve broader aims. The creation of the ICTY was a measure taken by the Security Council to fulfil its ‘primary responsibility for the maintenance of international peace and security,’”⁸¹⁴

Manusama goes further by arguing that:

Resolution 955, establishing the ICTR, echoed this by also declaring that the tribunal would contribute to ‘the restoration and maintenance of peace’. The key to assessing the work of the ICTs, therefore, is whether the creation and operation of the tribunal are ‘appropriate and effective for the purpose of the restoration and maintenance of international peace and security. [...] what is furthermore necessary is a theoretical and conceptual framework within which to assess the effectiveness of international war crimes prosecution based on their strategic purposes.’⁸¹⁵

⁸¹¹ Futamura Madoka, *op. cit.*, p 3

⁸¹² Skubiszewski (K), *Use of Force by States: Collective Security and Law of War and Neutrality*, Article in Sorensen (max), *Manual of Public International Law*, Macmillan, 1968, cited in Jalil Kasto, *op. cit.*, p. 34

⁸¹³ *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *op. cit.*, para. 36

⁸¹⁴ *Idem*; see also Kerr Rachel and Mobekk Eirin, *Peace and Justice: Seeking Accountability After War*, Polity Press, 2007, p 31. These authors are of the opinion that the establishment under Chapter VII of the UN Charter “as a measure for international peace and security was truly innovative and had a number of implications for its mandate and operation.”

⁸¹⁵ *Id.*

In Resolution 929 of 22 June 1994, the UNSC stated that “the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region.”⁸¹⁶ The Council also expressed “grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda.”⁸¹⁷ The Council therefore determined that such a situation “continues to constitute a threat to international peace and security.”⁸¹⁸ At the same time the UNSC claimed that it was “deeply concerned by the continuation of systematic and widespread killings of civilian population in Rwanda.”⁸¹⁹

Apart from the killings that were taking place in Rwanda, some also believed that the UNSC’s action was due to the massive influx of refugees in neighbouring States.⁸²⁰ Österdahl, for example, remarks that “the Security Council again did not specify, in the context of determining that the crisis in Rwanda constituted a threat to peace and security, exactly what it was in the incontestably true humanitarian crisis that constituted a threat to international peace and security in the region.”⁸²¹

This is quite troubling. The ambiguity is created by the fact that the UNSC did not clearly say which situation constituted a threat to international peace and security. Was it the continuation of killings in Rwanda or the massive influx of refugees in neighbouring States or both? There was a diverse situation. First there was a destructive war with its adverse consequences. There was a situation of killings that clearly violated international humanitarian law. There was the massive influx of refugees, which was in fact the consequence of both previous situations.

⁸¹⁶ UN SC Res. 929 of 22 June 1994, pre-para. 10 cited in Österdahl I., *Threat to the Peace: the interpretation by the Security Council of Article 39 of the UN Charter*, op. cit., p. 59

⁸¹⁷ Id.

⁸¹⁸ Op. cit., p. 61

⁸¹⁹ See para. 8 of Res. 929 of 22 June 1994, op. cit., p. 59

⁸²⁰ The Trial Chamber nevertheless takes judicial notice of the fact that the conflict in Rwanda created a massive wave of refugees, many of whom were armed, into the neighbouring countries which by itself entailed a considerable risk of serious destabilisation of the local areas in the host countries where the refugees had settled. The demographic composition of the population in certain neighbouring regions outside the territory of Rwanda, furthermore, showed features which suggest that the conflict in Rwanda might eventually spread to some or all of these neighbouring regions.

The Prosecutor v. Joseph Kanyabashi, Decision on the Defence Motion on jurisdiction, op. cit., para. 21

⁸²¹ Österdahl I., *Threat to the Peace: the interpretation by the Security Council of Article 39 of the UN Charter*, op. cit., p. 59

What could then have been the priority to address? Was the war the priority? Was it the violations of international humanitarian law or the influx of refugees? What were the causes and consequences of the whole situation?

The action of the Security Council should have clearly been based on a distinction between two traditional concepts of “*jus ad bellum*” and “*jus in bello*.” Lemennicier distinguishes the “just” war which deals with the justification of the war (*jus ad bellum*) and how it must be fought (*jus in bello*). *Jus in bello* enjoins parties to “respect the moral principles which govern our individual or collective actions. It is thus about a moral reflection on the goals and the means of the war starting from an ethical vision of the human interactions.”⁸²² Anderson⁸²³ also considers these two matters traditionally separated. The reason for such a separation is:

Because they have been regarded as separate legal and moral judgment, in which a determination that the resort to force is illegal aggression is independent of whether the conduct of hostilities violates international humanitarian law, and vice versa. Although in theory a single adjudicator could hear both the resort to force and conduct questions, and simply maintain perfect independence, in reality the same tribunal – even with separate panels – would tend to conflicts of interest, path dependence between the two supposedly independence areas. Many questions are raised about the legal propriety of the same forum hearing both kinds of substantive questions.⁸²⁴

In accordance with this distinction, it may be argued that to achieve the goal of maintaining or restoring peace and security, the UNSC must first and foremost conduct an objective, sincere and truthful assessment of the root causes of the conflict to be able to put an end to it. Those may include the different claims of the belligerents. The UNSC may also assist the parties to arrive at a peaceful resolution of their difference without resorting to armed conflict; or enjoining them to halt the conflict when it has started. Urquhart speaks of “a benevolent international framework to assist combatants to resolve their differences and to provide the necessary protective apparatus.”⁸²⁵ The parties cannot, by themselves, in a violent situation

⁸²² Lemennicier Bertrand, *Classical Just War Theory: a Critical View*, Libertarian International Spring Convention, Krakov, Poland, 22 – 23 March 2003; see also Bassiouni who makes the same distinction, but in another perspective. He argues that “if war prevention failed, though admittedly some wars were prevented through the collective security system of the UN, and if the humanisation of war failed, even though progress was made under the international humanitarian law regime, what would be left?” Bassiouni, “Perspectives on International Criminal Justice”, op. cit., p. 319

⁸²³ Anderson Kenneth, “The Rise of International Criminal Law: Intended and Unintended Consequences”, op. cit., p. 354

⁸²⁴ Ibidem, p. 354

⁸²⁵ Urquhart Brian, “The role of the United Nations in maintaining and improving international security”, *Survival: Global Politics and Strategy*, Vol. 28, No. 5, pp. 387 – 398, p. 392

they have created, resolve to face each other and solve their differences. They prefer the continuation of fighting. Coming together may even be extremely dangerous and destructive. So the UNSC can come in-between and force the parties to stop fighting. It can neutralise them all or neutralise the party that is unjustly attacking the other. The UNSC may suggest the kind of concessions each party must make. The Council may also adopt preventive measures. These measures should however be used at an early stage and firmly address the causes that lie at the root of the conflict. Defining a conflict in general terms but having in mind the Rwandan conflict, Shyaka suggests that:

The existence of a conflict reflects the presence of antagonisms which, by and large, originate from a difference of interests between two or among several parties. For the conflict to outbreak, the parties should not only have or pursue incompatible interests, but, they should also more importantly become aware of that situation. Consequently, the building process of sustainable peace [...] should consider as vital the knowledge of the conflict, its nature and its causes- direct or indirect- and the challenges and opportunities.⁸²⁶

There is no escalation of violence that is not preceded by a perceived incompatibility of interests between groups, asymmetric intergroup power relationships, as well as triggers that serve to mobilise or rally a group around its grievances.⁸²⁷ These are the effective processes the UNSC should undertake.

There is no doubt that the Security Council has prime responsibility to determine which measures are most appropriate⁸²⁸ for the restoration and/or maintenance of peace. It is also true that the Council cannot always, under the guise of discretion and wielding uncontrolled enormous powers, resort to means quite alien to the subject at hand and convince others that the measure taken was the most effective and appropriate. It is moreover unacceptable that the

⁸²⁶ The National Unity and reconciliation Commission, *The Rwandan Conflict: Origins, Development, Exit Strategies* (Study conducted by Dr Anastase Shyaka as consultant), p. 2

⁸²⁷ Babu Ayindo and Janice Jenner, op. cit., p. 1

⁸²⁸ For illustration, see Mr. Li Zhaoxing, representative of China at the UN Security Council:

The United Nations Charter contains explicit provisions on the mandates of the Security Council, the General Assembly and other United Nations organs. These bodies should earnestly carry out the respective mandates entrusted to them by the Charter. The Security Council should therefore refrain from involvement in activities that go beyond its mandate. It is our consistent position that the Security Council should work in line with the purposes and principles of the United Nations Charter and with the relevant mandates. We are not in favour of willfully linking the work of the Council with that of other organs. Therefore, we wish to express our reservations on the resolution's elements relating to the human rights Rapporteur.

Provisional Verbatim Record of the Security Council, Forty-Ninth year, 3388th meeting, Wednesday, New York, 8 June 1994, 6:30 P.M, New York, S/PV.3388 and Corr.1, 8 June 1994, in Morris Virginia & Scharf P. Michael, op. cit., p. 274

Council, instead of taking a timely military or diplomatic action, resorts to judicial means to cover up its weaknesses and cowardice under the pretence of protecting human rights. A distinction must be clearly made between war criminals who violate the “*jus in bello*” from the criminals who are fuelling the war in the pursuit of “*jus ad bellum*.” Once the distinction is made, each kind of criminal must be dealt with separately and not in a confused manner.

The approach the UNSC adopted for the former Yugoslavia and Rwanda is exemplified by the New Zealand representative to the Security Council when resolution 827(1993) on Yugoslavia was adopted. Mr. O’Brien argued that:

As noted in the resolution and in the Secretary – General’s report, the establishment of the Tribunal and the prosecution of persons suspected of crimes against international humanitarian law [are] closely related to the wider efforts to restore peace and security in the former Yugoslavia. This is an important point. We recall that in the Secretary General’s report of 2 February, the Co-Chairman of the International Conference specifically state that human rights and humanitarian issues are the core elements of the peacemaking process in the former Yugoslavia. In restating then their advocacy of the creation of the Tribunal, Messrs. Vance and Owen stated that the situation on the ground was not acceptable. Since February, of course, that situation has not improved; quite the contrary. It is important here to underline this, because our decision tonight, and indeed the tribunal itself, do have a context. The co-Chairman set it explicitly within the peacemaking process. Implementation of that process and the work of the Tribunal must mutually reinforce one another.⁸²⁹

This suggests that had the co-Chairman not included the component of the human rights and humanitarian law in his report, even as contributing to the peace process, this could not have been the concern of the Security Council. It is a quite interesting, but at the same time an embarrassing and shameful situation. Were the Council to be realistic and pragmatic at the time the Resolution 827(1993) was passed, it would have followed the perspective of Mr. Barbosa, the then representative of Cape Verde who substantially stated that:

[...] my delegation considers that the establishment of the Tribunal will be a positive step only if it is viewed as closely connected to a suitably comprehensive peace plan capable of preserving international peace and security throughout the territory of the Socialist Federal Republic of Yugoslavia. Needless to say, this will be impossible unless an end is put to the aggression against the Republic of Bosnia and Herzegovina, unless the freedom of its people is fully achieved, and unless its sovereignty and territorial integrity are respected.⁸³⁰ As we see it, the establishment of this Tribunal to judge and punish war crimes is an instrument for the promotion of international peace and security. That was the basis of the Council’s recourse to this procedure to establish it. We therefore hope that *approval of this step will encourage us to act in our search for effective solutions to the problems that we confront* in that part of Europe, in keeping

⁸²⁹Provisional verbatim record of the three thousand two hundred and seventeenth meeting held at headquarters, New York, on Tuesday, 25 May 1993, at 9 p.m., S/PV. 3217, 25 May 1993; in Morris Virginia & Scharf P. Michael, *An insider guide’s guide to the International criminal tribunal for the Former Yugoslavia: a documentary history and analysis*, op. cit., p. 193

⁸³⁰ *Ibidem*, pp. 197 - 198

with the peace plan regarded by all members of the Council as the *only realistic framework for providing a solution giving lasting peace* for the territory of the former Yugoslavia.⁸³¹ [emphasis added]

This was also the Pakistan delegation position.⁸³² The Djibouti representative highlighted the crucial mandate that the Council could have performed. He said:

That country will have its peace and its unity restored once the guns have been silenced, the militias have been dissolved, the causes of the conflict have been rooted out, the barriers between the regions have fallen, when all citizens have rallied round their State, the Republic of Bosnia and Herzegovina.⁸³³

Mr. Olhaye consistently maintained the same position when resolution 925(1994) concerning Rwanda was voted on. His statement reflects in clear terms the mandate of the Security Council in times of war accompanied with violations of international humanitarian law. The relevant part of his argument needs to be strongly overstated here:

We cannot escape the fact that what is required is a firm and unequivocal demand by the Council to the parties that fighting must be stopped forthwith, coupled with measures which clearly show the Council's determination to back up this demand. We cannot continue to push the issues of security and peace into the background of human rights headlines, however well it may play at home for some of us. The reason we have this tragic human rights situation, with human beings dying every day in unacceptable numbers, is precisely that the fighting has been allowed to continue, and, with possible counter-offensive looming, it could grow even worse. [...] If there is a lesson to be learned from this incredibly violent episode, it may be that, as has been noted many times by a distinguished former senior official of the United Nations Secretariat, the United Nations must have a force not defined by national politics, a standing multinational force at the disposal of the Security Council. It is an unbelievable travesty for Rwanda to burn while the United Nations fiddles. The crime may lie, in fact, not in the violation of human rights and the killings, but in the fact that this can and perhaps will happen again, and we will be just as ill-equipped to deal with it as we are now.⁸³⁴

To conclude this point from a theoretical perspective, Hazan remarks that “a political body [the Security Council] has created a legal organ to take action it is unable or unwilling to take

⁸³¹ *Idem*, p. 198

⁸³² Mr. Marker, representative of Pakistan remarked that “The international community must halt the aggression, reverse it through withdrawals from all territories occupied by the use of force and ‘ethnic cleansing’ and restore international legality. The Security Council must move swiftly to take further appropriate and effective enforcement actions in this direction.”, *id.*, p 199

⁸³³ *Id.*, p. 206.; see also Mr. Olhaye, representative of Djibouti:

The fighting must be stopped and law and order in this tiny country restored before there is really no country left [...]. Although as is clear, my delegation would like to see a stronger mandate for UNAMIR, time is crucial at the moment. It is critical that we take immediate steps to halt the progression of fighting, [...]. Should the Secretary General find that the measures called for are insufficient, it may be possible in the near future to upgrade UNAMIR's mandate to include more authority to halt the fighting.

as well as the representative of China who also advocated for a cease-fire first; Provisional Verbatim Record of the Security Council, forty-ninth year, 3377th meeting, Monday, 16 May 1994, 11:10 P.M., New York, S/PV.3377, 16 May 1994, in Morris Virginia & Scharf P. Michael, *op. cit.*, pp. 255 – 256

⁸³⁴ Provisional Verbatim Record of the Security Council, Forty-Ninth year, 3388th meeting, Wednesday, New York, 8 June 1994, 6:30 P.M, New York, S/PV.3388 and Corr.1, 8 June 1994, in Morris V. & Scharf P. M., *op. cit.*, p. 267

itself.”⁸³⁵ The tribunal also reverted to the same observation in its 1995’ *Annual Report* recalling that it was in:

stark contrast to the usual situation. Usually, legal norms and institutions come ‘after the event’, in recognition of a new state of affairs. Judicial institutions dealing with crimes committed in the course of hostilities are therefore usually only convened at war’s end. This is what occurred at Nuremberg and Tokyo, when Germany and Japan were occupied and many of their leaders captured by allied forces. By contrast, the Tribunal has been called upon to dispense justice while warfare, very often pursued by illegal means and methods, continues. High-ranking planners and perpetrators of war crimes are still able to take shelter from prosecution under the protective umbrella of military or political power. The Tribunal clearly can expect no cooperation from those authorities who may have been complicit, or at least negligent, in preventing serious violations of international humanitarian law, and it does not anticipate that they will surrender any suspects, or themselves, to the tribunal.⁸³⁶

The Council relied on Chapter VII solely because it knew its decision would be unquestionably binding.⁸³⁷ This is a positivist approach deprived of ethical and moral consideration in the Kantian categorical imperatives. This diversion also appears in other objectives that the Council purported to achieve by establishing *ad hoc* tribunals, including clearly political ones. National reconciliation is one such objective. These unfortunately are unachievable through judicial institutions.

⁸³⁵ Hazan Pierre, op. cit., p. 42; see also Anderson arguing that:

To say that something has emerged, however, does not address a fundamental question. It is a question going to the relationship and consequences of international criminal law, not the rest of international law, but instead to international politics and especially the politics of the use of force. International criminal law emerged partly because great powers saw it as an alternative to more forceful action in situations of massive human rights violations – but in which they could not see their individual interests in intervening directly.

Anderson Kenneth, “The Rise of International Criminal Law: Intended and Unintended Consequences”, op. cit., p. 334.

⁸³⁶ *Second Annual Report of the International Tribunal for the prosecution of persons responsible for serious violations of International Humanitarian Law Committed in the territory of the former Yugoslavia since 1991*, A/50/365, S/1995/728, 23 August 1995, para 194 - 195

⁸³⁷ See Forsythe P. David, “Politics and the International Tribunal for the Former Yugoslavia”, in Roger S. Clark & Madeleine Sann (ed.), *The Prosecution of International Crimes*, Transaction Publishers, New Brunswick (USA) and London(UK), 1996, pp. 185 – 206. On p.186 he argues that:

The [ICTY] was the result of a political decision. Key states decided, for reasons examined below, to create such a court. This policy decision was then legalized by subjecting the policy to a certain procedure: voting in the UN Security Council with reference to chapter VII of the UN Charter, pertaining to threats to international peace and security. This procedure had the effect of making the rulings by the Tribunal legally binding, obviating the necessity of a separate treaty, which some states might have rejected. As H.L.A. Hart has explained, it is the “secondary rule of recognition” that makes the primary rule legally binding. The “secondary” rule of legal procedure transforms a pure policy choice into a substantive legal rule.

4.5. The objective of contribution to the process of national reconciliation

4.5.1. Defining “reconciliation”

It is not easy to immediately or ever understand how the UNSC intended to attain the objective of national reconciliation through international *ad hoc* criminal tribunals. Etymologically, reconciliation is, according to Nebojsa, “about re-conciliation or re-establishing peaceful relationships after they were disrupted by quarrels, misunderstanding, insults, injuries and other negative situations.”⁸³⁸ With this definition in mind, Rosenberg observes that “the belief that international justice serves national reconciliation [...] is replete in the constitutive documents of the *ad hoc* tribunals”⁸³⁹ on the one hand. On the other hand, however, Groome supports the suggestion that reconciliation may be an important reason to engage in international criminal justice.⁸⁴⁰ Yet, Haskell and Waldorf argue to the contrary or question these assumptions. According to them, “to date, there is little evidence that international tribunals promote reconciliation.”⁸⁴¹

Traditionally, criminal tribunals are intended to deliver retributive justice in terms of prosecuting through fair procedures and punishing the guilty or acquitting the innocent. Reconciliation may demand more than retribution, as it also encompass restoration and reparation. How this second function may fit in the work of a criminal tribunal is where the inefficiency of *ad hoc* tribunals lies. It has been demonstrated that criminal justice delivered by the *ad hoc* tribunals has been too selective, indeed too limited and sometimes too biased to a

⁸³⁸ Nebojsa Petrovic, Psychological Aspect of Reconciliation Process in Former Yugoslavia, 29/10/2005, available at <http://www.kakanien.ac.at/beitr/fallstudie/NPetrovic1.pdf>, accessed on 26 December 2012

⁸³⁹ Rosenberg P. Sheri, “What’s law got to do with it?: the Bosnia v. Serbia decision’ s impact on reconciliation”, *Rutgers Law Review*, Vol. 61, Iss.1, 2008, pp. 131 – 159, , p. 136. To detail her statement, the authors writes (quotations omitted) that in Resolution 82791993 it:

explicitly states that ‘the restoration and maintenance of peace’ is one of its goals. In turn, the ICTY itself states in its 1994 annual report that ‘the role of the Tribunal cannot overemphasized. Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring peace. For its part, Security Council Resolution 955, creating the (ICTR), is ‘convinced that in the particular circumstance of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law...would contribute to the process of national reconciliation and to the restoration and maintenance of peace.

Ibiden, pp. 131 – 159, pp. 136 - 137

⁸⁴⁰ Groome M. Dermot, “The Future of International Criminal Justice...” op. cit., p. 799

⁸⁴¹ Haskell Leslie and Waldorf Lars, op. cit., p. 77

certain extent. From this posture, it cannot be said that justice will be, on its own, an instrument of reconciliation. Reconciliation requires more than prosecution. According to Archbishop Tutu:

There is no handy roadmap for reconciliation. There is no short cut or simple prescription for healing the wounds and divisions of a society in the aftermath of sustained violence. Creating trust and understanding between former enemies is a supremely difficult challenge. It is, however, an essential one to address in the process of building a lasting peace. Examining the painful past, acknowledging it and understanding it, and above all transcending it together, is the best way to guarantee that it does not – and cannot – happen again.⁸⁴²

We must remember the multiplicity of offenders and victims, the complexities of the situation born out of extremely cruel conflicts; the perceptions and realities of that whole environment and context, and so on and so forth. So, more is needed. Before even questioning whether international *ad hoc* tribunals can serve reconciliation, it is necessary to understand what this term means. This term is complex, and there is little agreement on its definition.⁸⁴³ The term is “often used, yet rarely defined.”⁸⁴⁴ It is “so vague [but] often employed by public policymakers, academics, and [the] NGO community.”⁸⁴⁵ It is Syring’s opinion that “whether reconciliation is best accomplished by truth or justice, the former is generally considered to be the strength of truth commissions, and the latter to be the primary attribute of war tribunals and courts of law.”⁸⁴⁶ Reconciliation has its own process, and justice has its own. Criminal tribunals may therefore be at odds to perform reconciliation.

There is already a dichotomy around the word “reconciliation” and what it requires to be achieved. There is an additional question about its achievement through the prosecution of a token of individual violators selectively. Osiel writes that “reconciliation cannot occur, to be sure, if the questionable basis of prosecutorial selectivity itself calls the legitimacy of pending trials into wide doubt.”⁸⁴⁷ Yet the concept of reconciliation remains too misunderstood, misused, manipulated at will and used with deliberate ambiguity. Groome has eventually been

⁸⁴² Bloomfield David, Barnes Teresa and Huysse Luc (ed.), *Reconciliation after violent conflict: a Handbook*, Foreword by Archbishop Emeritus Desmond Tutu, International Institute for Democracy and Electoral Assistance, Stockholm, Sweden, 2005

⁸⁴³ Bloomfield David, Barnes Teresa and Huysse Luc (eds), *Reconciliation after Violent Conflict: A Handbook*, International Institute for Democracy and Electoral Assistance 2003, p. 12

⁸⁴⁴ Intervention by Ian Guest, *op. cit.*, p. 138

⁸⁴⁵ Rosenberg P. Sheri, “What’s law got to do with it?...”*op. cit.*, p. 139

⁸⁴⁶ Syring Tom, “Truth versus Peace...”*op. cit.*, p. 151

⁸⁴⁷ Osiel Mark, “The banality of good: aligning incentives against mass atrocities”, *op. cit.*, p. 1810

modest in recognising that international criminal justice can only contribute partially⁸⁴⁸ to the process of reconciliation.

From the different opinions expressed, two situations arise. On the one hand, there is a work that must be devoted to truth commissions that can go deeper and address the ills within a society. On the other hand, there is a work of criminal tribunals, which has been found to aim at the determination of guilt or innocence of handful individuals. The question remains, however, to know to what extent, if any, reconciliation can be achieved through criminal adjudication. What does reconciliation mean to start with?

Simply defined, “reconciliation” is the settling of secular disputes between individuals who, in the past, lived under temporal or perpetual confrontation, and are now resolved or brought together and wish to live side by side peacefully with one another in the same space. Unfortunately, “it is not even clear whether scholars and practitioners refer to reconciliation as a process, a goal, or both.”⁸⁴⁹ It is important to understand reconciliation as a process whereby reconciliation cannot be solely the work of criminal tribunals. To work, reconciliation must be a forum where former antagonists meet and engage. According to the International Institute for Democracy and Electoral Assistance (IDEA):

Reconciliation is an over-arching process which includes the search for truth, justice, forgiveness, healing and so on. At its simplest, it means finding a way to live alongside former enemies – not necessarily to love them, or forgive them, or forget the past in any way, but to coexist with them, to develop the degree of cooperation necessary to share our society with them, so that we all have better lives together than we have had separately.⁸⁵⁰

If those adversaries cannot meet because of the fracture that exists between them, then a third party intervenes to assist in the process. This, again, is not a work of a criminal tribunal. Reconciliation is not about satisfying only the victims’ claims without considering also the perpetrators’ views. Reconciliation “involves the creation of the social space where both truth

⁸⁴⁸ Groome M. Dermot, *op. cit.*, p. 799

⁸⁴⁹ *Idem*, p. 138

⁸⁵⁰ Bloomfield David, Barnes Teresa and Huysse Luc (ed.), *Reconciliation after violent conflict: a Handbook*, *op. cit.*, p. 12

and forgiveness are validated and joined together, rather than being forced into an encounter in which one must win out over the other or envisioned as fragmented and separated parts.”⁸⁵¹ It is

Daly and Sarkin’s view that:

Generally speaking, reconciliation describes coming together; it is the antithesis of falling or growing apart. Reconciliation has a normative – almost a moral – aspect as well. It is the coming together (or re-coming together) of things that should be together. [...] for many, it is encompassed in the question as to how a society ravaged by war returns to some kind of normality when neighbours living side by side have endured some and perpetrated against one another crimes of unimaginable horror.⁸⁵²

The process involves mutual acknowledgment of past suffering and the changing of destructive attitudes and behaviour into constructive relationships towards sustainable peace.⁸⁵³ Ackerman concurs with this suggestion. He says: “like most journeys, the process of national reconciliation begins with a single step. Divided factions literally meet and sit together for the first time in an effort to begin an exchange of views and initiate a process of accommodation on past differences. This historic moment acts as a frame for the style, content and outcome of further actions.”⁸⁵⁴ This coming-together, according to Rosenberg “simply requires that former enemies hear each other out, enter into give-and-take about public policy, and forge consensus where possible on matters of common concern.”⁸⁵⁵ Rosenberg further suggests that: “a successful outcome requires all parties to agree that there is a greater advantage in uniting the nation than in continuing to be divided.”⁸⁵⁶ Archbishop Tutu, Former Chairman and leading figure of the South African Truth and Reconciliation Commission (TRC) defines reconciliation as:

a way to transform individuals, and the whole of society. It is a way to look at perpetrators of human rights abuses and see brothers and sisters. A way to look at the victims in oneself and see survivors. Through reconciliation, we can see the fluidity of everything in the universe: how the past influences the present and the future; how punishment is just the flip side of redemption, how the religious and the

⁸⁵¹ Lederach J. Paul, *Building Peace: Sustainable reconciliation in divided societies*, United States Institute of Peace Press, Washington, D. C., 1997, p. 29

⁸⁵² Daly Erin and Sarkin Jeremy, *Reconciliation in Divided Societies, Finding Common Ground*, University of Pennsylvania Press, Philadelphia, 2007, p. 5

⁸⁵³ Brounéus K (2003) Reconciliation: theory and practice for development cooperation, The Swedish International Development Cooperation Agency, Stockholm, cited by Brounéus Karen, Reconciliation and Development, in Ambos Kai, Large Judith, Wierda Marieke (ed.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development: the Nuremberg Declaration on Peace and Justice*, Springer, Verlag Berlin Heidelberg 2009, p. 205

⁸⁵⁴ Ibidem

⁸⁵⁵ Rosenberg P. Sheri, “What’s law got to do with it?...”op. cit., p. 139

⁸⁵⁶ Id.

political are inseparable, how we are all victims, perpetrators, bystanders, everyone part of the same family of humanity. Reconciliation embodies the idea of oneness and everything.⁸⁵⁷

Understood in this sense, reconciliation becomes a process that accommodates everyone involved in it. Such accommodation may take diverse forms, including accepting someone else's views and rights; welcoming a person where he could not belong, yet where he is needed. It requires personal effort and commitment to start with.

These definitions bring many questions to the table. What role, if any, can an *ad hoc* criminal tribunal play in the process? How and to what extent can it play such a role? How effective would it be? Even if reconciliation was a goal to achieve, the work of the criminal tribunal towards this end will not necessarily be of assistance. The *ad hoc* tribunals' approach, and particularly the ICTR's ambiguous position to reconciliation may better illustrate how difficult and complex the situation is to fit in the work of a criminal tribunal.

4.5.2. The ICTY and ICTR's ambivalent, inconsistent and misguided approach to national reconciliation

Resolution 955(1994) establishing the ICTR provides that it was the conviction of the UNSC that the tribunal would contribute to the process of national reconciliation in Rwanda. Quite surprisingly this aim does not appear in Resolution 827(1993) establishing the ICTY. However, the ICTY was established following the breakdown and secession of the republics' constituting the FRY. In addition to a tumultuous history that characterised the various populations of the federation, the bloody war of the 1990s "stole the lives of thousands, damaged infrastructures, destroyed social trust, eroded human decency, and compromised the futures of generations to come."⁸⁵⁸ In this amalgamation of problems, reconciliation was highly needed; even not expressly provided for in the UNSC resolution. Even then, the ICTY could only do little to this complex situation. Citing Hayden, Natalya suggests pessimistically that "the ICTY's work has fundamentally contributed to the problem of competing truths within the

⁸⁵⁷ Daly Erin and Sarkin Jeremy, *op.cit.* , Foreword by Archbishop Emeritus Desmond Mpilo Tutu, University of Pennsylvania Press, Philadelphia, 2007, p. x

⁸⁵⁸ Bryan Nicole, *Reconciliation in former Yugoslavia: underlying motivations and reasons for resistance*, a dissertation submitted to the Graduate School – Newark, Rutgers, The State University of New Jersey in partial fulfillment of requirements for the degree of Doctor of Philosophy, Newark, New Jersey, October 2010, p. 82

former Yugoslavia. Far from helping to establish a broad-based consensus on the basic facts of what happened during the wars, the tribunal's judgments have merely served to entrench conflicting and selective ethnic narratives that critically ignore 'inconvenient facts' about the war.⁸⁵⁹

It will therefore be adventurous to indulge in discussing reconciliation in the former Yugoslavia, as it then was; and what it has become after the demise of the federation. Bryan partly attempted the exercise⁸⁶⁰; yet only focusing on Bosnia and Herzegovina, Croatia and Serbia. The current research will not attempt to deal with this wide and complex issue. On Rwanda, this section will show, as an illustration from the ICTR experience, that criminal tribunals are not proper conduits for reconciliation. It is therefore a futile exercise to undertake and apply within and beyond each independent republic born out of the Yugoslavia breakdown, the concept of reconciliation.

It may sound too critical when one talks of ICTR's misguided approach to national reconciliation in Rwanda. There is however no other terminologies that can better describe how inappropriate this approach has been. According to Wambui, "the record of the Tribunal in fulfilling its mandate to contribute to the reconciliation process in Rwanda is notably poor."⁸⁶¹ The ICTR was solely an attempt to explain to the Rwandan population and to the world what it was doing in the remote town of Arusha in Northern Tanzania. The tribunal was prosecuting. That was its mandate. Prosecution has nothing to do with the process of national reconciliation as defined.

Evaluating the ICTR contribution to reconciliation in Rwanda, Othman, a former ICTR' Chief of prosecution and senior prosecution counsel posits that the aim of reconciliation "remains

⁸⁵⁹ Natalya Janine Clark, "The ICTY and the challenges of Reconciliation in the Former Yugoslavia", available at <http://www.e-ir.info/2012/01/23/the-icty-and-the-challenges-of-reconciliation-in-the-former-yugoslavia/>, accessed on 26 December 2012. The author cites Hayden, R.M. (1996). Schlinder's fate: Genocide, ethnic cleansing and population transfer, *Slavic Review*, 55, 727 – 748, p. 743

⁸⁶⁰ Bryan Nicole, *Reconciliation in former Yugoslavia: underlying motivations and reasons for resistance*, op. cit.

⁸⁶¹ Wambui Mwangi, "The International Criminal Tribunal for Rwanda: Reconciling the acquitted", in Chandra Lekha Sriram & Suren Pillay, *Peace versus Justice?*, University of KwaZulu-Natal Press, 2009, p. 274

controversial and debatable and to a large measure still quantifiably unfulfilled.”⁸⁶²The prosecution’ official has it right because even the founding fathers of the Statute establishing the ICTR were very hesitant as to whether the tribunal will contribute to the process of national reconciliation. This was clearly expressed by the representative of the Czech Republic during the debates at the UN Security Council when Resolution 955(1994) was passed. He said: “justice is one thing, reconciliation is another. The Tribunal might become a vehicle for justice, but it is hardly designed as a vehicle for reconciliation.”⁸⁶³

The manipulation and misrepresentation of the term “reconciliation” by the ICTR officials are also demonstrated through their contradictory positions when they address this issue. The prosecution’s position is that targeting people to arrest and prosecute from every corner of Rwanda may contribute to the process of national reconciliation.⁸⁶⁴ Being aware that the ICTR was pursuing a one-sided justice⁸⁶⁵ and could not reach the objective of reconciliation, the

⁸⁶² Othman M. Chande, *Accountability for International Humanitarian Law Violations: the Case of Rwanda and East Timor*, Springer, Heidelberg, 2005, 381 pages, p. 56

⁸⁶³ Provisional Verbatim record of the Security Council, forty-ninth year, 3453rd meeting, Tuesday, 8 November 1994, 3:35, P. M., New York, in Morris V & Scharf Michael P., *The International Criminal Tribunal for Rwanda*, op. cit., p. 302

⁸⁶⁴ The issue of national reconciliation also figured as the final criteria. In what way in our selection of targets could we contribute to national reconciliation in Rwanda? And we were particularly concerned that in selecting targets, given that the reports indicated that that the genocide had been widespread nationwide, we were conscious that we should not leave out any district or any geographic area of Rwanda in the selection of targets. Sometimes this meant that you had to do a trade off, you dropped off a couple of targets from one region where you thought there had been too many targets in order to be able to draw in a target from another under represented or unrepresented area of Rwanda.

International Criminal Tribunal for Rwanda: Model or counter model for International Criminal Justice?: The perspectives of the Stakeholders, International Symposium, Geneva, 9 – 11 July 2009, Session Six, Intervention by Prosecutor Hassan B. Jallow, p. 6

⁸⁶⁵ For an understanding of the one-sided justice see Human Rights Watch position in this respect: Roth Kenneth [HRW Executive Director], “*Letter Sent to US Ambassador John Negroponte, President of UN Security Council*”, August 9, 2002, available at <http://www.hrw.org/en/news/2002/08/09>, accessed on 10 August 2009; Human Rights Watch, “*Rwanda: Deliver Justice for Victims of Both Sides*”, August 12, 2002, available at <http://www.hrw.org/en/news/2002/08/12>, accessed on 10 August 2009; S/RES/1503 (2003) adopted by the United Nations Security Council at its 4817th meeting, on 28 August 2003; Roth Kenneth [HRW Executive Director], “*ICTR Should Address Serious Violations of International Humanitarian Law Committed by the RPA*”, June 1, 2006, available at <http://www.hrw.org/en/2006/06/01>, accessed on 10 August 2009; Human Rights Watch, “*Rwanda Tribunal Should Pursue Justice for RPF Crimes*”, December 12, 2008, available at <http://www.hrw.org/en/news/2008/12/12>, accessed on 10 August 2009; various scholars and human rights advocates, “*Rwanda Tribunal Should Prosecute RPF War Crimes*”, Letter addressed to UN Secretary General Mr. Ban Ki-moon, President Barack Obama and Prime Minister Gordon Brown on June 1, 2009, in researcher’s archives; Human Rights Watch, “*Rwanda: Tribunal Risks Supporting ‘Victor’s Justice’*”, June 1, 2009, available on <http://www.hrw.org/en/news/2009/06/01>; Desforges Alson, *Leave None to Tell the Story, Genocide in Rwanda*, Human Rights Watch and International Federation of Human Rights New York – Washington – London – Brussels,

spokesperson of the court held in a symposium that the ICTR was “an indispensable forum for the search of justice for the crimes of 1994.”⁸⁶⁶ The prosecutor knew quite well that the crimes were committed by both sides; there is no doubt about this. The ICTR was prosecuting only one part of the conflict. The Tribunal did not offer the opportunity for those two sides to meet. The Tribunal also did not attempt to prosecute the people [at least a few of them] from the other side. This is injustice if reliance is made to the dictum of *Aristotle* that “injustice arises when equal[s] are treated unequally and also when [the] unequal are treated equally.”⁸⁶⁷ Cultivating injustice cannot be part of the process of reconciliation.

The spokesperson states furthermore that “the ICTR has contributed to the reconciliation process by establishing an indispensable historical record of the planning and direction of the genocide at the highest level of the Rwandan State.”⁸⁶⁸ This statement aligns with Schabas’ argument that “while theoretical exceptions cannot be ruled out, it is nearly impossible to imagine genocide that is not planned and organized either by the State itself or a State-like entity, or by some clique associated with it.”⁸⁶⁹

The statement as it stands is as speculative as it is biased and disingenuous. It lacks factual basis and remains simplistic and meaningless rhetoric. For instance Desforges, more

1999, pp. 692 – 735, also available at <http://www.hrw.org/reports/1999/rwanda>; International Panel of Eminent Personalities (2000) Rwanda: The Preventable Genocide U/IPEP/PANEL; para. 22.1 – 22.42, available online at <http://www.oau.oua.org/Documents/ipep/rwanda-e/EN.html>, accessed on 15 January 2005

⁸⁶⁶ Moghalu C. Kingsley, [legal advisor, Special Assistant to the Registrar, ICTR], “The International Criminal Tribunal for Rwanda in Perspective”, Paper presented at the *African Dialogue II Conference*; Theme: “Promoting Justice and Reconciliation in Africa: Challenges for Human Rights and Development”, 24 – 26 May 2002

⁸⁶⁷ Cited in Starke J. Gabriel Q. C., *The Science of Peace*, op. cit., p. 62

⁸⁶⁸ *Idem*, pp. 3 - 4

⁸⁶⁹ Schabas A. William., “State policy as an element of International Crimes”, *The Journal of Criminal Law & Criminology*, Vol. 98, 2007 – 2008, No. 3, pp. 953 – 982, p. 966. In this article Schabas maintains that state policy is an element of international crimes, particularly of “genocide”. Schabas further suggests that:

Raphael Lemkin, the scholar who first proposed the concept of genocide in his book *Axis Rule in Occupied Europe*, spoke regularly of a plan as if this was a *sine qua non* for the crime of genocide. In the case of *Prosecutor v. Kayishema*, the ICTR Trial Chamber wrote: ‘Although a specific plan is not easy to carry out genocide, it would appear that it is not easy to carry out genocide without a plan or organization.’ Furthermore, the Chamber said that ‘the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide.

Schabas A. William., “State policy as an element of International Crimes”, op. cit.; but also Schabas’ further position that “The Appeals Chamber has held that there is no need to establish a plan to commit genocide. This means that it is possible to establish genocide without any evidence of State involvement, or that of an organized State-like entity”, see Schabas A. William., *The UN International Criminal Tribunals: the former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, 2006, p.171

knowledgeable of Rwanda⁸⁷⁰ than Schabas, called to testify as an expert witness in the *Military Two* case, was of the opinion that:

From April 1992 until the beginning of the genocide in April 1994, the government in charge in Rwanda was a multiparty government, including Tutsi representatives, and it is for that reason alone that it is impossible to conclude that there was planning of a genocide by the government. Rather, it is a more subtle analysis which has to lead to the conclusion that members of the government in their individual capacities made use of their official powers to create a system which could be turned to the use of violence, but it was not the government as such, simply because it was a government that included Habyarimana's opponents from April 1992 on, and it would simply not have been possible for them as a group to have agreed to such a policy.⁸⁷¹

Whether establishing a historical record is a proper function of a court of law, is still disputable.⁸⁷² Assuming that historical recording fits in the functions of the ICTR, it will still be “difficult to escape from the conclusion that truth requires total disclosure [because] an ailing country needs to know the truth about its past as one of the conditions for its recovery”⁸⁷³, as Beigbeder suggests.

Prosecutions at the international tribunals offer at best an imperfectly “truthful record.”⁸⁷⁴ In reality, a criminal tribunal seeks to assess the individual responsibility of a few perpetrators. It does not attend to the entire root and spectrum of all circumstances surrounding the commission of crimes, especially crimes committed in times of war. A criminal tribunal deals with a limited number of cases which it attempts to individualise. This does not allow the

⁸⁷⁰ Desforges' master's thesis and doctoral dissertation both addressed the impact of European colonialism on Rwanda. *Defeat Is the Only Bad News: Rwanda under Musinga, 1896–1931*, her dissertation, was published posthumously in 2011. Describing the politics of the court during the reign of Yuhi Musinga, it shows how divisions among different groups in Rwanda shaped their responses to colonial governments, missionaries and traders, available at http://en.wikipedia.org/wiki/Alison_Des_Forges, accessed on 7 May 2013. Desforges testified in more than 10 cases before the ICTR.

⁸⁷¹ Dr. Alison Desforges' testimony in *The prosecutor versus Augustin Bizimungu, Augustin Ndingiyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu*, ICTR – 2000 – 56 – T, Transcript of proceedings 19 September 2006, p. 4, lines 13 – 22

⁸⁷² Johnson D. Larry, op.cit, p. 280 who is of the view that “some say the tribunals also have an important role to play in getting the historic record straight to avoid future denials and facilitating reconciliation, while others would say that is not the function of a court of law”; Cassese, formerly judge and President of the ICTY, is of the view that:

The judicial response is hedged around with another limitation: Judges may not act as historians. Their judgment cannot constitute a contribution to the reconstruction of the past. To be sure, judicial decisions may articulate an important account of past events based on first-hand evidence. But the main task of judges is to determine whether the defendants are guilty or innocent. It is therefore wrong to expect from criminal tribunals a detailed historical account of past conflict.

Cassese Antonio, “Clemency Versus Retribution in Post-Conflict Situations (Friedman Award Address)”, op. cit., p. 8

⁸⁷³ Beigbeder Yves, op. cit., p 123 - 124

⁸⁷⁴ Developments in the Law: International Criminal Law, op. cit., p. 1973

discovery of the whole truth about an event. “Despite the tribunals’ efforts to recount the historical context for the crimes they allege, emphasising certain legal claims may still preserve only a partial record of other aspects of the conflicts.”⁸⁷⁵

The history that will transpire from the judgments of the ICTR will be a partial account of what happened. It will most reflect the prosecution theory of the case, namely that of a genocide against the Tutsi, and not the root causes of conflicts among different actors of the Rwandan society. Burke explains much better how this approach works. According to him:

Once people form theories, they fail to adjust the strength of their beliefs when confronted with evidence that challenges the accuracy of those theories. Indeed, theory maintenance will often hold when people learn that the evidence that originally justified the theory is inaccurate. At the same time that people fail to consider information that disconfirms a theory, they tend both to seek out and to overvalue information that confirms it.⁸⁷⁶

This is the whole danger of adjudicating events like the ones that unfolded in Rwanda by only looking at one side in an international *ad hoc* tribunal. It perverts history, and does not accurately reflect what happened. This perception of events goes contrary to the objective scientific approach that “proper scientific method requires researchers to seek to disprove their working hypothesis.”⁸⁷⁷

The ICTR historic record will be that of an African genocide of the end of the twentieth century, and nothing more.⁸⁷⁸ Unfortunately, and in accordance with Chuter, “experience suggests that people find it difficult to modify their views [in circumstances] when they have

⁸⁷⁵ Ibidem, p. 1973

⁸⁷⁶ Burke S. Alafair, “Improving prosecutorial decision making: some lessons of cognitive science”, op. cit., p. 1593. Burke further identifies four related but separate aspects of cognitive bias that contribute to imperfect theory formation and maintenance, namely the confirmation bias, the selective information processing, the belief perseverance, and the avoidance of cognitive dissonance.

⁸⁷⁷ Burke S. Alafair, op. cit., p. 1595, citing Karl R. Popper, *The logic of Scientific Discovery* 32 – 33 (1968)

⁸⁷⁸ See for instance an Editors’ note which stresses that:

The international tribunals, however, are accountable to the U.N., which established the ICTR and the ICTY for the purpose of prosecuting genocide. Thus, it was clear from the outset that the international community already suspected that genocide had occurred in Rwanda and the former Yugoslavia. As such, the chambers were under significant pressure both to find that genocide had occurred and to hand down genocide convictions. Had the *Akayesu* chamber, for example, not found that the Tutsi were a protected group, it could not have made a finding of genocide, thus defeating the very purpose of the tribunal. It is not surprising, then, that the chambers of the ICTR and the ICTY found that the Tutsi and the Bosnian Muslims, respectively, were protected groups, allowing the genocide prosecutions to proceed.

The editors, “Developments in the Law: International Criminal Law”, *Harvard Law Review*, Vol. 114, Iss.7, 2000 – 2001, pp. 1943 – 2073, pp. 2023 - 2022

made a moral and political commitment to one particular hypothesis in the past.”⁸⁷⁹ Genocide in Rwanda is the conventional wisdom and none is allowed to depart from it. Authorities of the tribunal had already laid strong foundations in this purview. For instance, Odora, Former Senior aide in the immediate Office of the Prosecutor in Arusha remarks that “the Rwanda[n] genocide ended the twentieth century on a note of unimaginable evil.”⁸⁸⁰ Once again Chuter observes that the result is likely “to be an expanding reality gap, as the years pass, between what is shown in court and what is believed outside.”⁸⁸¹

Moghalu, another ICTR Official also maintains that “the judgments of the ICTR have contributed to the individualization of guilt, a necessary element in reconciliation processes as opposed to collective guilt that blocks avenues for reconciling fractured societies.”⁸⁸² Again this alone, is not an element of reconciliation as defined. Moghalu’s opinion is based only on the prosecution of one part in a conflict that involved two distinct parties with far reaching impacts on the society. Moghalu purports moreover that the “ICTR has had the obvious effect of largely banishing extremists and extremist political philosophies from Rwanda’s political space.”⁸⁸³ First of all the “extremist” terminology was tailored from nowhere. The existence of “extremists” in Rwanda has not been proven but appears only in political speeches. It is a more divisive than a reconciling concept.

Moghalu advances furthermore that the ICTR has tried highly placed individuals like the Prime Minister.⁸⁸⁴ This does not, on its own, constitute an element of national reconciliation. The guilty plea of the Prime Minister will be revisited later to show how it was truncated.

⁸⁷⁹ Chuter David, *War Crimes: Confronting atrocity in the modern world*, op. cit., p. 229

⁸⁸⁰ Obote A. Odora, “Understanding and fighting genocide ideology”, The 13th Commemoration of Rwanda Genocide at African Union Headquarters, Addis Ababa-Ethiopia, 7th April 2007, *Guest Lecture at the African Union Headquarters*, Addis Ababa-Ethiopia, 7th April 2007; see also Justice Hassan B. Jallow (ICTR Chief Prosecutor), *Justice After Genocide: The Challenges of the International Criminal Tribunal for Rwanda*, Speech to the University of Lund in Stora Salen, Af-Building, Lund, January 31st 2007, [inedited copy on file with the researcher]. In this paper the Chief Prosecutor argued that the UNSC adopted a two-fold approach to justice in Rwanda after the genocide. It was to establish the ICTR principally to prosecute the perpetrators of genocide and to manage the criminal justice side of the equation for investigation and prosecution of the key organisers, planners and perpetrators of the genocide. The justice equation often attracts the attention of the media and external interests.

⁸⁸¹ Chuter David, *op. cit.*, p. 229 - 230

⁸⁸² Moghalu C. Kingsley, *op. cit.* p 3 - 4

⁸⁸³ *Idem*

⁸⁸⁴ *Id.*

The ICTR President in turn argues that “the Tribunal is not an enquiry commission. Judges are not historians. The purpose of a criminal trial is to establish individual guilt, not to establish the historical truth about the conflict.”⁸⁸⁵ Cassese, who from 1993 to 2000 was also a judge and President of the ICTY, shares the same view that “criminal trials [...] do not reconcile people. On the contrary, they may act as powerful incentives to rekindle past animosities and hatred.”⁸⁸⁶ The prosecution has its own view on how the ICTR has contributed to national reconciliation in Rwanda. The spokesperson advances another view quite different from the prosecution’s one. The judges dismiss any contribution to national reconciliation the ICTR might have achieved.

Faced with these multifaceted and contradictory statements from the spokesperson, the prosecutor and the president of the Tribunal, nothing consistent is left. The ICTR official position with respect to national reconciliation in Rwanda is still unknown. The ICTR’s approach to reconciliation has been as ambivalent as it has been contradictory. Those who believe that reconciliation has been attained ignore the content of the word “reconciliation” or divert its meaning. It is instead true to agree with Haskell and Waldorf that “the ICTR’s failure to prosecute RPF crimes has not promoted reconciliation in Rwanda, as impunity for these crimes remains a divisive issue.”⁸⁸⁷

Reconciliation is not about establishing outreach programs; it is not about creating information centres, broadcasting judgments in national languages or creating awareness campaigns as sustained by Judge Byron, once President of the ICTR.⁸⁸⁸ Reconciliation does not mean

⁸⁸⁵ *International Criminal Tribunal for Rwanda: Model or counter model for International Criminal Justice?: The perspectives of the Stakeholders*, International Symposium, Geneva, 9 – 11 July 2009, Session One, Intervention by Judge Byron, p. 15

⁸⁸⁶ Cassese Antonio, “Clemency Versus Retribution in Post-Conflict Situations (Friedman Award Address)”, op. cit., p. 8

⁸⁸⁷ Haskell and Waldorf, op. cit., p. 78

⁸⁸⁸ *International Criminal Tribunal for Rwanda: Model or counter model for International Criminal Justice?: The perspectives of the Stakeholders*, International Symposium, Geneva, 9 – 11 July 2009, Session One, Intervention by Judge Byron, pp. 15 - 16

facilitating training sessions of Rwandan judges and students, as it transpires from various ICTR annual reports.⁸⁸⁹

An international criminal tribunal can attain the aim of creating an historical account record and thereby contribute to the process of reconciliation if and only if it responds to “challenges of impartiality and judicial consistency.”⁸⁹⁰ Judicial consistency is the resultant of a true and accurate historical account. This is only possible if the judicial adjudication of past human rights violations are fully addressed. It does not mean that every single violation has to be prosecuted. This is indeed impossible. It means that for a conflict involving more than one actor, specimen or tokens of every part to the conflict must answer to its humanitarian law violations.

Criminal tribunals can moreover contribute to the process of reconciliation when everyone finds their place in the tribunal’s process. It is not the case in the Rwandan ICTR perspective because what is done is only the continuation of explanations of what the genocide was, how the victims feel about it and how they perceive the judgments rendered. The tribunal also publicises its work up to the hills in Rwanda, but it does not go outside its confines of understanding its mandate as one of only judging “genocide.” *ICTR Annual Reports* frequently

⁸⁸⁹ See for instance *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, referred to as *ICTR Annual Report*: paragraph 62 of the *Thirteenth Annual Report*, A/63/209–S/2008/514, 4 August 2008; paragraph 84 of the *ICTR Twelfth Annual Report*, A/62/284–S/2007/502, 21 August 2007; the concluding paragraph of the *ICTR Eleventh Annual Report*, A/61/265–S/2006/658, 16 August 2006; paragraph 88 of the *ICTR Tenth Annual Report*, A/60/229–S/2005/534, 15 August 2005; paragraph 80 of the *ICTR Ninth Annual Report*, A/59/183–S/2004/601, 27 July 2004; paragraphs 66 and 68 of the *ICTR Eight Annual Report*, A/58/140–S/2003/707, 11 July 2003; paragraph 88 of the *ICTR Seventh Annual Report*, A/57/163–S/2002/733, 2 July 2002; paragraph 142 and 215 of the *ICTR Sixth Annual Report*, A/56/351–S/2001/863, 14 September 2001; paragraph 1 of the *ICTR Fifth Annual Report*, A/55/435–S/2000/927, 2 October 2000; paragraphs 27 and 128 of the *ICTR Fourth Annual Report*, A/54/315 S/1999/943, 7 September 1999; paragraph 160 of the *ICTR Third Annual Report*, A/53/429 – S/1998/857, 23 September 1998; *Letter dated 29 May 2006 from the President of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 addressed to the President of the Security Council*, S/2006/358, 1 June 2006 (para. 65 and Annex 5 to the letter); para. of same subject *Letter dated 5 December 2005*, S/2005/782, 14 December 2005; para. 63 and 64 of same subject *Letter dated 23 May 2005*, S/2005/336, 24 May 2005

⁸⁹⁰ Fatic Aleksandar, *Reconciliation via war Crimes Tribunal?*, op. cit, p. viii

repeat a phrase allegedly to show that the tribunal worked for reconciliation in Rwanda. The phrase reads as follows:

In order for the prosecution of the persons responsible for the 1994 genocide to contribute to national reconciliation in Rwanda it is essential that the Rwandan people have an understanding of and confidence in the work of the Tribunal. To achieve this, the International Criminal Tribunal for Rwanda (ICTR) has established an outreach programme designed to reach, first and foremost, all sectors of Rwanda society and, second the rest of the world.⁸⁹¹

It has been demonstrated that none of the ideas put forth in this paragraph facilitate reconciliation in Rwanda. The question will remain pending after the ICTR closes its doors, and Bernard Muna's, formerly ICTR Deputy Prosecutor, disappointment will increase in that his questions were not answered. He stated in a symposium that:

I am only disappointed to say that we have not talked about reconciliation. How much has the Tribunal achieved on the way of reconciliation? Has this Tribunal achieved the aims which were stated in the statute of setting up to have reconciliation? Can we really say that the Tribunal has any reconciliation? I think this is something we can go into.⁸⁹²

Reconciliation is not a function of a criminal tribunal. As a transitional process that brings together former antagonists, it better fits in the work of truth-telling commissions. These commissions facilitate people to share the blame of the past and offer them the opportunity to design the future together.

4.6. Summary

This chapter was aimed at defining the objectives for which the *ad hoc* tribunals were established. The text of the statutes of each tribunal does not clearly elucidate the aims, goals and objectives of the tribunals. Objectives appear, however, from the reading of the preambles of the resolutions establishing the tribunals. They are an integral part of the resolutions establishing the ICTY and ICTR. Justice has been shown to constitute the ultimate objective of any litigation in a court of law. The *ad hoc* tribunals, particularly the ICTR, failed to meet the imperatives of justice. There are also many interrogations regarding whether *ad hoc* tribunals are a proper forum for deterrence, retribution and incapacitation.

⁸⁹¹ Annex 5 to the *Letter dated 29 May 2006 ...*, *op. cit.*; also found at paragraph 142 of the ICTR *Sixth Annual Report*, A/56/351-S/2001/863, 14 September 2001 and *Letter dated 30 November 2006*, S/2006/951, 8 December 2006 (Annex 5)

⁸⁹² *International Criminal Tribunal for Rwanda: Model or counter model for International Criminal Justice?: The perspectives of the Stakeholders*, International Symposium, Geneva, 9 – 11 July 2009, 10 July 2009, Session Four, Intervention by Mr. Bernard Muna, p. 8

Beyond the traditional expectations from criminal adjudications of offences, the *ad hoc* tribunals were overburdened with the strategic objectives of restoration and maintenance of international peace and security which are political objectives. The *ad hoc* tribunals unequivocally failed this mission, which improperly befalls on them. Reconciliation falls outside the ambit of a criminal tribunal.

Against the background of objectives which were either overestimated or unrealistic, the prosecutor undertook an uneasy task of determining his targets. In particular, the prosecutor was not, all the times, guided by his dual role of fighting crimes and doing justice. This practice, once again, defeated the ends for which the tribunals were established. In many instances, investigations of the serious crimes were flawed targeting some individuals believed to be the most responsible for the crimes. The judges did not intervene to redress the situation, even where misconduct transpired. This also contributed to the ineffectiveness of the *ad hoc* tribunals. The next chapter analyses how the *ad hoc* tribunals' prosecutor investigated the crimes, and how he/she behaved in the prosecution process in front of the judges' passive eyes.

CHAPTER 5: THE ROLE OF THE PROSECUTOR UNDER THE STATUTES OF *AD HOC* TRIBUNALS

5.1. Introduction

Article 16 and 15 of the ICTY⁸⁹³ and ICTR respective Statutes vest the prosecutor with the power to independently investigate and prosecute the crimes that are material to the mandate of the *ad hoc* tribunals. Article 18 of the ICTY Statute, using the same wording as Article 17 of the ICTR Statute, provides that: “The prosecutor shall initiate investigations *ex officio* or on the basis of information obtained from any source [...]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”

The express provision of the prosecutor’s status as an independent organ, his/her functions and the way he/she assumes his/her role, are clear indications of the importance of this office in the work of the tribunals. Indeed the prosecutor plays a crucial role with far reaching impact on the efficiency and effectiveness of the international tribunals. Without this portfolio, the *ad hoc* tribunals could not have functioned.

This chapter contends that the prosecutor is in charge of defending the public interest and not merely an advocate looking at only winning a particular case. This double role requires that the person performing these duties be sufficiently trained for the job, but most importantly takes into account the ethical and moral requirements of the office. Like prosecutors in domestic systems, the international prosecutor is vested with an enormous amount of discretion in the exercise of the functions. The statutes do not provide for any mechanisms of oversight on the work of the prosecutor. It is unclear whether the prosecutor assumes his/her office guided by the dual role or whether he/she prefers one over the other.

⁸⁹³ 1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

In domestic jurisdictions the criminal justice machinery is set in motion by law enforcement agencies before the prosecutor can take over. The prosecutor may also act directly from the investigation phase through prosecution and appeal. The *ad hoc* international prosecutor is in a privileged position because he heads the investigation as well as the prosecution units. According to Boas “in the adversarial structure of international criminal law, it is the prosecution that conducts investigations, makes decisions about who to indict, and prepares the indictments which determine the nature, scope, and structure of the case.”⁸⁹⁴ Understanding how the prosecutor discharges these functions is fundamental to assessing the effectiveness of the *ad hoc* tribunals. Despite the hierarchical organisation, abuses have been deliberately and maliciously committed. Judges have been passive bystanders even though they were aware of the abuses.

In the investigative role, the first duty of the prosecutor is, according to Wouters et al., “to research the objective truth. Subsequently, the prosecutor has to extend the investigation to cover all the facts and evidence, provided that they are relevant to the case and investigate incriminating and exonerating circumstances on equal footing.”⁸⁹⁵ As will be demonstrated in some cases adjudicated before the *ad hoc* tribunals, the prosecutor failed to thoroughly investigate what the accused have done wrong, investigating instead the people and the positions they occupied. This is not what investigations are about.

5.2. The prosecutor’s central role and attributes in the administration of criminal justice

In most, if not all of domestic jurisdictions “the prosecutor plays a special and unique role in the criminal justice process”⁸⁹⁶ though its role may “vary considerably among legal systems.”⁸⁹⁷ A prosecutor is an

⁸⁹⁴ Boas Gideon, *The Milosevic trial: Lessons for the conduct of complex international criminal proceedings*, op. cit., p. 6

⁸⁹⁵ Idem, pp. 377 - 378

⁸⁹⁶ Layton David, “The Prosecutorial Charging Decision”, *Criminal Law Quarterly*, Vol. 46, Iss. 3&4, 2002, pp. 446 – 482, p. 449; see also Bubany P. Charles & Skillern F. Frank, “Taming the dragon: An administrative law for prosecutorial decision making”, *American Criminal Law Review*, Vol. 13, Iss.3, 1976, pp. 473 – 506 (both authors equate the prosecutor to a dragon and argue that enforcement of criminal law depends in the final analysis on the sole judgment of one person – the prosecutor); Van Patten likewise taints the prosecutor with the capacity to do great good, which is unfortunately accompanied by a corresponding one to do great evil, Patten Van K. Jonathan, “Suing the Prosecutor”, *South Dakota Law Review*, Vol. 55, Iss.2, 2010, pp. 214 – 252; seeing it under another angle is Gourlie who compares the prosecution to an atomic energy capable of promoting justice or injustice whatever the

“essential agent of the administration of justice.”⁸⁹⁸ The prosecutor serves to uphold the rule of law and the respect of human rights more generally. In domestic systems, the lack of these two attributes may bring the criminal justice system and governing institutions into disrepute and lose all credibility and moral authority⁸⁹⁹ over the public. This is derived from the fact that the prosecutor’s notional client is a public that seeks the attainment of justice as opposed to victory in court.⁹⁰⁰

According to Terzano:

The role of the prosecutor is not just one of an advocate, but rather an ‘administrator of justice’ whose ultimate goal is to protect the innocent, convict the guilty, and guard the rights of the accused. Prosecutors—unlike defence attorneys—do not advocate for a single individual; they advocate for a just outcome.⁹⁰¹

Gourlie emphasizes this double role by suggesting that:

If the prosecutor’s duty to seek justice results in his acting as time-keepers or bloodhound, then his role in the administration of justice is clothed in hypocrisy. Prosecution thereby runs the risk of becoming a weapon of injustice instead of remaining an instrument for justice. What the prosecutor must guard against is the tendency to become too conviction-minded, and the inclination to lose sight of his role as a fair minister of justice.⁹⁰²

The American Bar Association’s *Standards for Criminal Justice* (ABA Standards) stresses the duty of the prosecutor as one of seeking justice, not merely one of convicting.⁹⁰³ These standards

case may be; or sees “the prosecutor as the central figure in the administration of criminal justice”, Gourlie C. William, “Role of the Prosecutor: Fair Minister of Justice with firm Conviction”, *Manitoba Law Journal*, Vol. 12, 1982 – 1983, pp. 31 – 42; p. 31 and p. 39. Danner also observes that:

In The Netherlands, the United States, and Egypt, for example, prosecutors have broad discretion to direct criminal investigations and to determine charging decisions. In Pakistan, England, Denmark, and Canada, by contrast, prosecutors do not generally oversee investigations but have broad discretion over charging decisions and argue the state’s case at trial. In France, a judge, not the prosecutor, investigates the most serious crimes, but the prosecutor sets the limits of the investigation by directing the judge d’instruction which facts to investigate. French prosecutors also have significant discretion in charging cases and overall play a central role in the criminal process.

Danner A. Marston, *op. cit.*, p. 512;

⁸⁹⁷ Dandurand Yvon, “The Role of Prosecutors in promoting and strengthening the rule of law”, *Second World Summit of Attorneys General, Prosecutors General and Chief Prosecutors*, Doha, Qatar, November 14 – 16, 2005 (Working paper III in archive with the researcher), p. 3

⁸⁹⁸ *Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (Art. 3)

⁸⁹⁹ Dandurand Yvon, *op. cit.*, p. 2

⁹⁰⁰ Layton David, “The Prosecutorial Charging Decision”, *op. cit.*, p. 449

⁹⁰¹ Terzano F. John, McGee A. Joyce & Holt D. Alanna., *Improving Prosecutorial Accountability: The justice Project*, 2009, also available at <http://www.thejusticeproject.org/>, p. 2

⁹⁰² Gourlie C. William, *op. cit.*, p. 41

⁹⁰³ ABA Standards for Criminal Justice: Prosecution Function and Defense function Standard 3-1.2(c), (1993)

and rules provide a duality of functions. According to Caves, this reflects “the prosecutor’s role in common law.”⁹⁰⁴ Groome, both a former Manhattan District Prosecutor and ICTY Lead Prosecutor in the *Milosevic* case underscores that “the prosecutor is not a partisan adversary but a judicial officer charged foremost with determining the truth.”⁹⁰⁵

Describing an American public prosecutor more generally, Gershman posits that “whether rural or urban, local or federal, elected or appointed, this official is glamorized by the media and diabolized by his foes. [...] he has the power to make decisions that control and even destroy people’s careers, reputations and lives.”⁹⁰⁶ Gifford reinforces this idea when he suggests that “being charged with a crime jeopardizes employment, reputation, and social standing.”⁹⁰⁷ It is the decision to charge that ultimately shapes and impacts on the criminal justice system at large in terms of efficiency, character, and the quality of the criminal justice system.⁹⁰⁸

These two precepts about the status of a public prosecutor apply *mutatis mutandis* to the international prosecutor as well. The international prosecutor is situated at the intersection of justice as a basic human right value enshrined in purposes of the UN and equality before the law, the presumption of innocence and the right to a fair public hearing.⁹⁰⁹ To be able to equally perform these roles, the prosecutor must have special attributes that distinguish him/her from ordinary lawyers, even from the judges.

⁹⁰⁴ Caves A. Michael, “The prosecutor’s Dilemma: obligatory charging under the Ashcroft Memo”, *Journal of Law and Social Challenges*, Vol. 9, 2008, pp. 1 – 23, p. 3

⁹⁰⁵ Groome Delmont, “The Future of International Criminal Justice: Re-evaluating the theoretical basis and methodology of International Criminal Trials”, *op. cit.*, p.797

⁹⁰⁶ Gershman L. Bennett, *Prosecutorial Misconduct*, Clark Boardman Callaghan, *op. cit.*, p. vii

⁹⁰⁷ Gifford G. Donald, “Equal protection and the Prosecutor’s Charging Decision: Enforcing an Ideal”, *The George Washington Law Review*, Vol. 49, Iss.4, 1980, pp. 659 – 719, p. 669; Caves is also of the view that a charging decision “can jeopardize a suspect’s standing within the community, severely degrade a suspect’s economic security, inflict emotional and psychological damage on the suspect and the suspect’s family, and is at the very least a tremendous disruption of her daily life”, Caves A. Michael, “The prosecutor’s Dilemma: obligatory charging under the Ashcroft Memo”, *op. cit.*, p. 11

⁹⁰⁸ Caves A. Michael, “The prosecutor’s Dilemma: obligatory charging under the Ashcroft Memo”, *op. cit.*, p. 12

⁹⁰⁹ See how the value of justice and the underlying rights are articulated in the “*Guidelines on the Role of Prosecutors*”, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

5.3. The attributes of a prosecutor

The prosecutor's specific attributes are threefold, namely independence, accountability and professionalism. McKechnie finds a strong relationship between independence and accountability. The "independence can only be assured if there is appropriate accountability."⁹¹⁰ According to the *International Commission of Jurists*, "prosecutors play a crucial role in the administration of justice. Respect for human rights and the rule of law presuppose a strong prosecutorial authority in charge of investigating and prosecuting criminal offences with independence and impartiality."⁹¹¹ This is valid whether in domestic or international prosecutions. So to say, any successful and unsuspected prosecution needs to be conducted by a "counsel of ability, independence, moderation, firmness and restraint."⁹¹² What do these three pillars encompass then?

5.3.1. Independence

It is not an easy exercise to calibrate and frame the independence of the international prosecutor beyond the common understanding of what the term "independence" means more generally. In general terms, the prosecutor's independence would mean the prosecutor's ability to apply the law to the facts at hand without any other extraneous consideration. How this works practically is a matter of further debate.

According to Tak "the topic of dependence or independence of the prosecution service can be dealt with from various angles since the level of (in-) dependence is the result of the interaction of various elements."⁹¹³ Tak identifies and distinguishes between the external and internal (in-)dependence and the institutional and functional aspects of the (in-)dependence.⁹¹⁴ "External (in-)dependence deals with the question to what state power the prosecution service is subordinated

⁹¹⁰ McKechnie John, Q.C, "Directors of Public Prosecutions: Independent and Accountable", *Western Australian Law Review*, Vol. 26, 1996, pp. 267 – 285, p. 273

⁹¹¹ International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: a practitioner's guide*, Practitioners' Guide Series No1, International Commission of Jurists, Geneva, Switzerland, 2004, p. 70

⁹¹² McKechnie John, Q.C, op. cit., p. 285

⁹¹³ Tak Peter J. P. (ed.), *Tasks and powers of the Prosecution services in the EU member States*, Wolf Legal Publishers, 2004, p. 3

⁹¹⁴ *Ibidem*, p. 3

or related.”⁹¹⁵ Internal dependence “refers to the internal structure of the prosecution service – a centralized or decentralized structure – and its hierarchical links.”⁹¹⁶

The external (in-)dependence is institutional. It relates to the relationship between the prosecution service and the three traditional powers within a democratic government, namely the legislative, the executive and the judiciary. The second leg of (in-)dependence, concerns more the internal organisation of the office of the prosecutor.

It is crucial therefore to understand the scope of the institutional independence and how it transpires in practice. According to Brubacher, this prosecutorial independence refers to “the institutional division of power, including the independence of the prosecutor from other bodies within the tribunal and the independence from the executive, which, in the international system, is considered to be the function of states and some international organisations such as the Security Council.”⁹¹⁷ There is an issue of administration where the prosecution is part of a hierarchical structure. Important, however, is to understand how the prosecution at its own level assumes its functions. Is the prosecution executing instruction from above...instructions that may indicate what to do and how to do it? It is only when this question is answered in the negative that the prosecution is independent.

The *International Commission of Jurists* remarks that “unlike with judges and lawyers, international law does not contain a provision that guarantees the institutional independence of prosecutors.”⁹¹⁸ Even in the absence of such provision, prosecution independence means making a personal best informed and objective opinion on a case without extraneous influence from any corner and to take a firm stand. It is a situation where a prosecutor decides, not because someone else enjoined or otherwise pressurised him/her to decide in a way rather than in another. The decision must be made freely without any influence or not under duress caused by people within or outside of the tribunal.

⁹¹⁵ *Idem*, p. 3

⁹¹⁶ *Id.*, p. 4

⁹¹⁷ Brubacher R. Matthew, “Prosecutorial Discretion within the International Criminal Court”, *op. cit.*, p. 84

⁹¹⁸ International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: a practitioner’s guide*, *op. cit.*, p. 70

Understood in this sense, the independence of a prosecutor may not be different from the one enjoyed by a judge. Shetreet argues that “principles of independence in the judiciary are essential for ensuring the rule of law, protecting human rights, and securing the continued preservation and development of democratic societies.”⁹¹⁹ This comprises the personal and institutional independence. Personal independence, according to Rugege “refers to the impartiality of a judge; that is, the judge’s ability to make a decision without fear, favour, or prejudice with regard to the parties irrespective of their position in society – it means the absence of bias.”⁹²⁰

Citing the *Basic Principles on the Independence of the Judiciary*, Rugege argues that “the judge should be able to resist intimidation or influence, whether pressure stems from governmental power, politics, religion, money, friendship, prejudice or other inducements. Decisions should only be based on the facts and the law.”⁹²¹ Jipping agrees that such independence “is not an end in itself but merely a means to the end of a proper exercise of judicial power; conversely, an improper exercise of judicial power destroys judicial independence.”⁹²²

Briefly, the independence of a judge or a prosecutor is not designed to promote the personal upliftment of the individual who enjoys it. It is a tool that the community of rulers and ruled recognise in the person of the judge or the prosecutor to properly exercise the function entrusted

⁹¹⁹ Shetreet Shimon, “The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: the mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges”, *Chicago Journal of International Law*, Vol. 10, Iss.1, 2009, pp. 275 – 332, p. 277

⁹²⁰ Rugege Sam, “Judicial Independence in Rwanda”, *Pacific McGeorge Global Business & Development Law Journal*, Vol. 19, Iss.2, 2006, pp. 411 - 424, p. 413

⁹²¹ *Basic principles on the Independence of the Judiciary*, Seventh United Congress on the Prevention of Crime and the Treatment of Offenders, Milan, U.N. Doc. A/CONF.121/22Rev.1 at 59 (1985), cited in Rugege Sam, op. cit., p. 413; see also *The Burgh House Principles on the Independence of the International Judiciary* (2004), available at www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf, accessed on 5 October 2013; the International Bar Association’s *Code of Minimum Standards of Judicial Independence* (1992) (“*IBA Standards*’ “); the *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region* (as amended at Manila, 28 August 1997), available at lawasia.asn.au/objectlibrary/147?filename=Beijing%Statement.pdf; accessed on 5 October 2013; *Draft Universal Declaration on the Independence of Justice* (“*Singhvi Declaration*”), available at www.cristidanilet.ro/docs/Shingvi%20Declaration.pdf, accessed on 5 October 2013; *Basic Principles on the Independence of the Judiciary*, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at <http://www.hjpc.ba/dc/pdf/Basic%20Principles%20on%20the%20Independence%20of%20the%20Judiciary.pdf>, accessed on 5 October 2013

⁹²² Jipping L. Thomas, “Legislating from the bench: the greatest threat to judicial independence”, op. cit., p. 143

to him or her. The independence of a prosecutor must be understood in a way, according to Gourlie, that:

political, personal, and private considerations must be set aside so far as the exercise of discretionary power is inherent in the office of the prosecutor. No matter how much pressure is put on him due to the heinous nature of an offence, the surrounding publicity, or the parties involved, the prosecutor must retain an inward sense of impartiality and display outward objectivity.⁹²³

Hammergren gives a broader picture regarding why independence is so important in the exercise of judicial functions which can also extend to prosecutorial functions. He suggests:

independence serves important social needs: it is not, properly speaking, an end in itself or a way to secure the professional position of judges for their own benefit, but rather a means to achieve the goals of a just and prosperous society. For this reason, independence needs to be complemented with means to ensure that judges and the judiciary as a whole comport with society's democratic principles and legitimate interests: even as they are independent, in other words, judges need to be accountable.⁹²⁴

Nevertheless, one thing needs to be borne in mind: "independence without accountability poses an obvious danger to the public interest which requires the fair and just administration of the criminal justice system."⁹²⁵ Coldrey⁹²⁶, a former Australian Director of Public Prosecution cautioning against independence without accountability, posits that:

Whilst it is argued that prosecutorial independence is an essential element in the proper administration of criminal justice it must be equally recognised that inherent in independence without accountability is the potential for making arbitrary, capricious, and unjust decisions.⁹²⁷

Greenawalt remarks that the question of prosecutorial authority proved a major point of dispute⁹²⁸ throughout the negotiation of the Rome treaty. The matter was so important to the point that "no aspect of the Court's institutional architecture has provoked more controversy – or proven more central to the United States' opposition – than has the provision for a standing independent prosecutor authorized to initiate investigations and indictments subject primarily to

⁹²³ Gourlie C. William, *Role of the Prosecutor: Fair Minister of Justice with firm Conviction*, op. cit. pp. 37 – 38, citing K. Turner, "The role of Crown Counsel in Canadian Prosecutions", (1962), 488 C.B.R.

⁹²⁴ Hammergren Linn, "Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals", in *Guidance for Promoting Judicial Independence and Impartiality*, op. cit., note 3, 149, cited in Sajó András, (ed.), *Judicial Integrity*, Martinus Nijhoff Publishers, Leiden/Boston, 2004, p. 9

⁹²⁵ Flatman Geoffrey, QC., "Prosecuting Justice: Independence of the Prosecutor", *Australian Institute of Criminology*, Melbourne, 18 and 19 April 1996, p. 4

⁹²⁶ Coldrey John QC (1990) Paper entitled *The Office of the Director of Public Prosecutions*, Thorsons Publishing, Great Britain, p. 185, cited in Flatman Geoffrey, QC, op. cit.

⁹²⁷ *Ibidem*, p. 5

⁹²⁸ Greenawalt Alexander K. A., *Justice without politics? Prosecutorial discretion and the International Criminal Court*, op. cit., p. 591

judicial, rather than political, constraints.”⁹²⁹ It is therefore quite surprising that no one has as yet questioned the independence of the *ad hoc* international prosecutor as a matter of principle.

The barometer to measure the prosecution’s independence is not easily available. Would it be through accountability eventually?

5.3.2. Accountability

Prosecutors should be able to explain what they legitimately and legally do and why they behave in a certain way rather than in another. Bellemare suggests that “accountability has always been a key component of the exercise of prosecutorial discretion.”⁹³⁰ McKechnie agrees that “the accountability of a prosecuting service is one of the bastions of its independence.”⁹³¹ This is not much demanding from a prosecutor given the special duties and the broader power he/she exercises in the criminal justice system, for the benefit and interest of the society. It is critical that those duties are discharged responsibly and ethically.⁹³² Prosecutors must do their work rightly, not necessarily to please everyone, but by offering the best they can offer in the eyes of the reasonable man. But what is accountability? Accountability may be defined in simple words as the readiness to respond to any legitimate question about one’s behaviour, conduit and action.

Normatively, a point of distinction needs to be made between the Common Law system and the Civil Law or prosecutorial system. In the latter system, the Prosecutor General is accountable to the Minister of justice, who in turn, accounts to Parliament. This kind of accountability is of a disciplinary nature and does not concern prosecutorial decisions.⁹³³ It is administrative. Professional bodies play little role in controlling prosecutors. Common to Civil Law or the prosecutorial system is a hierarchic oversight.

⁹²⁹ Ibidem, p. 585

⁹³⁰ Bellemare D. A., Q.C., “Accountability, Independence and ethics in prosecution practice: Public Confidence and Accountability in the Exercise of prosecutorial Discretion”, Paper presented at the International Society for the Reform of Criminal Law, 18th International Conference, Montreal, Quebec, Canada, August 10, 2004

⁹³¹ McKechnie John, Q.C, op. cit., p. 275

⁹³² See in this regard The Justice Project at <http://www.thejusticeproject.org/>, accessed on 8/2/2010

⁹³³ See Ambos Kai, “The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A comparative Overview on the Basis of 33 National Reports”, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 8, Iss.2, 2000, pp.89 – 118, pp. 101 – 102, pp. 102 - 103

The Common Law system whose application prevails in international prosecution needs more details. The prosecutor may be accountable or otherwise subjected to control in many ways: there are the “normal mechanisms of the court system” and through “internal review mechanism.”⁹³⁴ However, Bibas dismisses the courts’ control over the actions of prosecutors. In his opinion:

Individual trial judges are limited by the confines of particular cases and controversies. They are not well-suited to take the synoptic, bird’s-eye view needed to police systemic concerns about equality, arbitrariness, leniency, and overcharging. They lack statistical training and expertise, as well as detailed information from prosecutors’ files.⁹³⁵

It is even true that there is a little judicial oversight of the prosecution’s power and this oversight occurs in very limited and circumscribed cases. In the words of Gifford, few existing “procedural protections deal exclusively with questions of guilt or innocence; they do not address whether a prosecutor’s decision to charge was made in a fair and impartial way.”⁹³⁶ In respect of the supervisory power of the courts, Saylor and Wilson⁹³⁷ recall the United States Supreme Court position in *United States v. Hasting* holding that:

there are only three legitimate bases for the exercise of supervisory power; to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct.⁹³⁸

These criteria set a threshold rigidly difficult to meet and convince the court. Bronitt and McSherry are also of the view that:

the judicial duty is not to ensure fairness in the criminal process, but rather to prevent the accused being subjected to an unfair trial and the risk of wrongful conviction. Limiting this duty in this way means that judges do not have the responsibility for ensuing fairness during investigation. That said, what happens before a trial may hamper the ability of the court to conduct a fair trial.⁹³⁹

⁹³⁴ For these kinds of control see Ambos Kai, *Ibidem*, pp. 101 – 102; Mégret Frédéric, *International Prosecutors: Accountability and Ethics*, Working Paper No.18, December 2008

⁹³⁵ Bibas Stephanos, *op. cit.*, p. 35; Bibas Stephanos, “Prosecutorial regulation versus Prosecutorial Accountability”, *University of Pennsylvania Law Review*, Vol. 157, Iss. 4, 2009, pp. 959 - 1016. Bibas argues that judges largely avoid interfering with prosecutorial decisions

⁹³⁶ Gifford G. Donald, “Equal protection and the Prosecutor’s Charging Decision: Enforcing an Ideal”, *The George Washington Law Review*, Vol. 49, Iss.4, 1981, pp. 659 – 719, p. 669

⁹³⁷ Saylor F. Dennis VI & Wilson J. Douglas, “Putting a square peg in a round hole: the application of Model Rule 4.2 to Federal Prosecutor”, *University of Pittsburgh Law Review*, Vol. 53, Iss.2, 1992, pp. 459 – 487, p. 479

⁹³⁸ *Ibidem*, p. 479

⁹³⁹ Bronitt Simon & McSherry Bernadette, *Principles of Criminal Law*, LBC Information Services 2001, 2001, p.

This inability of the court to control all the action of the prosecutor was expressed by Lord Scarman in *R v Sang* that: “the judge’s control of the criminal process begins and ends with the trial, though his influence may extend beyond its beginning and conclusion.”⁹⁴⁰ In Canada, for instance, “judges have steadfastly refused to review [the] discretionary decisions [of the prosecutor], even in the face of apparent quasi-constitutional and constitutional limitations laid down in the Bill of Rights and the Charter of Rights respectively.”⁹⁴¹ The courts only intervene when there is an overt abuse of the process “where the court feels that the exercise of a prosecutorial power has resulted in an unacceptable degree of unfairness to an accused.”⁹⁴² But, it is also worthy to note that the acceptance of the doctrine of “abuse of process has been slow and uneven.”⁹⁴³

The prosecutor may also be accountable to his administrative hierarchy like in the British system where there exists “a certain parliamentary control.”⁹⁴⁴ This is so construed because the [Director of Public Prosecution] or DPP “is accountable to the Attorney-General and he or she is a Member of Parliament.”⁹⁴⁵

In domestic systems, the prosecutor’s powers may also be regulated by the Constitution and other laws. But the prosecutor’s accountability is not easily achieved. The reason for this is that “legislatures have strong incentives to give prosecutors freedom and tools to maximize convictions and minimize costs.”⁹⁴⁶ Constitutions and laws are therefore not sufficient to hold prosecutors accountable as a matter of the broader policy of combating crimes at lower costs. It is also worth noting that this kind of accountability varies from State to State.⁹⁴⁷

⁹⁴⁰ *R v Sang* [1980] AC 402 at 455, cited in Bronitt Simon & McSherry Bernadette, op. cit., p. 102

⁹⁴¹ Morgan C. Donna, “Controlling Prosecutorial Powers – Judicial Review, Abuse of Process and Section 7 of the Charter”, *Criminal Law Quarterly*, Vol. 29, Iss.1, 1986, pp. 15 – 65, p. 24

⁹⁴² *Ibidem*, p. 35

⁹⁴³ *Idem*, , p. 36

⁹⁴⁴ Ambos, op. cit., p. 102

⁹⁴⁵ *Ibidem*, p. 102

⁹⁴⁶ Bibas Stephanos, op. cit., p. 15

⁹⁴⁷ In the UK, “the DPP is also subject to his professional body and to periodic reviews by such bodies as the Audit Commission. In the US, federal prosecutors must report periodically to the Attorney General and accountable to the public. The Independent counsel has specific reporting obligation to the Special Division and the Congress. In South Africa the Attorney-General is accountable to Parliament and the Minister of justice.”

The last way of controlling the prosecutor's action is the reliance on ethics as prosecutors exercise their function as normal legal professionals. Gershman realises however that "prosecutors are increasingly immune to ethical restraints."⁹⁴⁸ This observation is quite true because "prosecution is a low-visibility process about which the public has poor information and little right to participate."⁹⁴⁹ Bibas argues furthermore that "prosecutors have great leeway to abuse their powers and indulge their self-interests, biases, or arbitrariness."⁹⁵⁰ He suggests moreover that prosecutors "are tempted to try a few strong or high-profile cases to gain marketable experience, while striking hurried plea bargains in most other cases."⁹⁵¹

These observations from knowledgeable scholars and practitioners counter the sustained belief that in most instances, prosecutors exercise their discretion in good faith. They support instead the idea that discretion is unchecked, unstructured, and largely hidden from the public's view⁹⁵², criticism and scrutiny. Gifford goes even further in suggesting that "to argue that all prosecutorial discretion is exercised in good faith and that controls are therefore unnecessary is to deny reality."⁹⁵³

Both Gershman and Bibas refer to the American domestic system where at least there exists professional bodies that are entitled to take disciplinary action against misbehaving prosecutors. Even in this case, Gershman observes that "there has been for some time a sense of frustration at the failure of professional disciplinary organizations to deal with such misconduct."⁹⁵⁴ The reason may be the ineffectiveness of bar authorities. In Gershman's opinion, "the failure to

⁹⁴⁸ Gershman L. Benett, "The New Prosecutor", *University of Pittsburg Law Review*, Vol. 53, Iss.22, 1992, pp. 393 – 458, p. 393; Cassidy proposes that ethical virtues can tailor what a prosecutor should be, what ultimately will facilitates what he should do, see Cassidy R. Michael, "Character and context: what virtue theory can teach us about a prosecutor's ethical duty to "seek justice", *Notre Dame Law Review*, Vol. 82, No 2, 2006, pp. 635 - 697

⁹⁴⁹ Bibas Stephanos, "Prosecutorial Regulation versus Prosecutorial Accountability", *University of Pennsylvania Law School*, 2008, p. 5 paper posted at NELLCO Legal Scholarship Repository available at http://lsr.nellco.org/upenn_wps/253, accessed on 31 August 2010, citing his earlier article Bibas Stephanos, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. Rev. 911, 923-31 (2006)

⁹⁵⁰ *Ibidem*, p. 5 - 6

⁹⁵¹ *Idem*, p. 6

⁹⁵² Gifford G. Donald, "Equal protection and the Prosecutor's Charging Decision: Enforcing an Ideal", *op. cit.*, p. 667; Morgan C. Donna, "Controlling Prosecutorial Powers – Judicial Review, Abuse of Process and Section 7 of the Charter", *op. cit.*, pp. 15 – 65

⁹⁵³ *Ibidem*, pp. 659 - 719

⁹⁵⁴ *Ibidem*, p. 444 (footnotes omitted)

discipline prosecutors contrasts sharply with the fairly common use of disciplinary sanctions against private attorneys in civil and criminal matter.”⁹⁵⁵

Bibas enumerates a list of non-exhaustive misconducts and misbehaviours that prosecutors commit which go unpunished and undisciplined. He says:

Many of the cases involved prosecutors who committed crimes, such as bribery, extortion, embezzlement, and conversion. Many others involved presenting false evidence, withholding exculpatory evidence, or lying to or deceiving the court. The only other significant categories of cases involved criticizing judges, neglecting duty, fixing traffic tickets, contacting represented defendants *ex parte*, and having conflicts of interest as a part time prosecutor. In short, prosecutors are disciplined rarely, both in the abstract and relative to private lawyers. And when they are disciplined, they usually have committed multiple violations, at least one of which falls within the serious categories listed above.⁹⁵⁶

This may be due to practical and institutional reasons that shape the position of a prosecutor. Bibas finally advocates for an internal self-regulation within an office of the prosecutor, what he calls creating a prosecutorial office culture.⁹⁵⁷ He suggests that this culture must start in law schools and continues at work where head prosecutors would “formulate clear policies, follow them consistently, ferret out and penalize violations, and reward compliance.”⁹⁵⁸ There is however strong doubt that this can work within an office of an international prosecutor where the work is done on an *ad hoc* basis. Prosecutors also come from diverse backgrounds with varied experiences, and without a common office culture.

The question is therefore whether this must go unchallenged, especially when one is dealing with international prosecutors. There are no international disciplinary organisations to look into the prosecutor’s accountability and discipline. How to design mechanisms and institutions to regulate and control the international prosecutor in the exercise of discretion in the event of abuse is the crucial issue. The statutes establishing *ad hoc* tribunals and the Rome Statute of the ICC set up prosecution powers but do not provide for the regulation and control of their exercise.

The Trials and Appeals Chamber are also not very clear in holding prosecutors accountable. In extreme cases, can professional bodies to which prosecutors belong intervene? Internal

⁹⁵⁵ *Idem*, p. 44

⁹⁵⁶ Bibas Stephanos, “Prosecutorial Regulation versus Prosecutorial Accountability”, *University of Pennsylvania Law Review*, Vol. 157, No. 4, 2009, pp. 959 – 1016, p. 977

⁹⁵⁷ Bibas Stephanos, *op. cit.*, p. 1007 et ss.

⁹⁵⁸ Bibas Stephanos, *op. cit.*, p. 1007

regulations within the OTP are likewise designed to facilitate the work of the international prosecutor rather than regulate its conduct. Most of the time such regulations are legislated by the Chief Prosecutor and aimed at the subordinates.⁹⁵⁹ Turner advises for a balanced approach to remedies that are available to curb prosecutorial misconduct, like excluding evidence, staying the proceedings, dismissing the case, policing prosecutors through sentence reductions, dismissals of select counts, fines, and referrals for discipline.⁹⁶⁰ Yet, this approach does not solve the problem of misconduct and accountability. The approach has a negative impact on the normal course of a case while the misconduct is the act of an individual prosecutor. It is a sort of court contempt.

Maybe a combination of the domestic mechanisms can help to regulate the international prosecutor's exercise of power. Additionally, an external oversight body completely detached from the *ad hoc* tribunals to oversee the misuse and abuse of the prosecution powers can be imagined. The UN Department of Legal Affairs can establish such a body on a non-permanent basis. The ICC may also institute an oversight body specifically designed to deal with issues of prosecution misconduct on a case by case basis. Those bodies may be modelled to what Terzano calls "separate prosecutorial review boards responsible for investigating allegations of misconduct and sanctioning prosecutors when necessary."⁹⁶¹ He also suggests that such a "review board should be comprised of individuals within the criminal justice system who present a broad range of interests and an understanding of the unique responsibilities of prosecutors, including judges, prosecutors, and criminal defence attorneys."⁹⁶²

Terzano finally recommends that the review board:

should be unlike bar disciplinary boards in that it would conduct periodic, random, and unannounced reviews of closed cases. Its audits would help deter misconduct as well as gauge its prevalence and suggest

⁹⁵⁹ See in this respect ICTR Prosecutor's Regulation No.1 of 1999 as amended on 21 October 1999 "concerning the procedure to be adopted following a request by a national authority to take evidence from a person *inter alia* in the custody of the International Criminal Tribunal for Rwanda", Prosecutor's Regulation No.2 of 1999, concerning the Standards of Professional Conduct of Prosecution Counsel (valid for both the ICTR and the ICTY Prosecution Counsels) and Prosecutor's regulation No.1 of 2005 concerning "matters antecedent to the conclusion of a Plea Agreement between the Prosecutor and an Accused.

⁹⁶⁰ Turner J. Iontcheva, "Policing International Prosecutors", *International Law and Politics*, Vol. 45, 2012, pp. 175 – 258, p. 258

⁹⁶¹ John F. Terzano, Joyce A. McGee & Alanna D. Holt, *Improving Prosecutorial Accountability: op. cit.*, p. 4

⁹⁶² *Idem*, p. 14

how it might best be addressed. Additionally, the review board should serve as an information-providing entity by making its operations transparent, and its findings publicly available.⁹⁶³

How this body can perform its function without interfering in the work of the prosecutor more specifically and the work of the tribunal more generally remains to be tested. Yet it is a feasible idea which may focus on the failures of individual prosecutors who have deliberately engaged in unacceptable behaviour. The normal process of a case should not suffer or be impacted by disciplinary or criminal sanctions imposed upon an individual prosecutor. Such an action will make international tribunals more effective and improve the prosecutor's professionalism.

5.3.3. Professionalism

Professionalism in legal practices is better understood when one talks of defence lawyers more generally.⁹⁶⁴ The literature on professionalism overuses the semi-phrase "service to client",⁹⁶⁵ "paying client",⁹⁶⁶ "keeping cost down for clients who pay more [...]"⁹⁶⁷ or even "income of

⁹⁶³ John F. Terzano, Joyce A. McGee & Alanna D. Holt, op. cit. , p. 15

⁹⁶⁴ See in this respect Webb Julian, "Legal Disciplinary Practices: An ethical problem in the Making", *Legal Ethics*, Vol. 8, No.2, 2005, pp. 185 – 194; Brown J. Gerarda, "Rethinking 'the practice of law'", *Emory Law Journal*, Vol. 41, 1992, pp. 451 – 466; Rodes E. Robert, Jr., "Professionalism and community: a response to Terrell and Wildman", *Emory law Review*, Vol. 41, Iss.2, 1992, pp. 485 – 488; Vischer K. Robert, "Pluralism and professionalism: the question of authority", *Legal Ethics*, Vol. 8, Iss.1, 2005, pp. 35 – 54; Freedman H. Monroe, "Professionalism in the American adversary system", *Emory Law Journal*, Vol. 41, Iss.2, 1992, pp. 467 – 472. Freedman definition of professionalism resonates more as if it only concerns private lawyers. He states that:

my own definition of professionalism, therefore goes like this: in a free society that emphasizes each individual's dignity and the right to due process and equal protection under the law, professionalism means that a lawyer should: first, help members of the public to be aware of their legal rights and of the availability of legal services to achieve those rights; second, advise each client fully and candidly regarding the client's legal rights and legal and moral obligations; and third, zealously and competently use all lawful means to protect and advance the client's lawful interests as the client determines those interests to be; further, the fact that the lawyer is earning a living through the legal profession is immaterial.

Freedman, op. cit. [footnote 17), citing Monroe H. Freedman, *The Golden Age of Law That Never Was*, Legal Times, Dec. 17, 1990, reprinted in *The Lawyer as professional* (T.W. Floyd & W.F. Newton eds., 1991); Gordon also notes:

The solution of professionalism to these problems is to instill the ethic of putting the client's welfare first as a primary virtue of the practice of the profession, i.e., not so much as an ethical or altruistic obligation defined as such, but as a description of the job: we are professionals, looking after people is what we do; looking after them well is the definition of doing the job well.

Gordon W. Robert, "Professionalisms old and new, good and bad", *Legal Ethics*, Vol. 8, No. 1, 2005, pp. 23 – 34, p. 27

⁹⁶⁵ For illustration, Rodes E. Robert, Jr., "Professionalism and community: a response to Terrell and Wildman", op. cit., p. 485

⁹⁶⁶ Baldwin C. Richard, "Rethinking professionalism' – and then living it", *Emory Law Journal*, Vol. 41, Iss.2, 1992, pp. 433 – 450, p. 433

⁹⁶⁷ Idem, p. 434

lawyers”⁹⁶⁸, and so on and so forth. Professionalism may therefore be perceived as a private defence lawyers’ empire that excludes lawyers acting as prosecutors. This understanding is too narrow and not justified. According to Terrell, an outstanding scholar who wrote extensively⁹⁶⁹ on the topic, “being a lawyer, particularly one engaged in private practice seems suddenly an embarrassment rather than a source of pride.”⁹⁷⁰ This statement suggests that professionalism goes beyond the private legal practice and encompasses the work of prosecutors as well.⁹⁷¹ Prosecutors are lawyers first and foremost. Other practices also have a professional tradition.

Professionalism is therefore a behavioural attribute of people who work in a definite area of life. Nothing prevents a prosecutor from shifting from his position as a prosecutor to one of a private lawyer or a judge. Professionalism applies equally to all lawyers, including prosecutors.

Terrell argues that:

everyone agrees that professionalism consists of something more than the ordinary rules of legal ethics that simply prohibit the worst sorts of behaviour by lawyers. Professionalism is loftier – an attitude, manifest in actions, demonstrating that the lawyer holds to fundamental principles that transcend any immediate project. Professionalism makes one’s vocation an aspiration. While ordinary lawyering can bring success, professionalism evokes praise.⁹⁷²

⁹⁶⁸ Penegar L. Kenneth, “The professional project: a response to Terrell and Wildman”, *Emory Law Journal*, Vol. 41, Iss.2, 1992, pp. 473 – 484, p. 476

⁹⁶⁹ Terrell P. Timothy & Wildman H. James, Rethinking “Professionalism”, *Emory Law Journal*, Vol. 41, Iss.2, 1992, pp. 403 – 432; Terrell P. Timothy, “Professionalism as trust: the unique internal legal role of the corporate general counsel”, *Emory Law Journal*, Vol. 46, No. 3, 1997, pp.1005 – 1010; Terrell P. Timothy, “A tour of the Whine Country: the challenge of extending the tenets of lawyer professionalism to law professors and law students”, *Washburn Law Journal*, Vol. 34, Iss.1, 1994 – 1995, pp. 1 – 32; Terrell P. Timothy, “Professionalism on an international scale: the lex mundi project to identify the fundamental shared values of law practice”, *Emory International Law Review*, Vol. 23, Iss.2, 2009, pp. 469 - 582

⁹⁷⁰ Terrell P. Timothy & Wildman H. James, Rethinking ‘Professionalism’, op. cit., p. 403

⁹⁷¹ One needs note however the evolutionary definition provided by Gordon in his article “Professionalisms old and new, good and bad”, in which he suggests:

Profession in English usage first means a vow or oath taken upon entering a religious order; and then becomes extended to mean the group or persons who take such a vow. By the sixteenth century the Latin term “profession”, which meant any occupation whatever, had been converted into English. By sometime around the mid-eighteenth century “profession” in the first sense of religious believers had expanded to include anyone entering upon a “calling”, and “profession” in the second sense of occupation narrowed to divinity, law and medicine (with the occasional addition of teachers and military officer). The ministry, law and medicine are the prototype “liberal” (implying “generosity” in mind and material possession) or “learned” professions – employments of special dignity linked with university education, gentlemanly social status, some degree of leisure and discretion, and exemplary character.

Gordon W. Robert, “Professionalisms old and new, good and bad”, op. cit., pp. 25 - 26

⁹⁷² Terrell P. Timothy, “Professionalism as trust: the unique internal legal role of the corporate general counsel”, *Emory Law Journal*, Vol. 46, No. 3, 1997, pp.1005 – 1010, p. 1006

Terrell and Wildman suggest that professionalism is the accepted allusion to the Bar's ambitious struggle to reverse a troubling decline in the esteem in which lawyer's are held – not only by the public but also, ironically by lawyers themselves.⁹⁷³ Terrell envisages professionalism as the right way of doing a thing worthy to be done,⁹⁷⁴ consciously and out of personal conviction. Terrell gives a detailed definition of professionalism as follows:

Thus, we will assume from the beginning that appropriate lawyering reflects, at the very least, the basic qualities of competence, diligence, informational responsibilities, confidentiality, loyalty, honesty, and independence of professional judgment that any code of professional duty would demand. All lawyers should manifest those characteristics when they engage in their profession. The question here is more ambitious: What qualities beyond these expected minima define the best lawyering that one encounters? What are the qualities of the lawyers we respect most – the ones typically held up as 'role models' for the rest of us, the ones whose life story ennoble the profession and thereby inspire us?⁹⁷⁵

To any lawyer "professionalism is no great mystery. It is the expectation among the members of the profession that all of them are dedicated to, and respect, the basic value and social function of their occupation."⁹⁷⁶ According to *Lex Mundi*, an international body of independent law firms, the concept of professionalism must be distinguished "from the more familiar topic of legal 'ethics.'⁹⁷⁷ *Lex Mundi* further states that:

Over time, the latter [ethics] has become synonymous with efforts in every jurisdiction to establish the minimum standards to which all members of a profession must adhere simply to maintain their licenses to practice. Professionalism, on the other hand, is aspirational in character. It is about lawyers at their best, rather than their acceptable least."⁹⁷⁸

It is *Lex Mundi*'s principle that [the] "demanding values are 'beyond' the requirements of the rules of legal ethics."⁹⁷⁹

Terrell synthesises those qualities in a diagram that combines the ethic of excellence, the respect of the legal system, the commitment to accountability, the ethics of integrity, the responsibility for adequate distribution of legal services, and the respect for other lawyers.⁹⁸⁰ All these

⁹⁷³ Terrell P. Timothy & Wildman H. James, Rethinking 'Professionalism', o. cit. p. 403

⁹⁷⁴ Terrell P. Timothy, "A tour of the Whine Country: the challenge of extending the tenets of lawyer professionalism to law professors and law students", op. cit. p. 16

⁹⁷⁵ Terrell P. Timothy, "Professionalism on an international scale: the *lex mundi* project to identify the fundamental shared values of law practice", op. cit., p. 479

⁹⁷⁶ Terrell P. Timothy & Wildman H. James, Rethinking 'Professionalism', op. cit., p. 407

⁹⁷⁷ Lex Mundi Publication, "Lex Mundi and Professionalism: A Statement of Shared Fundamental Values", available at <http://www.lexmundi.com/images/lexmundi/PDF/Publications/SharedFundamentalValues.pdf>, accessed on 17 September 2010, p. 1

⁹⁷⁸ Lex Mundi Publication, op. cit., p. 1

⁹⁷⁹ *Ibidem*, p. 2

⁹⁸⁰ Terrell P. Timothy, "Professionalism on an international scale...", op. cit. p. 482

characteristics combined bring to the highest practical value, a principled enthusiasm and an engaged citizenship.⁹⁸¹

It has now been established how the term “professionalism” applies to the work and person of a prosecutor. What needs to follow is an exploration for how general professional attributes merge in shaping an international professional prosecutor.

Rule 1.1 of the *American Bar Association Standards* (the ABA Standards), titled ‘Primary Responsibility’ provides that ‘the primary responsibility of the prosecution is to see that justice is accomplished.’⁹⁸² This may be so if justice is attained, and it must be, “in a fair and impartial manner, within a system that both searches for truth and values the protection of individual rights.”⁹⁸³ The ICTR Statute envisages a prosecutor of high moral character, who “possesses the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases.”⁹⁸⁴ The prosecution counsels are furthermore required to “adopt the highest standards of professional conduct”, particularly in assisting “the tribunal to arrive at the truth and to do justice for the international community, victims and the accused.”⁹⁸⁵

Chief Prosecutor Louise Arbour pioneered the prosecutors’ regulations specifically emphasising that “the duties and responsibilities of the Prosecutor differ from, and are broader than, those of the defence counsel.”⁹⁸⁶ This is so because public prosecutors, and not judges, are “primarily responsible for the overall effectiveness of the criminal justice system.”⁹⁸⁷ In the words of Côté, prosecutors are “the public face of this new international criminal justice system.”⁹⁸⁸ Moreover,

⁹⁸¹ *Idem*

⁹⁸² Mitchell Stephens, “Ignoring Justice: Prosecutorial discretion and the ethics of charging”, *Northern Kentucky Law Review*, Vol. 35, Iss.1, 2008, pp. 53 – 65, p. 57

⁹⁸³ Layton David, “The Prosecutorial Charging Decision”, *Criminal Law Quarterly*, Vol. 46, Iss. 3& 4, 2002, pp. 447 – 482, p. 449

⁹⁸⁴ ICTY Statute, as amended by Security Council Resolution 1503 of 28 August 2003, S/RES/1503(2003)

⁹⁸⁵ Prosecutor’s regulation 2(h)

⁹⁸⁶ Prosecutor’s regulation 1

⁹⁸⁷ Council of Europe, the role of public prosecutions in the Criminal justice System, Recommendation 19 (2000) adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum at 21(2001), quoted in Marston A. D., “Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court”, *op. cit.*, p. 512

⁹⁸⁸ Côté, Luc, “International criminal justice: tightening up the rules of the game”, *International Review of the Red Cross*, Vol. 88, No. 861, March 2006, pp. 133 – 144, p. 135

and “generally speaking, except in a few specific areas, the functions of the prosecutor in war crimes trials do not differ greatly from the functions of the prosecutor in any other area of criminal law although they will, of course, differ in details and, frequently, in magnitude.”⁹⁸⁹ The emphasis is put more on the first part of the prosecution’s function, that of doing justice. Doing justice starts with a fair assessment of what happened. This warrants the prosecutor’s intervention through thorough investigation and prosecution.

5.4. The roles of investigation and prosecution

5.4.1. Investigation

Alifano defines an investigation as:

an examination, a study, a survey and a research of facts and/or circumstances, situations, incidents and scenarios, either related or not, for the purpose of rendering a conclusion of proof. When one investigates, he/she makes a systematic inquiry, closely analyzes and inspects while dissecting and scrutinizing information. An investigation, therefore, is based upon a complete and whole evaluation and not conjecture, speculation or supposition.⁹⁹⁰

To this definition, Hogan adds that it is: “an observation or inquiry into allegations, circumstances, or relationship in order to obtain factual information.”⁹⁹¹ Criminal investigations, according to Rod are:

the systematic search and collection and analysis of information with the aim of identifying perpetrators of crime (s); the bringing of those before Courts to answer charges, the compilation of the brief of evidence. It involves crime and problem analysis, the interviewing of witnesses, victims and suspects, and intelligence and information gathering analysis processes, preparation of the brief of evidence and Court appearances.⁹⁹²

The investigative process must be distinguished from its finality, which is obtaining evidence. The investigator collects information that assists to answer these questions: when, where, who, what, how and why.⁹⁹³ This means that all information collected is not necessarily going to be used as evidence. All evidence will not be presented in court; and some evidence presented may

⁹⁸⁹ Howard S. Levie, “Prosecuting War Crimes before an International Tribunal”, *Akron Law Review*, Vol. 28, Iss.3, 1995, pp. 429 – 435, p. 429

⁹⁹⁰ Alifano M. Charles, *Fundamentals of Criminal Investigation*, Worldwide Law Enforcement Consulting Group, Inc, 2006, available in pdf at www.worldwidelawenforcement.com, accessed on 10 May 2013

⁹⁹¹ Horgan J. John, *Criminal Investigation*, 2nd edition, Gregg Division, McGraw-Hill Book Company, 1974, p. 1

⁹⁹² Harvey Rod, *The Independence of the Prosecutor: a police perspective*, paper, available at http://www.aic.gov.au/media_library/conferences/prosecuting/harvey.pdf, accessed on 10 January 2011

⁹⁹³ Idem

not be acceptable. Such evidence may not be admissible or relevant. The job of the investigator consists in collecting all information and screening it, having in mind what is needed to prove a specific case, and what will be acceptable by the court. Why are criminal investigations so important? To quote from Mattarollo, “the obligation to investigate and prosecute forms part of current international and domestic law.”⁹⁹⁴ According to *Human Rights Watch*:

investigations are essential to justice. Their quality and impartiality affect almost every aspect of disciplinary or judicial proceedings, from identification of the perpetrator to the strength of the evidence and the decision to indict or dismiss. Efficient investigative procedures and resort to an impartial process are essential safeguards against abuse and impunity – and against the pain, terror, and suffering that they cause.⁹⁹⁵

Though the statutes of the *ad hoc* tribunals do not provide for a definition of the term “investigation” or at least what needs to be done in the course of an investigation, Article 54(1) of the Rome Statute of the ICC “contains and extensively describes the duties of the Prosecutor while investigating.”⁹⁹⁶ One such duty, according to Wouters et al. “is to research the objective truth. Subsequently, the Prosecutor has to extend the investigation to cover all the facts and evidence, provided that they are relevant to the case and investigate incriminating and exonerating circumstances on equal footing.”⁹⁹⁷ In this perspective, a crime investigator must remain objective and open to different avenues. Alifano emphasises that an investigator should follow the facts wherever they may lead and not attempt to fit certain facts to the exclusion of others into a pre-determined conclusion. He must always look beyond the obvious and seek the truth.⁹⁹⁸ One may assume that this guidance also applies to the *ad hoc* tribunals’ prosecutor.

With respect to crimes subject matter of the *ad hoc* international tribunals, Bang-Jensen et al. argue that:

prior to the commencement of investigations of the type of crimes with which the two tribunals are concerned, a comprehensive review of what actually happened during the wars needs to be conducted. A

⁹⁹⁴ Mattarollo R., “Impunity and International Law”, *Revue Québécoise de Droit International*, Vol. 11, 1998, pp. 81- 94, p. 84

⁹⁹⁵ Human Rights Watch, “*Promoting Impunity: The Israeli Military’s Failure to Investigate Wrongdoing*”, Vol. 17, No. 7(E), June 2005, p. 17

⁹⁹⁶ Wouters Jan, Verhoeven Sten and Demeyere Bruno, “The International Criminal Court’s Office of the Prosecutor: Navigating between Independence and Accountability” in Doria José, Gasser Hans-Peter, & Bassiouni M. Cherif (eds), *The legal regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff Publishers, Leiden Boston, 2009, pp. 345 – 400, p. 377

⁹⁹⁷ Idem, pp. 377 - 378

⁹⁹⁸ Alifano, op. cit.

general factual overview of the crimes perpetrated by all sides will determine the investigative strategy a tribunal adopts and will influence who ultimately is indicted and prosecuted.⁹⁹⁹

The aim of any investigation is to come out with evidence that is relevant and material to the matter being investigated and admissible in a criminal court. “Evidence is the essential work product of any investigation and the raw material that judges will work with in their quest to ascertain the truth. Obtaining the best and most reliable evidence in a balanced and fair manner is the objective of every investigation.”¹⁰⁰⁰

The general definition and the one particular to international crimes investigations emphasises the pressing need of thorough, objective and accurate investigations. This work requires that some principled guidelines be set up and adhered to. Investigating a crime presupposes first of all that a crime has been committed. To this end, an investigator must ascertain the veracity or falsity of an allegation that a crime has been committed. The second step is to respond to the crime with the necessary energy and resources it so requires. Horgan once again suggests that “successful results are proportionate to efforts expended.”¹⁰⁰¹

Unlike in domestic jurisdictions where investigations are conducted by the police which might be a separate entity from the prosecution, in the *ad hoc* tribunals, the investigation unit is part and parcel of the international prosecutor’s office and functions under his full control. It is therefore the international prosecutor who oversees the way investigations are conducted. It is then fair to conclude that the international prosecutor is in a better position than his domestic counterpart as far as investigations are concerned. The corollary of this privilege must also be an expectation of a better outcome. The practice reveals however that this has not always been the case. Some international investigators go on the job without a clear understanding of what their duties entail. They go into the field with preconceived conclusions about the gravest crimes committed and attempt to find evidence to prove them. By doing so however the investigator forgets that all the results of his/her action will be challenged in court.

⁹⁹⁹ Bang-Jensen Nina, Gjelten Tom, Gutman Roy, Nizich Ivana & Warrick Thomas, “Tribunal Justice: The Challenges, the record, and the prospects”, *American University International Law Review*, Vol. 13, Iss.6, 1998, pp. 1541 – 1577, p. 1544

¹⁰⁰⁰ Institute for International Criminal Investigations, *Investigators’ Manual*, The Hague, The Netherlands, 2006, p. 141

¹⁰⁰¹ Horgan J. John, *Criminal Investigation*, op. cit., p. 2

In Horgan's words "an investigation should be designed to accomplish justice by determining the accurate detection of the offender and by making it possible in the trial of that defendant to sustain the [prosecution] burden of criminal proof beyond a reasonable doubt."¹⁰⁰² This is to suggest that there must be first and foremost a clear understanding of the reasons why such accuracy is so warranted.

5.4.2. The need for investigations of international crimes

Human Rights Watch argues that "an effective remedy for serious human rights violation requires a prompt, thorough, and effective investigation capable of determining whether criminal wrongdoing has occurred and if so, identifying the person(s) responsible."¹⁰⁰³ This is very important because the tendency in current international prosecutions is to forge the offender rather than investigating him. More precisely:

Investigating serious violations of international humanitarian law requires a multi-disciplinary approach, and requires operational teams of specialists who bring together a range of skills and capabilities. Experience has shown that in addition to investigators with a traditional police background, teams require the services of military, criminal and political analysts, historians, demographers, forensic specialists and linguistics. All groups of investigators can learn from each other, and it is essential that all understand the legal structure of the cases and the legal requirements for gathering evidence.¹⁰⁰⁴

A professional investigator "must carefully and methodically gather as much relevant evidence as possible in the hope that it will be sufficient to reliably determine the truth about the event being investigated."¹⁰⁰⁵ The difficulty with international investigations is the mindset of the investigator who goes into the field with some preconceived ideas about the offenders. The investigator will go into the field with the gravity and seriousness of the crime in his mind and with a so-called prosecution policy. He will attempt to gather evidence that only advances the prosecution theory of the case. Once in the field, the investigator will only look for the confirmation evidence; and by doing so he will miss the real evidence. He/she will short-cut the

¹⁰⁰² *Ibidem*, p. 8

¹⁰⁰³ Human Rights Watch, *Promoting Impunity...*, op. cit., p.6

¹⁰⁰⁴ ICTY Manual on Developed Practices, op. cit., p. 12

¹⁰⁰⁵ Institute for International Criminal Investigations, op cit., p. 141

process. One must however not lose sight of the fact that “the media tends to aggressively exaggerate and sensationalize criminal activity,”¹⁰⁰⁶ misrepresenting facts, sometimes purposely.

Once one knows clearly the importance of his work, he will look at other advantages of investigation in order to avoid bias or side-taking. The investigations must therefore permit the individualization of the cases, avoiding discrediting the whole system, organisation or individuals. Investigations are also essential as a legal obligation to uphold the rule of law and preserve rights, “prevent crimes, punish perpetrators, and ensure that victims have access to an effective remedy.”¹⁰⁰⁷

If investigations are to promote accountability “they must meet international standards of thoroughness, timeliness, and impartiality.”¹⁰⁰⁸ For a category of serious human rights violations like cases in which the death of people is concerned, the only remedy available is judicial in nature. This must also be the case when faced with extrajudicial executions, enforced disappearance and torture.¹⁰⁰⁹ Preparing a court case necessitates investigations of “the most careful scrutiny.”¹⁰¹⁰

Investigation is set in motion “based upon an unfounded allegation that a crime occurred.”¹⁰¹¹ It is based upon the discovery of few elements that tend to prove that a crime was actually committed and that an investigator frames what he is looking for and how far he can go. The *Institute for International Criminal Investigators’ Manual* emphasises that “at the outset and during the early stages of an investigation, evidence serves to objectively orient the investigator about the case, what investigative problems will be encountered, and what investigative avenues should be part of an investigation plan.”¹⁰¹² It is only upon complete investigations that a prosecutor may be able to categorise, target and profile potential suspects. A check list of a complete investigation may comprise the following:

¹⁰⁰⁶ Stevens J. Dennis, “Identifying Criminal Predators, Sentences, and Criminal Classification”, *Journal of Police and Criminal Psychology*, Vol. 15, No. 1, pp. 50 – 71, p. 50

¹⁰⁰⁷ *Ibidem*, p. 18

¹⁰⁰⁸ *Idem*, p. 24

¹⁰⁰⁹ *Id.*, p. 25

¹⁰¹⁰ *Id.*

¹⁰¹¹ Institute for International Criminal Investigations, *op. cit.*, p. 144

¹⁰¹² *Ibidem*

- Assess what evidence has been obtained;
- Identify any gaps, ambiguities or inconsistencies in the available evidence;
- Identify details that need to be established or corroborated;
- Identify where you may have to go, or who to speak to in order to obtain those details;
- Determine what defences the suspect may have open to him/her, and
- Obtain any evidence available to rebut or limit possible defence.¹⁰¹³

Though it would seem impracticable, but the suggestion is that this check list needs to be met before initially charging a person.

What is striking however is a perception tending to be a reality that the international prosecutor and his team target before investigating. They assume that certain categories of persons are necessarily guilty of crimes. For instance, Othman, a former Chief of Prosecution at the ICTR writes on “considerations that ought to be taken into account in holding answerable those suspected of having committed serious international humanitarian law violations: the ‘big, medium and small fish.’”¹⁰¹⁴ If this consideration is arrived at after investigation, it is sound. But if it constitutes the criteria to initiate investigations, it is very wrong. So the three attributes should instead read “big, medium and small suspect criminal fish.” It was observed in the report of the *Commission of Responsibility* that “in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a constituted tribunal.”¹⁰¹⁵ Conversely, it is also true that the responsibility of being in a position should not be a determining factor to orient investigation. Only alleged criminal responsibility should, especially when profiling and categorising potential targets. It is obvious that the purpose of successful investigation is the subsequent prosecution of the suspect.

5.4.3. Prosecution

In simple words the prosecutor’s function is to fight crime. By doing so, the prosecutor redresses or attempts to redress the wrong done by an offender. It is quite clear that such a duty is not done in the sole interest of the individual who acts as a prosecutor. Somebody else and the society at

¹⁰¹³ *Idem*, p. 166

¹⁰¹⁴ Othman C. Mohammed, *Accountability for International Humanitarian Law Violation: the case of Rwanda and East Timor*, Springer, Berlin – Heidelberg, 2005, p. 153

¹⁰¹⁵ Commission of Responsibility, Majority Report, March 29, 1919, cited in Marrus R. Michael, *The Nuremberg War Crimes Trial 1945 -46*, Bedford Books, Boston – New York, 1997, p. 4

large benefit from the prosecutor's job. The crime does not offend only the victim. It offends the society at large. It even embarrasses the offender as well. Therefore, the prosecutor does not act for his own benefit or interest. He acts in the interest of the society. He must therefore meet the expectation of the society. Green summarises the true prosecution's role by recalling the *Michigan Court* opinion in 1872 as follows:

The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.¹⁰¹⁶

The prosecutor's function hangs on a balance between two imperatives, namely that of a zealous advocate who seeks to win a case, and that of an officer of the court, seeking justice. In legal technicalities, likewise, the prosecutor fights or controls crimes by being efficient. But once he is dealing with a particular defendant, the prosecutor needs to adhere to the due process requirements. This is called fairness. The defendant must be given the opportunity to put his case before the judges who will decide it impartially. He must have access to means that allow him to be familiar with the court processes and culture. He must be given time to prepare for his defence.

The corollary of the prosecutors' twin obligation is about balancing between a career and the obligation to serve justice as a moral imperative. In international prosecutions, specifically with the ICC, this antinomy becomes a quest between "the legal duty to give effect to the rule of law and the political exigencies of acquiring the support needed to give effect"¹⁰¹⁷ to the decisions of the prosecutor. A good and professional prosecutor will therefore be one who arrives at satisfying these equally demanding duties.

Fisher argues, however, that:

¹⁰¹⁶ Hurd v. People, 25 Mich. 404, 415 – 16 (1872), cited in Green A. Bruce, "Why should prosecutor seek justice", *Fordham Urban Law Journal*, Vol. XXVI, 1999, pp. 607 – 643, p. 613. In concluding his article, Green underscores that "convicting and punishing lawbreakers is only one [objective in the criminal context], and it is no more important than others, such as avoiding the punishment of innocent people and ensuring that people are treated fairly", p. 642

¹⁰¹⁷ Brubacher R. Matthew, "Prosecutorial Discretion within the International Criminal Court", *Journal of International Criminal Justice*, Vol. 2, Iss.1, 2004, pp. 71 – 95

Observers have complained about a tendency on the part of prosecutors to prefer the former of these ‘schizophrenic’ obligations to the later. This is commonly described as a tendency to behave overzealously or according to a ‘conviction psychology.’¹⁰¹⁸

Fisher’s arguments describe better the *ad hoc* tribunals’ prosecutors. They prefer overzealousness over and above anything else, including fairness. According to Terzano et al., overzealousness in the pursuit of convictions can and has led to wrongful convictions.”¹⁰¹⁹ These authors further maintain, in explaining this tendency, that:

When prosecutors form a theory of guilt for a defendant, confirmation bias and belief perseverance can threaten their ability to adjust their thinking, even when confronted with evidence strongly challenging the accuracy of their theory. Psychological biases can lead prosecutors to favour evidence which confirms their theory, while ignoring or discrediting contradictory information. This phenomenon often leads to a “tunnel vision” mentality, where prosecutors and law enforcement focus all of their attention and efforts on building a case against a single suspect, often overlooking weaknesses in their case or leads pointing to other suspects. Tunnel vision is particularly dangerous when the prosecution’s theory is wrong, and the defendant is in fact innocent.¹⁰²⁰

International prosecutors forget that they are also in charge of ensuring fairness to defendants.

Carter says it much better by suggesting that:

we value highly the qualities of playing the game by its stated rules – of convicting the guilty only within the boundaries of law – because regardless of how undeserving any given defendant may be of how he or she reacts to the disposition of the case, we feel the good society does not wield unlimited power over its subjects.¹⁰²¹

In domestic jurisdictions to a large extent, prosecutors exhibit a one-sided vision of their role. Yet in national systems prosecutors may be wary of the public outcry about their behaviour. On an international level, it looks like this concern has not, as yet, alarmed anyone while prosecutors perform the same role as in domestic jurisdictions. The international prosecutors are by the same token, out of reach of any form of oversight. It will then be very naïve to believe that the way prosecutors behave in domestic jurisdictions can suddenly change by a magic move at the international level.

¹⁰¹⁸ Fisher Z. Stanley, “In search of the Virtuous Prosecutor: A conceptual Framework”, *American Journal of Criminal Law*, Vol. 15, Iss.3, 1988, pp. 197 – 261, p. 198

¹⁰¹⁹ Terzano F. John, McGee A. Joyce & Holt D. Alanna, *Improving Prosecutorial Accountability...*, op. cit., p.7; Abrams opines that the design of such a process “may affect the administration of criminal justice in ways which concern both the suspect and society”, Abrams Norman, “Prosecutorial charge decision systems”, *University of California Law Review*, Vol. 23, 1975 – 1976, pp. 1 – 56, p. 3

¹⁰²⁰ John F. Terzano, Joyce A. McGee & Alanna D. Holt, *Improving Prosecutorial Accountability...*, op. cit., p. 14

¹⁰²¹ Carter H. Lief, “Fairness in criminal prosecution”, *The Justice Systems Journal*, Vol. 3, 1977 – 178, p. 51

5.5. Illustration of the international prosecutor's abuse of power

5.5.1. Commonalties of the prosecutor's abuse of investigative and prosecutorial powers

As already indicated, at the domestic or international level the prosecutor exhibits a great tendency to depart from seeking justice. According to Davis, "if prosecutors always made decisions that were legal, fair, and equitable, their power and discretion would be less problematic."¹⁰²² However, as Gershman notes, such discretion has become "lawless"¹⁰²³, 'tyrannical'¹⁰²⁴ and 'most dangerous.'¹⁰²⁵ In addition to this, some prosecutors do not always even follow the rules.¹⁰²⁶ They assumed that their role is lead evidence aimed at only convicting an accused person.

According to Chuter:

the mechanics of mounting a trial often militate against attempts to find the full truth of everything. Prosecutors will often choose to present only that set of facts that will lead to a conviction. The full story of what happened in a particular village at a given time may never be known, because it does not form part of the prosecution case, and it is not examined in court. Often, in turn, this is because the truth of what happened is probably unknowable, and so the court could not be expected to reach a verdict on the evidence available.¹⁰²⁷

The assumption may be that the international prosecutor is less interested in the discovery of truth, than in securing conviction. This tendency leads directly to Chuter's disappointing conclusion about the outcome of international prosecutions. He observes that:

the contribution of war crimes trials to the establishment of the truth about large and complex episodes of violence is likely to be limited and patchy, because trials are actually intended for other purposes than the writing of history. But there are also important limits to what trials can discover, even about the incidents they address, because of how they are conducted. [...] By definition, what is proved cannot be more than what is alleged, and what is alleged will often be what prosecutors think can be proved.¹⁰²⁸

Askin even believes that investigation and prosecution cause insecurity and stress to the perpetrators¹⁰²⁹ or become a tool of intimidation and harassment, as Nemeth suggests.¹⁰³⁰

¹⁰²² Davis J. Angela, *Arbitrary Justice: The powers of the American Prosecutor*, Oxford University Press, 2007, p. 8

¹⁰²³ Herbert L. Packer, *The limits of the Criminal sanction* 290(1968), cited in Gershman B. L., "The New Prosecutor", op. cit., p. 407

¹⁰²⁴ *Henderson v. United States*, 349 F.2d 712, 714 (DC. Cir.1965) (Brazelon, C.J., dissenting); idem.

¹⁰²⁵ Robert H. Jackson, *The Federal Prosecutor*, 31 *J. Crim. & Criminology* 3, 5(1940), id.

¹⁰²⁶ Davis J.A, *Arbitrary Justice: The powers of the American Prosecutor*, op. cit., p. 13

¹⁰²⁷ Chuter David, *War Crimes: Confronting atrocity in the modern world*, Lynne Rienner Publisher, Boulder, London, 2003, p. 226 - 227

¹⁰²⁸ *Ibidem*, p. 226

¹⁰²⁹ Askin D. Kelly, "Reflections on some of the most significant achievements of the ICTY", *New England Law Review*, Vol. 37, Iss.4, 2002 – 2003, pp. 903 – 914, p. 903.

Before the *ad hoc* tribunals, Katz remarked that “there has been relatively little interest in the rights of the accused.”¹⁰³¹ In other words, the international prosecutor has acted without restraint, investigating whom he wished, charging his target as abundantly as he deemed fit; without any kind of accountability, oversight or judicial review. In addition to being a professional as defined, the international prosecutor is moreover expected to be a person of high morality and expertise. The Chief Prosecutor occupies a high rank in the UN system.¹⁰³² The Office of the Prosecutor forms a compact body composed of qualified lawyers. Altogether they form what is called the OTP. But misconduct still prevails. Judges do little if anything to redress the situation.

The arguments are taken from the lack of thorough and consistent investigation and the prosecutor’s conviction inclination can be better exemplified by the case of Minister Ntagerura and General Kabiligi who appeared before the ICTR. At the ICTY reference will be made to the overcharging shown in the case of Milan Milutinovic, Slobodan Milosevic and Radovan Karadzic. These are cases that are used in this research because instances of abuse of power have been decried in many other cases not mentioned here.

5.5.2. The Prosecutor versus André Ntagerura and the Prosecutor v. Gratién Kabiligi: an alleged meeting and delivery of weapons at the Bugarama football pitch on 28 January 1994

5.5.2.1. The facts

André Ntagerura served as minister in Rwanda for almost 14 years, until 1994. His last appointment was that of Minister of Transport and Communications in the interim government.¹⁰³³ He was arrested in Cameroon on 27 March 1996. On 17 May 1996, the ICTR

¹⁰³⁰ Nemeth C. P., *Aquinas on Crime*, op. cit., p. 113

¹⁰³¹ Katz J. Cogan, “International Courts and Fair trials: Difficulties and Prospects”, *The Yale Journal of International Law*, Vol. 27, Iss.1, 2002, pp. 111 - 140, p. 111

¹⁰³² Article 16 (4) of the ICTY Statute provides that “the Prosecutor shall be appointed by the Security Council on nomination by the Secretary General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary General of the United Nations”; see also Article 15(4) of the ICTR Statute.

¹⁰³³ *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, (Ntagerura Judgment), Case No. ICTR – 99 – 46 – T, 25 February 2004, para. 5

issued an order for provisional detention and of transfer to the tribunal detention facilities in Arusha, in Tanzania. He was indicted by the ICTR prosecutor on 9 August 1996.¹⁰³⁴ His indictment was subsequently amended on 28 November 1998. The Trial Chamber unanimously acquitted him on all charges on 24 February 2004. The Appeals Chamber confirmed his acquittal on 7 July 2006.¹⁰³⁵ Ntagerura's trial was a joinder between him and two other accused, Emmanuel Bagambiki and Samuel Imanishimwe.¹⁰³⁶

After a successful senior officers' training in Rwanda and abroad, Brigadier General Gratien Kabiligi served as the Director of Studies at the ESM (*Ecole Supérieure Militaire*, Military academy) in Kigali from 1988 until 1991. He subsequently commanded a battalion on the frontline in *Mutara* sector. He was later appointed as a commander of the *Byumba* military operations sector from 1992 until 1993. Afterwards, he was appointed as the Head of training and operations at the Army Headquarters in Kigali (G3); where he remained until July 1994 when the Rwandan Army was defeated. After the defeat, Kabiligi went into exile.

He was arrested in Nairobi on 18 July 1997 and transferred the same day to the UNDF in Tanzania. Like his co-accused, General Gratien Kabiligi was charged “ with conspiracy to commit genocide, genocide, crimes against humanity (murder, extermination, rape, persecution and other inhumane acts) and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II (violence to life and outrages upon personal dignity).”¹⁰³⁷ On 18 December 2008, the Trial Chamber acquitted him on all charges, while sentencing his co-accused to life imprisonment. The Appeals Chamber reduced Kabiligi's coaccused sentence in its judgment of 14 December 2011.¹⁰³⁸

¹⁰³⁴ Ntagerura Judgment, para. 8

¹⁰³⁵ *The Prosecutor* (appellant and respondent) v. *Andre Ntagerura* (respondent), *Emmanuel Bagambiki* (respondent) and *Samuel Imanishimwe* (appellant and respondent), Case No. ICTR – 99 – 46 - A

¹⁰³⁶ Emmanuel Bagambiki was the prefect of Cyangugu prefecture in South Western Rwanda. He was acquitted on trial level and his acquittal was confirmed on appeal. Samuel Imanishimwe was an interim military camp commander in 1994. He was sentenced to 27 years jail term on trial level, which was reduced to 12 years on appeal. He has since July 2009 completed his jail term and was released from custody. The current author was a Defence Legal Assistant and Investigator on this case.

¹⁰³⁷ Kabiligi judgment, para. 2

¹⁰³⁸ On 14 December 2011, the Appeals Chamber reduced the sentence of Lieutenant Colonel Anatole Nsengiyumva to 15 years, while Bagosora's sentence was reduced from life to 35 years. Aloys Ntabakuze case has been previously

What is particularly important for this research is therefore the prosecutor's allegation that "on 28 January 1994, Kabiligi participated in a meeting in *Cyangugu* prefecture involving the distribution of weapons"¹⁰³⁹ along with Ntagerura and others.

Andre Ntagerura was charged with genocide¹⁰⁴⁰, extermination as a crime against humanity¹⁰⁴¹ and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II.¹⁰⁴² It is interesting to read from the Trial Chamber judgment that the prosecutor offered to "plead all material facts underpinning the charges against an accused in the indictment with sufficient details."¹⁰⁴³ The prosecutor also acknowledges that "the mode and extent of an accused's participation in alleged crime are always material facts that must be clearly set forth in the indictment."¹⁰⁴⁴

In dismissing the charge of genocide (deliberately inflicting on members of the Tutsi ethnic group conditions of life calculated to bring about their destruction in terms of Article 2(2)(c) of the Statute), the Trial Chamber argued that the allegation was not charged in the indictment. It only appeared in the prosecutor's Closing Brief.¹⁰⁴⁵ Other paragraphs tending to plead genocide were also dismissed. The various reasons were that "the supporting allegations, even if proven, could not constitute the material elements of the crimes of conspiracy"¹⁰⁴⁶ to commit genocide. Other paragraphs in this respect were "impermissibly vague and fail to plead any identifiable criminal conduct on the part of the accused."¹⁰⁴⁷ Moreover, the prosecutor conceded that it had

severed from Military Two case due to his counsel's unavailability. See *Théoneste Bagosora & Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR – 98 – 41 – A, 14 December 2011.

¹⁰³⁹ *The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Judgment, op. cit., para. 32

¹⁰⁴⁰ Ntagerura judgment, para. 665

¹⁰⁴¹ Ntagerura judgment, para. 696 et ss.

¹⁰⁴² Ntagerura judgment, para. 764 et ss.

¹⁰⁴³ Ntagerura judgment, para. 30

¹⁰⁴⁴ Ntagerura judgment, para. 31

¹⁰⁴⁵ Ntagerura judgment, para. 665

¹⁰⁴⁶ Ntagerura judgment, para. 665

¹⁰⁴⁷ Ntagerura judgment, para. 666

not offered proof in respect of some allegations. Other allegations were not proven beyond a reasonable doubt.¹⁰⁴⁸

Andre Ntagerura was also charged with extermination as a crime against humanity under Article 3(b) of the ICTR Statute. This charge was dismissed because the allegations that supported this charge were vague and did not plead any criminal conduct of Ntagerura. The prosecution also conceded that it failed to prove those allegations beyond reasonable doubt.¹⁰⁴⁹

The charge of serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II did not succeed because of the same reasons of vagueness¹⁰⁵⁰ or because the prosecution conceded it did not lead to any related evidence. The prosecution also failed to meet its burden of proof beyond reasonable doubt.

5.5.2.3. Aspects of prosecutor's abuse of power in these cases

The crucial question is not whether the allegations in the indictment were impermissibly vague, that the evidence did not attain the acceptable threshold of proof beyond reasonable doubt or that the prosecution conceded it did not lead to enough evidence to sustain a conviction. The problem lies elsewhere, namely in the prosecution's attempt to mislead the Trial Chamber on facts it tendered. The Chamber, on its side, did not remedy the situation.

In the *Ntagerura* case, evidence was actually provided, but the prosecution knew that some of that evidence was false or otherwise fabricated. It was not evidence that resulted from an investigation as defined in this chapter. The prosecutor also hid evidence favourable to Mr. Ntagerura and Kabiligi. Unfortunately, the Trial Chamber did not allude to these forms of misconduct. By not doing so, it is suggested that the Chambers, in these cases, and the Trial Chambers in general, deliberately encouraged prosecution misconduct in these two cases.

¹⁰⁴⁸ Ntagerura judgment, para. 667

¹⁰⁴⁹ Ntagerura judgment, paras 705 - 706

¹⁰⁵⁰ Ntagerura judgment, para. 769

For instance in the *Ntagerura* case, the prosecution knowingly provided evidence through witness LAI that “on 5 January 1994, at around 5:00 PM, he was present when *Bagambiki* and Commander *Bavugamenshi* met at *Munyakazi’s* home [in *Bugarama*, South Western Rwanda], where they discussed an upcoming visit by *Ntagerura* planned for Democracy Day on 28 January 1994.”¹⁰⁵¹ LAI testified that “on the morning of 28 January 1994, *Ntagerura*, *Bagambiki*, *Kabiligi*, and another soldier arrived at the *Bugarama* football field in a helicopter to deliver weapons to *Munyakazi*.”¹⁰⁵²

To corroborate this incident, the prosecution also led witness LAJ who alleged that he was present on the site on 28 January 1994¹⁰⁵³ and heard *Ntagerura* delivering a speech that “the situation has become increasingly serious and that they had to be extremely vigilant at all times because, the enemy, the *Tutsis* who were killing *Hutus*, could attack at any time [...].”¹⁰⁵⁴ The prosecutor moreover called witness LAP, who alleged that he was in *Bigogwe* camp in North Western Rwanda where he saw *Ntagerura*, *Kabiligi* and the helicopter from which he personally offloaded firearms, grenades and ammunitions, on the same day at around 09:30 AM. He alleged that “he heard both *Ntagerura* and *Kabiligi* say that they were heading to *Cyangugu*.”¹⁰⁵⁵

Ntagerura denied the allegations in testifying that he did not go to *Bugarama* as alleged. General *Kabiligi* testified that:

he did not visit the *Bigogwe* camp or *Bugarama* in a helicopter with *Ntagerura* to supply arms to *Interahamwe*. *Kabiligi* testified that, between 27 January and 8 February 1994, he was in Cairo, Egypt, on a government mission concerning officers’ training which was approved by an order signed by the President on 19 January 1994. On his return to *Kigali*, he submitted a report addressed to the President of Rwanda

¹⁰⁵¹ *Ntagerura* judgment, para. 119

¹⁰⁵² *Ntagerura* judgment, para. 120 referring to witness LAI’s testimony of 17 September 2001; see also *The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, op. cit., para. 261 where it is also stated [by Prosecution witness that:

On the morning of 28 January 1994, *Kabiligi*, *Ntagerura* and *Bagambiki* arrived by helicopter at the *Bugarama* football field where around 20,000 *Interahamwe* youths from the *Bugarama*, *Gishoma* and *Nyakabuye* communes were gathered. The witness, who assisted with protocol for the rally, stood nearby and watched as *Munyakazi* and various others, including the *bourgmestre*, welcomed *Kabiligi*, who gave *Munyakazi* a pistol and congratulated him for being ‘courageous’. *Kabiligi* also encouraged the youth to be vigilant and to fight the enemy, whom he identified as the *Tutsis*, wherever they were found.

¹⁰⁵³ *Ntagerura* judgment, para. 122 - 123

¹⁰⁵⁴ *Ntagerura* judgment, para. 122

¹⁰⁵⁵ *Ntagerura* judgment, para. 124

concerning the mission. Kabiligi testified that he travelled to Egypt on a diplomatic passport, which he returned to the Ministry of Foreign Affairs in Rwanda.¹⁰⁵⁶

Upon examination of the testimonies of prosecution witnesses LAI, LAJ and LAP, the Trial Chamber concluded that there was an inconsistency which “draws the credibility and reliability of their evidence into question.”¹⁰⁵⁷

The prosecution appealed against the Trial Chamber’s finding. It alleged that “ the Trial Chamber did not apply any caution to his [Kabiligi’s testimony] that he was out of the country on 28 January 1994, but accepted it and used it to discredit the evidence of Witnesses LAI, LAJ and LAP, who had claimed to have seen him on this date.”¹⁰⁵⁸ The Chamber also found that the “prosecution failed to prove Ntagerura’s participation in these events beyond a reasonable doubt.”¹⁰⁵⁹

The Trial Chamber however failed to indicate that this was a prosecutor’s misconduct, and not simply an inconsistency between the prosecution’s witness account. One may even say that it was a pure fabrication of a seemingly corroborative evidence of an event which did not take place. This is so because as earlier as 22 September 1997, namely one month and 4 days after Kabiligi’s arrest, the prosecutor knew that Kabiligi did not deliver weapons at the *Bugarama* football pitch. Therefore he could not be in Bugarama on that day with Ntagerura. In Kabiligi’s own trial (*Military One Case*), the prosecution herself tendered into evidence a letter dated 17 January 1994, in which the Rwandan Ambassador to Egypt informed the Defence Ministry of Egypt on the arrival of Kabiligi (then a colonel) with another Rwandan officer. The letter substantially read that:

the delegation will be composed of two people, namely colonel Gratién Kabiligi, head of the delegation and officer in charge of operations of the Rwandan Army General Staff, and Lt-Colonel Cyprien Kayumba, Director of Finances at the Ministry of Defence of the Republic of Rwanda.[...].¹⁰⁶⁰

¹⁰⁵⁶ The mission report was tendered into evidence as exhibit 5; see judgment, para. 126

¹⁰⁵⁷ Ntagerura judgment, para. 129

¹⁰⁵⁸ *The Prosecutor v André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR – 99 – 46 – A, 7 July 2006, para. 241

¹⁰⁵⁹ Ntagerura judgment, para. 132.

¹⁰⁶⁰ Letter in possession of the researcher. This letter was authored by the Embassy of the republic of Rwanda in Cairo on 11 January 1994. It was tendered into evidence in *Military One Case* as P 233A (French version) & B (English version) on 7 June 2004. The French version of the letter is quoted K0098108 – K0098109 which is the prosecution numbering system of its documents. The English version is quoted K0247059.

On 22 September 1997, the then Deputy Prosecutor of the ICTR, Mr. Bernard Muna received another letter from the Egyptian Embassy in Kigali. This letter referred to a previous one eventually from the OTP dated 18 September 1997 in which “you [the prosecutor] seek assistance and cooperation for the investigation concerning colonel Kabiligi, a Citizen of Rwanda, under the Statute of the International Tribunal for Rwanda.” The Embassy wrote:

Upon receipt of your note, I contacted the concerned authorities in Egypt who informed me of the following:

1. Colonel Kabiligi arrived in Cairo on 28/03/94
2. He joined the seminar organized by the Nasser High Military Academy on 29/03/94
3. On 07/04/94 the Academy received a note from the Embassy of Rwanda in Cairo asking to cancel colonel Kabiligi’s participation in the seminar due to the development taking place in his country and that he will be leaving Cairo the same day 07/04/94.¹⁰⁶¹

Probably due to mismanagement or disorganisation within the OTP, another letter was addressed to the Egyptian Embassy in Kigali by Laurent Walpen, Chief of Investigations and Deputy Prosecutor on 12 March 2002. It was a request for information concerning travels of Colonel Gratien Kabiligi to Egypt during the months of January to April 1994. The letter said substantially that:

the Office of the Prosecutor has in its possession information to the effect that colonel Gratien Kabiligi visited Egypt from January to February 1994 and March to April 1994 for official business with the Egyptian Ministry of Defence and a Seminar at the Nasser High Military Academy respectively. We are trying to establish the exact dates on which colonel Gratien Kabiligi entered and left Egypt on those occasions [...].¹⁰⁶²

On 28 May 2002, the Embassy answered once again that it was closely following up on the subject with the Egyptian authorities.¹⁰⁶³ On 20 June 2002, the Embassy posted the following:

I have the pleasure to inform you that the competent Egyptian authorities have focused aggressively on that matter giving it the attention it deserves and that the registers thoroughly consulted show the following information:

1. Arrival of the suspect to Cairo from Ethiopia on January 27th, 1994
2. Departure to Rwanda on February 8th, 1994
3. Arrival from Kenya on March 28th, 1994
4. Departure to Saudi Arabia on April 8th, 1994.¹⁰⁶⁴

¹⁰⁶¹ Letter in possession of the researcher. This letter was authored by the Embassy of the Arab Republic of Egypt in Rwanda. It was tendered into evidence in *Military One Case* as P 232 E (K0241017) (English version) and K0260771(French version)on 7 June 2004.

¹⁰⁶² Letter dated 12 March 2002 authored by Laurent Walpen, Deputy Prosecutor and cc to Chief Prosecutor, Ms Carla Del Ponte and addressed to His Excellency the Ambassador of Egypt in Rwanda. It is marked K0237621 – K0237622. It was tendered into evidence in *Military One Case* on 7 June 2004 and admitted as P232A.

¹⁰⁶³ See Letter dated 28 May 2002 authored by Mr. Gamal Shaheen, Ambassador of the Arab Republic of Egypt (Re: Information concerning the case of Colonel Gratien Kabiligi) addressed to the Deputy Prosecutor of the International Criminal Tribunal for Rwanda, tendered into evidence in *Military One Case* on 7 June 2004. This letter is quoted K0238332 in prosecution archives.

Davis¹⁰⁶⁵ identifies some of prosecutorial misconducts. Among those are the failure to disclose exculpatory evidence and the use of false or misleading evidence.¹⁰⁶⁶ It is crystal clear that the prosecutor in *Ntagerura* and *Kabiligi* case hid evidence, or did not disclose evidence that Kabiligi and Ntagerura were not in *Bugarama* on 28 January 1994. This is the first misconduct. The second misconduct is that the prosecutor deliberately and knowingly led evidence particularly through its witnesses LAI, LAJ and LAP tending to prove that Kabiligi was in *Bugarama* on that date. The prosecutor had information that this was not the case as Kabiligi was in Egypt. Witness LAI testified in the *Ntagerura* case from 17 September 2001. LAJ testified in the same case from 23 October 2001 as did witness LAP.¹⁰⁶⁷ Witness LAI was called again to testify on the same false fact of 28 January 1994 in the *Military II case* from 31 May 2004. It is likely that this witness was also to be used in *Munyakazi's* case in regards to the disclosed material, particularly transcripts in *Ntagerura* case.

With regard to the organisational structure of the OTP, the prosecutor could not ignore that the event of 28 January 1994 did not take place. Calling witnesses to testify to a false event without taking time to check on their veracity is first of all disingenuous and unprofessional. The prosecutor misused the funds it could have used for a proper case. The Trial Chamber judges likewise did not apply their mind to this particular despite the information on its falsity that was availed to it. This is an instance where one may assume that judges encourage prosecution misconduct. Davis writes again that: “when misconduct is neither acknowledged nor punished, the line between acceptable behaviour and misconduct begins to blur. [...] When the law is broken by the very people the public trusts to enforce the law, meaningful action must be taken.”¹⁰⁶⁸ Nothing was done in this case.

¹⁰⁶⁴ Letter in possession of the researcher, and tendered into evidence in *Military One Case* on 7 June 2004 as P

¹⁰⁶⁵ Davis J. Angela, op. cit., p. 125

¹⁰⁶⁶ Idem, p. 125

¹⁰⁶⁷ *Ntagerura* judgment, para. 119 through 126 and corresponding footnotes.

¹⁰⁶⁸ Davis J. Angela, op. cit., p. 141

5.6. Accused charged and prosecuted, not because of what they have done, but because of who they were and the position they occupied: lack of thorough investigation

The analysis of some *ad hoc* tribunals' cases reveals that the prosecution charged and prosecuted the accused, not pursuant to evidence of their involvement in the commission of the crimes alleged; but because of the position of authority the person occupied. The prosecutor did not play by the rules. The judges also complacently worked in the same purview. According to Judge Møse:¹⁰⁶⁹

From the outset, the Prosecutor focused on investigating and prosecuting individuals who had held important positions in Rwanda in 1994. This policy has been maintained over the years, and has since become an explicit part of the Completion Strategy for both tribunals, as expressed in Resolution 1503(2003). The Tribunal's focus on leadership is illustrated by the fact that the accused who have been apprehended include one prime minister, 14 ministers, six prefect, 11 bourgmestres (mayors), high-ranking political, military and media personalities, as well as members of the clergy.¹⁰⁷⁰

Judge Møse's remarks are in contrast with the view of Taylor, an American senior prosecutor at Nuremberg. He was wondering what to do of an arrested person. According to Taylor,

the first question a prosecuting attorney asks in such a situation is 'Where's the evidence?'. The blunt fact was that despite what everybody knew about the Nazi leaders, virtually no judicially admissible evidence was at hand. Unless it could be found, all the care put into drafting agreements and organisation plans would be wasted efforts.¹⁰⁷¹

The *ad hoc* tribunals have, overtime, developed practical considerations upon which they base their decisions for investigation and prosecution. Yet there still is an unexplored grey area of discretion which raises many unanswered questions. In deciding what and who should be investigated, investigators must make choices. These choices must be justified by objective criteria. The ICTY Prosecutor Office's investigative guidelines regarding the commencement of investigations and the selection of targets of investigations placed emphasis *inter alia* on the following factors: (1) the seriousness of the crimes, the number of victims, the duration of the offences and the scope of destruction; (2) the role of the person under investigation, especially

¹⁰⁶⁹ Judge Erik Møse was ICTR President from 2003 until 2007; its Vice-President from 1999 to 2003; and returned to Norway to serve as one Justice of its Supreme Court.

¹⁰⁷⁰ Møse Erik, The International Criminal Tribunal for Rwanda, in Bellelli Roberto (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review*, Ashgate Publishing Limited, 2010, pp.79 – 99, at p. 89

¹⁰⁷¹ Telford Taylor, *The Anatomy of the Nuremberg Trials*, Little Brown and Company, Boston/New York /Toronto/London, 1992, p. 49

his position in the political or military hierarchy, the extent of his authority, and his alleged participation in the crimes under investigation; and (3) whether the persons and the crimes to be investigated were exceptionally notorious, even though the person did not hold a formal hierarchical position.¹⁰⁷²

The worry here is that the primary criterion is number 2 regarding the position of the suspect in the political and military hierarchy and the extent of the accused authority. The participation in the crimes can only be established after a thorough investigation. The prosecutors have, at many occasions, acknowledged that evidence of such participation was not easily obtainable. They therefore resort to a bottom-up construction of the case in view to catching the leaders. Prosecutors are not alone in such a construction enterprise. Rather, they are assisted by anticipated research by academics, but most importantly by politicians whose aims are more or less getting rid of the person they believe to be most responsible, not necessarily of the crimes, but of the overall political mess. In the case of Milosevic, as depicted by one Cigar of the U.S Marine Corps School of Advanced War fighting, tells it all. Cigar painted Milosevic's picture in 1996, years before Milosevic was eventually arrested. There is little doubt that Cigar's analysis was not considered and even used by those who mounted the indictment against Slobodan Milosevic. He suggests that:

In fact, a colleague of mine and I are putting together a study on responsibility, the issue of responsibility. He [Milosevic] has both command responsibility, which is an indirect form, and also more direct responsibility. He had authority, both legal and factual, over many of the forces and agencies which were directly engaged in these acts. He had the power and the knowledge, both constructive knowledge and actual knowledge of what was going on and without his involvement or the involvement of agencies subordinate to him much of this would not have happened. I think that he bears a very great proportion of the responsibility for that. He certainly is the prime mover and has been until very recently. [...] But even with the Army, Milosevic is one of the three people on the Supreme Defense Council which really regulates Army policy. It's an interlocking system. He is the head of the government. He is also the head of the ruling party. All of these people, if you want, in Serbia are part of the party. They are all subordinate to him. It is still an ideological political party. He has multiple channels for information, multiple channels of authority, and multiple channels for control. You can't abdicate command either. So these agencies, when they act, eventually ultimate responsibility for them has to go back to one individual.¹⁰⁷³

¹⁰⁷² ICTY Manual on Developed Practices, op. cit., p. 15

¹⁰⁷³ Intervention by Professor Norman Cigar of the U.S. Marine Corps School of Advanced Warfighting, *The War Crimes Trials for the Former Yugoslavia: Prospects and Problems*, Briefing of the Commission on Security and Cooperation in Europe, Washington, DC, May 28, 1996, Basket III Hearings before the U.S., Commission on Security and Cooperation in Europe and other Selected Congressional hearings, Reports and Prints I 1995 – 1996, p. 22

Prosecutors do not need to construct a case in this way. What needs to be done is to appropriately investigate the person whatsoever her previous position might have been, and prove a case against him if any. But the position a person occupied should not be an ultimate criterion to focus on. What needs more focus is the crime and its gravity irrespective of who committed it. Sistare concurs with this position in arguing that “liability based on personal characteristics represents a more serious violation of the act doctrine than does vicarious liability. As there are other means for dealing with significant criminal conduct related to personal characteristics.”¹⁰⁷⁴

The position a person occupied in the administrative, political or military hierarchy is a personal circumstance which has nothing to do with his criminal propensity. This becomes clear when one looks at the investigation and prosecution phases. In the *Blaskic* case, the Trial Chamber held that:

Keeping in mind the mission of the Tribunal, it is appropriate to attribute a lesser significance to the specific personal circumstances. Although they help to explain why the accused committed the crimes they do not in any event mitigate the seriousness of the offence. Furthermore, these circumstances may aggravate the responsibility of an accused depending on the position he held at the time of the acts and on his authority to prevent the commission of crimes.¹⁰⁷⁵

At the ICTR, according to *Othman*, considerations are (1) the nature and seriousness of the crimes, (2) the military or paramilitary rank or government position of an alleged perpetrator, (3) the significance of legal issues involved in the case, (4) the prospect of arresting the suspect, and the impact of the case on the resources of the office.¹⁰⁷⁶ It has been demonstrated how disingenuous some of these criteria are which fail to meet the criminal goals.

5.6.1. Milan Milutinovic case

Milan Milutinovic¹⁰⁷⁷ was an elected President of the Republic of Serbia from December 1997 to December 2002.¹⁰⁷⁸ He was arrested, detained and prosecuted, not because of what he has done, but because of what he was and the position he occupied. The prosecution alleged that “Milutinović, having been elected by the people as the President of Serbia, and enjoying an

¹⁰⁷⁴ Sistare C.T., *Responsibility and Criminal Liability*, op. cit., p.50

¹⁰⁷⁵ *The Prosecutor v Tihomir Blaskic*, Case No. IT 95 – 14 - T, 03 March 2000, para. 765

¹⁰⁷⁶ *Othman C. Mohammed*, op. cit., p. 160

¹⁰⁷⁷ *The Prosecutor v. Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Nebojsa Pavkovic, Vladimir Lazarevic and Sreten Lucic*, Judgment, Volume 3 of 4, Case No IT – 05 – 87 – T, 26 February 2009

¹⁰⁷⁸ *Prosecutor v. Milan Milutinovic, et al.*, Vol. 1 of 4, 26 February 2009, para. 8

effective security of tenure during his term, was one of the most prominent and powerful political figures of the FRY and Serbia.”¹⁰⁷⁹ Were the prosecutors to arrive at such a classification after thorough investigations once again, this would make sense. The indictment against him further states that:

being the President of Serbia during the times relevant to the Indictment, [Milan] represented Serbia and conducted its relations with foreign states and international organisations; (b) was a member of the supreme Defence Council (“SDC”) of the FRY, and thereby participated in decisions regarding the use of the VJ and exercised command authority over the MUP units subordinated to the VJ during the state of war; (c) had the authority, in conjunction with the Assembly of the Republic of Serbia [...], to request reports from the Serbian Government, concerning matters under its jurisdiction, and from the MUP, concerning its activities and the security situation in Serbia; (d) had the authority to dissolve the National Assembly and with it the Serbian Government; and (e) had the power, during a state of war, to enact measures normally under the competence of the National Assembly, including the passage of law.¹⁰⁸⁰

According to the prosecution, the accused “planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of these crimes. Within the scope of “committing”, he allegedly participated in the joint criminal enterprise [...]. He allegedly contributed to the joint criminal enterprise using the *de jure* and *de facto* powers available to him.”¹⁰⁸¹ Milutinovic was charged personally under Article 7(1) and as a superior under Article 7(3). His *mens rea*, according to the Indictment, may be inferred from a number of factors, “namely his knowledge of the likelihood that forces of the FRY and Serbia would commit crimes in Kosovo.”¹⁰⁸²

The indictment alleged that he participated at many meetings with other senior governmental officials including President *Slobodan Milosevic*. During these meetings, important decisions would be taken, some of which favoured criminal activities for which other individuals were found guilty. He also had access to various information related to crimes committed in Kosovo.

A primary observation is, however, that most of the alleged conducts fall into the Federal Republic of Yugoslavia’s constitution, and could therefore be considered a legitimate exercise of power in a sovereign State. For example, the Trial Chamber found that “the SDC retained *de jure*

¹⁰⁷⁹ Ibidem, para. 103

¹⁰⁸⁰ *Prosecutor v. Milan Milutinovic et al.*, Volume 3 of 4, para. 99

¹⁰⁸¹ *Prosecutor v. Milan Milutinovic et al.*, Volume 3 of 4, para. 100

¹⁰⁸² Idem, para. 101

command over the VJ during wartime, in accordance with the FRY Constitution”¹⁰⁸³ as were “decisions on appointments of VJ Generals.”¹⁰⁸⁴ However a review of all prosecution’s allegations in this case may assist to comprehend the overall confusion that the prosecution entertains in indicting high profile personalities.

As President of Serbia, the prosecution argues that Milutinovic, “wielded a significant degree of *de facto* power and influence over various bodies, since he was a close political confidante of *Milosevic*, and had even exerted a degree of influence over him.”¹⁰⁸⁵ Looking at how the Constitution of the Federal Republic of Yugoslavia was drafted, the Trial Chamber concluded that “Milutinovic had no direct control over the VJ, nor could he issue orders to its units. Indeed, [...], his only formal connection with the VJ was by virtue of his *ex officio* membership in the SDC.”¹⁰⁸⁶ In fact, those powers were vested in Milosevic.

Concerning his participation in the deliberations and decisions of the SDC, the Trial Chamber reviewed a number of such meetings at which Milutinovic participated, and concluded that “none of the SDC records indicate formulation or implementation of the common purpose articulated in the Indictment.”¹⁰⁸⁷

It was also alleged that Milutinovic participated in meetings of the Supreme Command in wartime. Though he actually did not participate during the NATO bombing over Kosovo and was seen less than two times in the building of the Supreme Command Staff¹⁰⁸⁸, the Trial Chamber was of the view that “Even though in theory Milutinovic still had a formal role in the command structure of the VJ, the real commanding at that point was done by the Supreme Commander, Slobodan Milosevic, using the decision of the SDC issued on 4 October and approving for defence of the country in case of an attack by NATO.”¹⁰⁸⁹

¹⁰⁸³ *Idem*, para. 129

¹⁰⁸⁴ *Idem*, paras 119, 126 and 292

¹⁰⁸⁵ *Idem*, para. 103

¹⁰⁸⁶ *Idem*, para. 107

¹⁰⁸⁷ *Prosecutor v. Milan Milutinovic et al.*, Volume 3 of 4, para. 125

¹⁰⁸⁸ *Idem*, paras 128 - 130

¹⁰⁸⁹ *Idem*, para. 131

Here the Trial Chamber could have emphasised that rather than being criminal activities, these duties fall legitimately in the job description of any one assuming the office of the President. They need not be confused with criminal activities unless proof that they were could be shown. The chamber acknowledged that those meetings fall within the ambit of the Constitution of the FRY. But the Trial Chamber did not say anything as to whether these meetings were part and parcel of a sovereign state. Had the Trial Chamber said that, this could have discouraged the prosecution's further attempts to mount unnecessary indictments based on legitimate powers.

The prosecution moreover contends that "Milutinovic attended numerous meetings with the highest political, military, and police leadership where information on Kosovo was exchanged, plans for future actions were discussed, and decisions were made."¹⁰⁹⁰ Some of those meetings "related to the political and security situation in Serbia and how it was reflected in the situation in Kosovo."¹⁰⁹¹ Milutinovic's participation in some miscellaneous meetings "shows that his contributions were either related to the Holbrooke – Milosevic Agreement or were general morale-boosting speeches, designed to ameliorate concerns of the officials working in Kosovo."¹⁰⁹²

It was also alleged that as the President of Serbia, Milutinovic

had several powers available to him that he could have used to make it 'significantly more difficult for the crimes charged' to occur. In deliberately omitting to do so, in spite of his knowledge of the crimes committed by the VJ and the MUP, he contributed to the plan to modify the ethnic balance of the province in order to ensure control over it.¹⁰⁹³

Against this allegation, "the Chamber is of the view that the prosecution failed to explain and show how the ID Decree actually worked in practice in order to achieve the aim of the joint criminal enterprise."¹⁰⁹⁴

The Trial Chamber articulated that:

the purpose behind all four decrees described in detail above, is open to an interpretation other than the one suggested by the Prosecution, namely that, rather than encouraging expulsion they appeared to have been

¹⁰⁹⁰ *Idem*, para. 132

¹⁰⁹¹ *Idem*, para. 134

¹⁰⁹² *Idem*, para. 143

¹⁰⁹³ *Prosecutor v. Milan Milutinovic et al.*, Volume 3 of 4, para. 144

¹⁰⁹⁴ *Idem*, para. 172

ensuring increased police control over the whereabouts of the population within Kosovo, as well as increased control over the younger members of that population.¹⁰⁹⁵

This was quite an easy inference that the prosecution could have drawn itself rather than making it a chargeable offence. The Trial Chamber declared itself “unable to draw an inference adverse to Milutinovic from the evidence surrounding the decrees.”¹⁰⁹⁶

As far as Milutinovic’s efforts to negotiate a peaceful settlement with Kosovo Albanians, the prosecution alleged that “these meetings obstructed any real efforts at reaching an agreement with credible Kosovo Albanian representatives, since they were attended only by unrepresentative Kosovo Albanians. They also served to divert attention away from the crimes being committed by the forces of the FRY and Serbia.”¹⁰⁹⁷ On reasonable grounds and in an articulated charging strategy, the prosecution could have arrived, even before charging, at a conclusion that Milutinovic was not the one choosing his adversaries in negotiations.

The Trial Chamber held that “against that background, particularly in light of the refusal of the Kosovo Albanians to negotiate and the evidence of Petritsch, it cannot be concluded that Milutinovic, who participated so actively in the negotiation process and appeared to be willing to meet the leading representatives of the Kosovo Albanians, was obstructing any genuine attempt at a solution.”¹⁰⁹⁸

The prosecution contended moreover that “Milutinovic exhibited an obstructive attitude during his interactions with international representatives. Furthermore, even when agreements were reached, he continued to obstruct their implementation.”¹⁰⁹⁹ The prosecution knew and had at its disposal evidence that “during all three meetings described above, Milosevic was the one making decisions and was the final authority in the country.”¹¹⁰⁰ Yet the prosecution did not disclose that information in favour of Milutinovic. The prosecution was further aware of the fact that “Milosevic was responsible for making security force decisions, which then Sainovic was then to

¹⁰⁹⁵ *Idem*, para. 173

¹⁰⁹⁶ *Idem*, para. 173

¹⁰⁹⁷ *Idem*, para. 174

¹⁰⁹⁸ *Prosecutor v. Milan Milutinovic et al.*, volume 3 of 4, para. 190

¹⁰⁹⁹ *Idem*, para. 191

¹¹⁰⁰ *Idem*, para. 196

implement in Kosovo.”¹¹⁰¹ But the witness who testified on these last two meetings could not leverage certainty prompting the Trial Chamber to be “unable to rely on his evidence that Milutinovic participated in any meeting with Phillips. Indeed, this uncertainty on behalf of Phillips would suggest that he was not concerned with what Milutinovic was doing at the time.”¹¹⁰²

The evidence summarised above shows that in those meetings with international actors, namely with NATO officials and the KVM, Milutinovic “did not take an active role during the same and never stood out as somebody who had much influence or involvement in the discussions.”¹¹⁰³

On Milutinovic’s attitude towards implementation, the Trial Chamber found that it was “not satisfied that the purpose of Milutinovic’s visit to the MUP Staff in Kosovo was to encourage MUP officials to breach the October Agreements as alleged by the Prosecution.”¹¹⁰⁴ For his alleged obstructionist attitude in the Rambouillet negotiations¹¹⁰⁵, the Trial Chamber found that “all sides were ultimately to blame for the failure of the negotiations at Rambouillet.”¹¹⁰⁶ It was also the Chamber’s view that “the evidence of Milutinovic’s criticisms of the process in the later stage of the negotiations does not necessarily lead to the conclusion that he did not want to achieve an agreement and avoid the NATO threat.”¹¹⁰⁷ The evidence furthermore shows that “the decision on whether to accept the agreement was ultimately in *Milosevic’s* hands, and that, therefore, neither Milutinovic nor Sainovic had the power to make [a] decision to the contrary.”¹¹⁰⁸ The Trial Chamber was therefore not satisfied that “Milutinovic personally exhibited an obstructive attitude aimed at ensuring their failure. The evidence is equally open to the interpretation that he was endeavouring to secure a deal that would be accepted by the FRY/Serbian authorities.”¹¹⁰⁹

¹¹⁰¹ *Idem*, para. 197

¹¹⁰² *Idem*, para. 198

¹¹⁰³ *Idem*, para. 200

¹¹⁰⁴ *Idem*, para. 201

¹¹⁰⁵ See judgment, para. 202

¹¹⁰⁶ *Prosecutor v. Milan Milutinovic et al.*, Volume 3 of 4, para. 213

¹¹⁰⁷ *Idem*, para. 213

¹¹⁰⁸ *Idem*, para. 213

¹¹⁰⁹ *Idem*, para. 213

It was also contended that Milutinovic met with Ibrahim Rugova, the leader of the LDK. According to the prosecution this proves that Milutinovic knew of the crimes that were being committed in Kosovo.¹¹¹⁰ It was the prosecution's case that those meetings, "rather than being genuine attempts to reach an agreement, were 'part of a propaganda campaign to divert attention from crimes being committed' and to discredit Rugova in the eyes of the Kosovo Albanian population."¹¹¹¹ According to the Chamber, these meetings amounted to propaganda to induce NATO to cease its bombardment.¹¹¹² The chamber dismissed allegation of Milutinovic influence within the SPS party because it had "very little evidence" of such alleged influence, and that he was not always in good terms with SPS members in Kosovo.¹¹¹³

There were many other issues raised by the prosecution, including his personal and professional relationships and dealings between Milutinovic and Milosevic.¹¹¹⁴ In the lengthy indictment, the prosecution argued that "Milutinovic shared the intent to further the common purpose of modifying the ethnic balance in Kosovo through criminal means and that he made statements to that effect."¹¹¹⁵ Against the prosecution's contention, the Trial Chamber held that "much of the evidence outlined above and used by the Prosecution to prove Milutinovic's state of mind has been deemed insufficiently reliable."¹¹¹⁶

The prosecution has moreover argued that Milutinovic was present when Milosevic uttered some words which, on face value, may be construed as expressing criminal intent. The prosecution's contention was that Milutinovic did not distance himself from those utterances. The Trial Chamber held that "it is not appropriate to attribute any intent to Milutinovic on the strength of his presence when Milosevic made these remarks, which may or may not have included a reference to the 'final solution', since, having regard to the whole circumstances, it cannot be said that Milutinovic's inaction in the face of such remarks would be indicative of approval."¹¹¹⁷ The Trial Chamber found moreover that *Milutinovic* was put on notice of crimes being

¹¹¹⁰ *Idem*, para. 214

¹¹¹¹ *Idem*, para. 214

¹¹¹² *Idem*, para. 223

¹¹¹³ *Idem*, para. 231

¹¹¹⁴ *Idem*, paras 232 - 239

¹¹¹⁵ *Idem*, para. 240

¹¹¹⁶ *Prosecutor v. Milan Milutinovic et al.*, Vol. 3 of 4, para. 248

¹¹¹⁷ *Idem*, para. 248

committed in Kosovo and “use of excessive force by the FRY/Serbian authorities” through various national and international sources.¹¹¹⁸

The Trial Chamber had to decide on Milutinovic’s criminal responsibility under both Article 7(1) and 7(3) of the ICTY Statute. The Chamber evaluated the overall prosecution’s contention with respect to allegations that Milutinovic participated in a joint criminal enterprise. The Trial chamber was then “of the view that a number of examples of Milutinovic’s participation in the joint criminal enterprise alleged by the prosecution have not been proved beyond reasonable doubt.”¹¹¹⁹ Though the Trial Chamber found that Milutinovic participated in some activities of the joint criminal enterprise, it also showed that such participation was not “a significant contribution to the joint criminal enterprise.”¹¹²⁰

As to intent, the Chamber found that it “has not been provided with sufficient evidence to show beyond reasonable doubt that he intended to retain [the control by the FRY and Serbian authorities over Kosovo] through criminal means, such as the crimes of displacement.”¹¹²¹ The Chamber therefore rejected the claim that Milutinovic was criminally responsible by commission through participation in a joint criminal enterprise.¹¹²²

On other forms of liability, namely planning, instigating and ordering, it was the prosecution’s contention that the totality of the evidence establishes that Milutinovic was responsible pursuant to these modes of responsibility. The Chamber based its holding on the fact that there was insufficient evidence “that Milutinovic possessed the intent to commit crimes of displacement; the Chamber is also not convinced beyond reasonable doubt that Milutinovic designed an act or omission with the intent that an underlying offence of forcible displacements be committed.”¹¹²³ Milutinovic did not issue any order either. Therefore, in the absence of sufficient evidence and lack of intent, “the Chamber finds that Milutinovic cannot be found responsible under the categories of planning, instigating or ordering.”

¹¹¹⁸ *Idem*, paras. 249 - 270

¹¹¹⁹ *Idem*, para. 274

¹¹²⁰ *Idem*, para. 275

¹¹²¹ *Prosecutor v. Milan Milutinovic et al.*, Volume 3 of 4, para. 276

¹¹²² *Idem*, paras. 271 - 276

¹¹²³ *Idem*, para. 279

On aiding and abetting the commission of the crimes of displacement, the Chamber posed that “the evidence must show that Milutinovic provided practical assistance, encouragement, or moral support to the perpetration of a crime, whether by positive action or omission, and that this had a substantial effect on the commission of the crime.”¹¹²⁴ The Chamber noted two incidents in which Milutinovic’s actions could be interpreted as aiding and abetting, but emphasised that “these two factors on their own, however, in the context of such a large case with a multiplicity of players, cannot be said to have had a substantial effect on the commission of the crimes of displacement which were committed from late March 1999 onwards.”¹¹²⁵ He also lacked the required intent.

The Chamber turned to address Milutinovic’s responsibility under Article 7(3) of the ICTY Statute. It was the Chamber’s view that the totality of the evidence relating to Milutinovic powers over the MUP, was insufficient to show that he had effective control over the forces of the FRY and Serbia.¹¹²⁶ Thus he cannot be held responsible as a superior of those forces. The Trial Chamber acquitted Milan Milutinovic of all charges against him.

5.6.2. Slobodan Milosevic case

As discussed above, already in 1996, American scholars and politicians finished building a case against Slobodan Milosevic. What they attempted to achieve by conducting private investigations against Milosevic is not quite clear. They did not undertake disinterested academic research. They tended to advance and anticipate the U.S position vis-à-vis Milosevic and the eventual outcome of his case. The following quote tells the whole story:

I want to draw some attention to the fact that there seems to be a consensus that the crunch in Bosnian policy is upon us, that the next few weeks will determine not only Bosnia’s future, but, in a small way, perhaps that of the upcoming Presidential election.¹¹²⁷

¹¹²⁴ *Idem*, para. 281

¹¹²⁵ *Idem*, para. 281

¹¹²⁶ *Prosecutor v. Milan Milutinovic et al.*, Volume 3 of 4, para. 283

¹¹²⁷ *The War Crimes Trials for the Former Yugoslavia: Prospects and Problems*”, Briefing of the Commission on Security and Cooperation in Europe, op. cit., p. 2

William and Cigar's study concluded that there was "a compelling legal and factual case that Slobodan Milosevic, through forces and agencies under his control, is responsible for directing and aiding and abetting war crimes on an extensive scale."¹¹²⁸ They intended their study to be a construction of a *prima facie* case for the indictment of Milosevic for the commission of war crimes in the former Yugoslavia.¹¹²⁹ The study responded to basically three questions:

First of all, how can the war criminals from the Yugoslav conflict be held personally and individually accountable for their actions? Second, what role should the United States play in achieving that goal? Finally, if we fail to achieve this goal, what will be the ultimate cost?¹¹³⁰

Against this approach, Miller concludes that "clearly, international politics play a significant role in Milosevic's prosecution."¹¹³¹ But where the irony of these international prosecutions rests is the way they are manipulated by political players, to only further their own interests. For instance, and assuming that the studies and such other research around Milosevic were disinterested, and could only show an eventual *prima facie* case against Milosevic as early as 1996, the first indictment issued against him concerned events in Kosovo.¹¹³² That indictment was confirmed on 24 May 1999, three years after Williams and Cigar concluded the possible culpability of Milosevic on crimes he allegedly committed in Bosnia and Croatia.

Williams and Cigar's research did not address Milosevic's alleged criminal conduct in Kosovo. Surprisingly, the confirmed indictment concerned "crimes alleged to have been committed from March to June 1999 in Kosovo by the forces of the FRY and Serbia."¹¹³³ Explaining these timely and untimely political calculations is really beyond the reach of law. The Croatia and Bosnia indictments were confirmed on 8 October 2001.¹¹³⁴

¹¹²⁸ War Crimes and Individual Responsibility: a *prima facie* case for the Indictment of Slobodan Milosevic, prepared by Paul Williams and Norman Cigar, Annex to *The War Crimes Trials for the Former Yugoslavia: Prospects and Problems*, Briefing of the Commission on Security and Cooperation in Europe, Washington, DC, May 28, 1996, Basket III Hearings before the U.S., Commission on Security and Cooperation in Europe and other Selected Congressional hearings, Reports and Prints I 1995 – 1996, p. 26

¹¹²⁹ *Idem*, p. 26

¹¹³⁰ *The War Crimes Trials for the Former Yugoslavia: Prospects and Problems*, Briefing of the Commission on Security and Cooperation in Europe, *op. cit.*, p. 1

¹¹³¹ Miller William, "Slobodan Milosevic's prosecution by the International Criminal Tribunal for the former Yugoslavia: A harbinger of things to come for International Criminal Justice", *Loyola Los Angeles International and Comparative Law Review*, Vol. 22, Iss.2, 2000, pp. 553 – 580, p. 567

¹¹³² Boas, *op. cit.*, p. 81

¹¹³³ *The Prosecutor v. Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Nebojsa Pavkovic, Vladimir Lazarevich and Sreten Lukic*, Judgment, Case No. IT – 05 – 87 – T, 26 February 2009, Vol. 1 of 1, para. 5

¹¹³⁴ Boas, *op. cit.*, p. 83

The consolidated Indictment against Milosevic alleged that he:

was criminally responsible for crimes against humanity, war crimes and violations of the laws or customs of war, in that he [together with named and unnamed others] planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution' of the crimes. The indictment asserted that the reference to 'committing' referred to participation in a joint criminal enterprise as a co-perpetrator, the purpose of the criminal enterprise being to expel a substantial proportion of the Kosovo Albanian population from the province.¹¹³⁵

The choice of the charges is also problematic. Kelly points out that:

while charged with three sets of crimes (genocide, war crimes, and crimes against humanity) occurring in three distinct military campaigns (Croatia, Bosnia and Kosovo), Milosevic is undergoing prosecution for genocide in the Bosnian campaign only. Although genocide was clearly implicated in the ethnic cleansing of Kosovo, Milosevic is not charged with it – rather, he faces charges of crimes against humanity for that brutality.¹¹³⁶

The indictment goes on stating that:

Slobodan MILOSEVIC was elected President of the Presidency of the then Socialist Republic of Serbia on 8 May 1989 and re-elected on 5 December 1989. After the adoption of a new Constitution, on 28 September 1990, the Socialist Republic of Serbia became the Republic of Serbia, and Slobodan MILOSEVIC was elected to the newly established office of President of the Republic of Serbia in multi-party elections, held in December 1990. He was re-elected to this office in elections held on 20 December 1992.¹¹³⁷

The indictment further alleges that:

After serving two terms as President of the Republic of Serbia, Slobodan MILOSEVIC was elected President of the Federal Republic of Yugoslavia on 15 July 1997, beginning his official duties on 23 July 1997. Following his defeat in the Federal Republic of Yugoslavia's presidential election of September 2000, Slobodan MILOSEVIC relinquished his position on 6 October 2000.¹¹³⁸

The substance of the charges are however that:

Acting alone or in concert with other members of the joint criminal enterprise, he participated in the joint criminal enterprise in the following way:

- (a) exerted effective control over elements of the JNA and VJ which participated in the planning, preparation, facilitation and execution of the forcible removal of the majority of non-Serbs
- (b) provided financial, logistical and political support to the VRS
- (c) exercised substantial influence over, and assisted, the political leadership of Republika Srpska in the planning, preparation, facilitation and execution of the take-over of municipalities in Bosnia and Herzegovina and the subsequent forcible removal of the majority of non-Serbs
- (d) participated in the planning and preparation of the take-over of municipalities in Bosnia and Herzegovina and the subsequent forcible removal of the majority of non-Serbs. [...] provided the financial, material and logistical support necessary for such take-over

¹¹³⁵ Boas Gideon, *The Milosevic trial...*, op. cit., p. 81

¹¹³⁶ Kelly J. Michael, *Nowhere to hide: Defeat of the sovereign immunity defense for crimes of genocide and the trials of Slobodan Milosevic and Saddam Hussein*, Peter Lang, New York, 2005, p. 95

¹¹³⁷ *The Prosecutor of the Tribunal against Slobodan Milosevic*, Amended Indictment, (Milosevic Indictment), Case No. IT – 02 – 54 – T, 22 November 2002, para. 3

¹¹³⁸ Milosevic Indictment, para. 4

- (e) participated in the formation, financing, supply, support and direction of special forces of the Republic of Serbia Ministry of Internal Affairs
- (f) participated in providing financial, logistical and political support and direction to Serbian irregular forces or paramilitaries
- (g) controlled, manipulated or otherwise utilized Serbian state-run media to spread exaggerated and false messages of ethnically based attacks by Bosnian Muslims and Croats against Serb people intended to create an atmosphere of fear and hatred among Serbs living in Serbia, Croatia and Bosnia and Herzegovina which contributed to the forcible removal of the majority of non-Serbs.¹¹³⁹

Milosevic was therefore charged of genocide (count 1) for a series of actions, including the following:

widespread killing of thousands of Bosnian Muslims during and after the take-over of territories within Bosnia and Herzegovina¹¹⁴⁰,
killing of thousands of Bosnian Muslims in detention facilities within Bosnia and Herzegovina¹¹⁴¹,
causing of serious bodily and mental harm to thousands of Bosnian Muslims during their confinement in detention facilities within Bosnia and Herzegovina.¹¹⁴²

The big and unresolved question was however for the prosecution to prove all the allegations levelled against the accused in the absence of evidence that Milosevic physically committed those crimes. For the prosecution, the strategy was to allege a joint criminal enterprise between Milosevic and his other senior aides and associates.

Laughland notes that the joint criminal enterprise was mounted in a way that Milosevic “was accused of participating in three massive ‘joint criminal enterprises’, which were themselves said to have all formed part of ‘one transaction’, a single plan to expel non-Serbs from territory in order to consolidate Serb control over it.”¹¹⁴³

Boas who was actively involved in the Milosevic case reveals that despite this ingenious prosecution charging strategy, the prosecution case in Milosevic was far from the best practice, and seriously threatened the fair and expeditious trial framework within which international criminal trials are conducted.¹¹⁴⁴

¹¹³⁹ Ibidem, para. 25

¹¹⁴⁰ Idem, para. 32 (a)

¹¹⁴¹ Idem, para. 32 (b)

¹¹⁴² Idem, para. 32 (c)

¹¹⁴³ Laughland John, *Travesty: the trial of Slobodan Milosevic and the corruption of international justice*, Pluto Press, London, 2007, pp. 123 - 124

¹¹⁴⁴ Boas Gideon, *The Milosevic trial...*, op. cit., p. 79

The case against Milosevic went ahead on trial until his death in custody on 11 March 2006. Boas summarises that at the time of Milosevic's death "he had been on trial for 66 count of genocide, crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war. The alleged conduct encompassed more than 7,000 allegations of wrongdoing over eight years of conflict in the former Yugoslavia."¹¹⁴⁵ It is however regrettable that Milosevic died without his judgment being delivered though one may say, for sure, that he was to be found guilty. Other senior leaders' indictments and prosecutions are insufficient in terms of meeting the standards of a proper criminal investigation and indictments drafting and proceeding at trial.

5.6.3. Radovan Karadzic case

Like Milosevic, two other prominent Serb leaders were targeted by international prosecutions. They eventually remained at large for some time until their arrest. The calling and instructing of the prosecution of the former president of the Republika Srpska and the former Serb General was also live in the State Department in Washington before being on the table of the ICTY prosecution in The Hague. In a briefing before the Commission on Security and Cooperation in Europe, a member stated that: "Now, in addressing the issue of war criminals today, I am going to focus on Karadzic and Mladic."¹¹⁴⁶

Another member also placed the U.S intervention in perspective by clearly saying that:

apprehending and bringing to justice Karadzic and Mladic is declared U. S. policy. It's an objective which has been articulated and revalidated frequently. In fact, a failure to cooperate with the International Criminal Tribunal places all signatories in violation of what is a contractual obligation binding them to comply with Article IX(1) in the Dayton agreement.¹¹⁴⁷

Radovan Karadzic was "President of the Serbian Democratic Party of Bosnia and Herzegovina from July 1990 until his resignation on 19 July 1996."¹¹⁴⁸ He was the "sole president of the RS

¹¹⁴⁵ Ibidem, p. 1

¹¹⁴⁶ *The War Crimes Trials for the Former Yugoslavia: Prospects and Problems*", Briefing of the Commission on Security and Cooperation in Europe, op. cit., p.9

¹¹⁴⁷ Ibidem, p. 9

¹¹⁴⁸ *The Prosecutor of the Tribunal against Radovan Karadzic*, Third Amended Indictment (Karadzic Indictment), Case No. IT – 95 – 5/18 – PT, 27 February 2009, para. 2

(Republika Srpska) and Supreme Commander of the RS armed forces from 17 December 1992 until about 19 July 1996.”¹¹⁴⁹

The third amended indictment against Karadzic charged him with genocide, crimes against humanity and violations of the laws and customs of war.¹¹⁵⁰ The indictment alleges Karadic’s individual criminal responsibility under Article 7(1) of the Statute for planning, instigating, ordering, committing and/or aiding and abetting the crimes charged through the acts and omissions described in paragraph 14 therein.¹¹⁵¹ It specifies that “committing”, in the context of Karadic’s liability under Article 7(1), refers to his participation in a joint criminal enterprise.¹¹⁵²

The prosecution case was that Karadzic participated in several joint criminal enterprises. His principal associate was General Ratko Mladic. The objective of the joint criminal enterprise was the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina.¹¹⁵³

Karadzic and Ratko Mladic participated “in three additional joint criminal enterprises, the objectives of which were (1) to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling, (2) to eliminate the Bosnian Muslims in Srebrenica, and (3) to take United Nations personnel as hostages.”¹¹⁵⁴

On paragraph 9 of the indictment, the prosecution alleges that the umbrella joint criminal enterprise intended to permanently remove the Bosnian Muslims and Bosnian Croats inhabitants. This was realized by the commission of Genocide (count 1), persecution, extermination, murder, deportation, and inhumane acts (forcible transfer). Why not simply charge them for genocide, persecution, murder, deportation and inhumane acts as crimes against humanity and show how

¹¹⁴⁹ Karadzic Indictment, para. 3; Milosevic Indictment, para. 10

¹¹⁵⁰ *Prosecutor v. Radovan Karadzic*, Case No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009 (“Indictment”), p. 1, hereinafter referred to as Karadzic Indictment.

¹¹⁵¹ *Ibidem*, para. 30

¹¹⁵² *Idem*, para. 5

¹¹⁵³ *Idem*, para. 6

¹¹⁵⁴ Karadzic Indictment, para. 8

they personally committed those crimes? There is a point to make between the language of the law and the actual facts of the individual accused.

The concise statement of facts is divided in four categories, namely the crimes committed to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian-claimed territory¹¹⁵⁵; the crimes committed to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling¹¹⁵⁶; the crimes committed to eliminate the Bosnian Muslims in Srebrenica¹¹⁵⁷, and finally the crime of taking hostages.¹¹⁵⁸ In many instances, the indictment alleges that Karadzic shared the intent for the commission of the crimes with other members of the joint criminal enterprise. Being accused of involvement in almost all the same incidents, Karadzic was charged as a superior under Article 7(3) of the ICTY Statute.

It is a fact that the prosecution always claims that it has difficulties uncovering evidence that links an accused of high profile to crimes committed by subordinates or others. Sometimes the prosecution fails to even establish the required elements of holding a superior responsible of acts committed by subordinates. It is in this instance that the prosecution relies on a hierarchical pyramid.

In Dr. Karadzic's case, the premises are for the prosecutor to state that Radovan Karadzic was "the highest civilian and military authority in the RS"¹¹⁵⁹ and then to go on to cite all that his functions and prerogatives entail in terms of responsibility. Yet, it is a mere quotation which has nothing to do with a criminal conduct or propensity. One should note that functions and prerogatives of a Republic President are determined by the constitution and other laws. It is treacherous to use those functions and prerogatives to establish that the superior was also a criminal by the same token. It is another issue when the prosecutor can establish that the superior-suspect used or abused his power to commit crimes.

¹¹⁵⁵ *Ibidem*, paras. 9 through 14

¹¹⁵⁶ *Idem*, paras. 15 to 19

¹¹⁵⁷ *Idem*, paras. 20 to 24

¹¹⁵⁸ *Idem*, paras. 25 to 30

¹¹⁵⁹ Karadzic Indictment, para. 33

If it is proven that the accused is guilty of the allegations, then the indictment must clearly state what they actually did rather than becoming a wrap of what the existence of the accused has been in his public life. Stating that they participated in an enterprise, yet that they did not physically commit any of the crimes charged, misses the point.

5.7. Summary

The central role that the prosecutor plays in criminal proceedings influences the effectiveness of the criminal justice system in general. Such a role as it transpires from the Statutes of the ICTY and ICTR remains of paramount importance. Drawing from the status of a prosecutor in domestic jurisdictions, it was shown how the *ad hoc* tribunals' prosecutor is comfortable as one body that investigates and prosecutes. The *United States Supreme Court* in *Berger v. United States* explained how the prosecutor must undertake his or her double role. In this case, it was held that the prosecutor:

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and those interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffers. He may prosecute with earnestness and vigour – indeed, he should so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹¹⁶⁰

The prosecutor wields enormous power and discretion. Yet, few or no checks and balance exist to limit and guide the international prosecutor. Most of the time, the prosecutor abuses them. The prosecution of André Ntagerura, a former cabinet minister in Rwanda and General Gratian Kabiligi, the former head of operations and trainings at the Rwandan Army Headquarters illustrated how abusive the prosecution's powers can be. The international prosecutor is not totally independent even though he or she may deny or always denies this fact. He or she is unaccountable to anyone. There is no oversight system to regulate how the prosecutor utilises his or her power or how he or she behaves. Ntagerura and Kabiligi cases illustrate this assertion:

¹¹⁶⁰ *Berger v. United States*, 295 U.S. 78, 88(1935), cited in Mitchell Stephens, "Ignoring Justice: Prosecutorial discretion and the ethics of charging", *Northern Kentucky Law Review*, Vol. 35, 2008, pp. 53 – 65, p. 54

The chapter also clarifies what investigations are and to what extent they should go; and why they are necessary. When an atrocious international crime is committed, prosecutors should attempt to thoroughly investigate the crime itself and find out who the perpetrators are, and what exact role a particular suspect has played. Building a case from the accused position in government, army or political institutions is a genuinely incorrect premise. There is an assumption that crimes of a certain magnitude cannot be committed unless the high echelons in the polity and military hierarchy gave consent, were involved or otherwise condoned such crimes. This may or may not be true. Prosecutors should not be impressed by the gravity and extensive nature of the crime. They should be guided by the evidence available that implicates a particular suspect; evidence that is sufficient enough to charge a person; evidence that is sufficient enough to secure conviction. Such evidence should allow uncovering all the contours of the crimes for, at least, future prevention.

The indictments levelled against Milan Milutinovic, Solobodan Milosevic and Radovan Karadzic were examples of the prosecutor's ambitious charging strategy; yet not sufficiently supported by available evidence. From a defective indictment, the prosecutor led the case at trial using legal technicalities not properly commensurate with international crimes. Two of those techniques normally used to dispose of petty crimes are the plea bargain and judicial notice.

CHAPTER 6: THE OVERRELIANCE ON GUILTY PLEAS AND JUDICIAL NOTICE TO DISPOSE OF INTERNATIONAL CRIMES

6.1. Introduction

Guilty pleas and judicial notice are procedures and doctrines which are not uncommon in criminal matters. They are even legitimate in jurisdictions that use them most. In international crimes prosecutions, however, these techniques do not allow the uncovering of the true nature, the gravity and seriousness of the crimes as well as the extent of the participation of perpetrators. From the experience of the *ad hoc* tribunals, the arguments in support of this assertion are discussed below.

Guilty plea and judicial notice are procedural techniques that allow a speedy disposition of a criminal case. Both can have a great impact on the substance of a case. For example, a person who is sentenced after pleading guilty to crimes he or others believe they did not commit, will always feel that the law has been too unfair and too harsh, or that they had been manipulated by unscrupulous court officials. The same feeling will likewise be borne by objective and independent researchers, who may, at the end of the day, discover that a person was condemned for crimes he or she did not actually commit or has been condemned leniently while he or she committed egregious crimes. The loser is of course the person who is condemned for what he or she did not do. The overall casualty remains the truth. Without the truth of the facts, society suffers; the objectives assigned to *ad hoc* tribunals may be defeated. The work done through the use of plea bargaining and judicial notice would have been in vain. Two “interlocking” purposes of criminal law may have been frustrated. According to Sistare, criminal law serves the goal of securing conformity to standards of conduct and thus the goal of public safety; one of development and recognition of personal freedom and responsible agency and thus the goal of justice to individuals.¹¹⁶¹

¹¹⁶¹ Sistare C. T., *Responsibility and Criminal Liability*, Kluwer Academic Publishers, Dordrecht/Boston/London, 1989, p. 11

Sistare argues further that “a liberal society must, therefore, be committed to recognizing and respecting the individual *qua* individual. This is an essential element of its legitimacy as well as a characteristic social feature. This characteristic perspective and this claim to legitimacy affect the nature of criminal law in a liberal society.”¹¹⁶² It is therefore counterproductive to build a body of laws that does not develop the freedom of the individual at the same time alleviating the ills of the society. Overusing guilty pleas and judicial notice in international prosecutions has the potential to frustrate the balance between these two imperatives. If this becomes the case, especially when the individual *qua* individual is for example overcharged, then there is no point being made. Society and the individual must be served equally because the ultimate goal is the betterment of humanity, which is composed of individuals. Quoting lastly from Sistare, he suggests that:

The freedom of self-determination is not possible in a society without constraints on conduct. But freedom from the harmful actions of other persons is not an end in itself in a society which values personal development. We desire stable social relations in order that we have a free society. If the ultimate purpose of a liberal society is the promotion of personal freedom, then the criminal law must acknowledge the individuality of each citizen.¹¹⁶³

Common law systems heavily rely on guilty plea and judicial notice to dispose of the majority of criminal cases. Likewise, in international crimes prosecutions, these two have overridden traditional investigative and procedural rules usually used in Roman-Dutch law. Looking at both, they leave a huge gap between the aims and the methods used in international crimes adjudication. This chapter concentrates on judicial notice and plea bargaining showing how they are inappropriate techniques to adjudicate serious crimes.

6.2. Plea bargaining

The plea bargain is one of the procedures used in international prosecutions to basically secure conviction, and eventually secure a lenient sentence. It involves a prosecutor inducing a defendant to waive his rights to trial. The plea bargain is often used in domestic common law

¹¹⁶² *Ibidem*, p. 11

¹¹⁶³ Sistare C. T., *Responsibility and Criminal Liability*, op. cit., p. 12

jurisdictions. It has now been transposed to the international arena of prosecution. It is more of an “administrative policy”¹¹⁶⁴ than a substantive concern of criminal law:

Such a policy depicts a model of trial justice that is essentially pragmatic and morally relative; where system objectives are given undue prominence over the search for truth and closure for the victims of mass atrocity. According to this model, the ideology of international trial justice is conveyed by judges through symbolism and rhetoric. Procedural devices such as plea agreements are employed to achieve the prized bureaucratic goals of speed, efficiency and the maximization of resources.¹¹⁶⁵

Generally, criminal defendants in countries that practice plea bargaining face a dilemma. Such a dilemma, according to Lippke, is that, “if they waive their right to trial and plead guilty, they typically receive charge or sentence reductions in exchange for having done so. If they exercise their right to trial and are found guilty, they often receive stiffer sanctions than if they had pleaded guilty.”¹¹⁶⁶ Lippke calls those two categories “waiver reward” for those who choose to plead guilty, and “non-waiver penalties”, for those who do not.¹¹⁶⁷ Such a statement is centred on the advantages and disadvantages of the defendant but does not say anything about what is pursued in international prosecutions, let alone in domestic ones. Lippke remains of the view that “it is not obvious why either is appropriate, since whether or not criminal defendants waive their right to a trial would seem to have little to do with the seriousness of their offenses or the appropriate sanctions that they should suffer for having committed them.”¹¹⁶⁸

In international prosecutions, more is at stake. The events that brought about the criminality of the culprit need to be uncovered in view to avoiding their repeat. There are issues of deterrence, retribution, fighting impunity, and above all, justice. If attention is directed at the individual offender *per se*, there is a difference that needs to be made between the Common Law legal systems and the Roman-Dutch law system. In common law systems, the practice is often applied while in the Roman-Dutch Law system, there is reluctance, or at least a tendency to resort to plea bargain. This is due to, according to Harmon, “the role of judges in the civil law legal systems,

¹¹⁶⁴ See Henham Ralph, “The ethics of plea bargaining in international criminal trials”, *Liverpool Law Review*, Vol. 26, Iss.3, 2005, pp. 209 – 224

¹¹⁶⁵ *Ibidem*, p. 209

¹¹⁶⁶ Lippke L. Richard, “To waive or not to waive: the right to trial and plea bargaining”, *Criminal Law and Philosophy*, Vol. 2, Iss.2, 2008, pp.181 – 199, p.181

¹¹⁶⁷ *Ibidem*. The two terminologies are used throughout the article.

¹¹⁶⁸ *Idem*, p. 182

the practice of plea bargain with an accused is unacceptable or is severely restricted.”¹¹⁶⁹

Contrary to the practice in Common Law systems:

a defendant’s admission of guilt in civil law jurisdictions is not determinative on the issue of criminal culpability but merely part of evidence that will be considered by the court in its ultimate determination of the case. Even with an admission of guilt, the prosecution is still obliged to present its case to the court and the court may absolve an accused of criminal responsibility notwithstanding his/her admission of guilt.”¹¹⁷⁰

Having stated this distinction; how does plea bargaining work? Is it a useful and commendable tool to prosecute international crimes? Henham criticises plea bargaining “as lacking in moral legitimacy in the context of trial justice because [it does] not serve rationalizations for punishment which resonate with the needs of victims and victim communities.”¹¹⁷¹ It is therefore more useful to militate for “a moral right to trial.”¹¹⁷²

6.2.1. Meaning and contents

Feeley observes that “while no single definition of the term is universally accepted, the practice may encompass negotiation over reduction of sentence, dropping some or all of the charges or reducing the charges in return for admitting guilt, conceding certain facts, foregoing an appeal or providing cooperation in another criminal case.”¹¹⁷³ Fisher thinks that plea bargaining has evolved, which later aided in better comprehending the different stages at which it may be resorted to. According to him, the plea may consist in charge bargaining. The prosecutor drops some charges; from a serious to a lesser offence. It may also be a sentence bargaining: rather than asking a heavy penalty, the prosecutor undertakes to require a reduced one¹¹⁷⁴ for the accused who decides to plead guilty.

¹¹⁶⁹ Harmon Mark, “Plea Bargaining: the uninvited guest at the International Criminal Tribunal for the former Yugoslavia” in Doria José, Gasser Hans-Peter, & Bassiouni M. Cherif (eds), *The legal regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff Publishers, Leiden Boston, 2009, pp. 163 – 182, p. 165

¹¹⁷⁰ *Ibidem*, p. 165

¹¹⁷¹ Henham Ralph, *op. cit.*, p. 210

¹¹⁷² Lippke L. Richard, *op. cit.*, p. 181

¹¹⁷³ Feeley M.M., ‘Perspectives on Plea Bargaining’, 13 *Law and Society Review*, 1999 at 1999 – 200(1979), quoted in Scharf P. Michael, “Trading Justice for Efficiency: Plea Bargain and International Tribunals”, *Journal of International Criminal Justice*, Vol. 2, Iss.4, 2004, pp. 1070 – 1081, p.1070

¹¹⁷⁴ Fisher George, *Plea Bargaining’ Triumph: a history of plea bargaining in America*, Stanford University Press, Stanford, California, 2003, p. 12

Parties to a criminal case may bargain over the charges themselves in terms of the number, naming and qualification. Instead of bringing charges of murder, the prosecutor charges for manslaughter. Within a charge, parties may also agree on facts to retain and ones to dismiss. It is fact bargaining.¹¹⁷⁵ The prosecution agrees to present a particular (usually less serious) version of the facts in return for a guilty plea.¹¹⁷⁶ Parties can even agree that the accused will provide cooperation in pursuing other cases.

Whereas the prosecutor and the accused may bargain at will if the case has not yet been brought to trial or in any event if the case has not yet involved a judge, the situation changes when the judge has been seized. The judge has a determinative say when the parties agree on the reduction of the sentence to enter after conviction. It is the judge only who is vested with the right and discretion to impose a sentence, not the parties. This reasoning may not apply in the case of an appeal as it is upon the parties to decide whether to appeal or not to appeal.

But normally “the plea bargaining process is mostly carried on between the defence and the prosecution with little judge judicial review.”¹¹⁷⁷ In fact, except in a few instances, judges only proceed to a formalistic exercise that goes not deeper into the matter, leaving again leeway to the prosecutor’s offer. Whether with the judge’s intervention or not, a defendant who pleads guilty is not so sure of the full impact of his plea. All depends on prosecutor’s sincerity and judges’ discretion. Plea has its rationale.

6.2.2. Reasons for plea bargaining

Why bargain a plea instead of facing or conducting a full trial? Is plea-bargaining really an appropriate method of adjudicating crimes of serious concern to humanity like genocide, war crimes and crimes against humanity? Is there a way of leaving the individuals accused to opt for a confession rather than through manufactured pleas? These are important questions one needs to pose before resorting to plea bargaining. It is not easy to immediately know the motives of each

¹¹⁷⁵ Henham Ralph, “The ethics of plea bargaining in international criminal trials...”, op. cit p. 210

¹¹⁷⁶ *Idem*, p. 210

¹¹⁷⁷ *Idem*, p. 347

party in resorting to plea bargaining. The commonalties are that the parties to a plea bargain envision an advantage. According to Fisher, there are:

those defendants who pled guilty out of remorse for their crimes or to shorten their engagements in court from those who did so as part of a plea bargain, expecting to win some concession in exchange. We must employ still other devices to distinguish explicit plea bargains, in which the parties spoke out loud the terms of their exchange, from implicit bargains, in which the defendant pled guilty for an un-promised but hoped-for reward.¹¹⁷⁸

For the prosecutor, engaging in plea bargaining does more to serve the professional upbringing or to hide political advantages. Fisher refers to Raymond Moley's original plea bargaining exposé in 1928 where he suggested that a plea is part of the prosecutor's work record, and counts as a conviction. The prosecutor brandished such records before the voters for re-election when, in reality, these 'convictions' included all sorts of compromises.¹¹⁷⁹

Previously, plea bargains were unwelcome to the judges because their concern differed slightly from the incentives of the prosecutors. Pleas "served judges' needs less well than those of prosecutors; it confronted judges' principled aversion to discharging their awesome duty to sentence without full information; and it wounded some judges' pride of power."¹¹⁸⁰ Later on, however, judges became more and more interested in plea bargains. Fisher cites an exploding civil caseload brought about by business diversity resulting in a great number of civil cases in addition to criminal cases. "The crucial caseload pressure came not from criminal courtrooms but from their civil counterparts."¹¹⁸¹ Thus, the

judges' principled objections gave way as newly commissioned probation officers investigated defendants' crimes and backgrounds and gave judges enough information to make reasoned sentencing decisions after a plea – and as newly appointed parole boards' relieved judges of the responsibility of setting defendants' sentences with precision. Judicial pride found refuge in the development of sentencing mechanisms that let prosecutors make promises during plea bargaining without taking sentencing power (or at least without taking it overtly) from judicial hands.¹¹⁸²

The international criminal judges do not have civil cases to deal with. If there are such flaws in domestic jurisdictions, it is hard to believe that they will be cured before an international criminal tribunal where matters are even more complex. Moreover, plea bargains counter-

¹¹⁷⁸ Fisher George, *Plea Bargaining' Triumph...*, op. cit., p. 5

¹¹⁷⁹ *Ibidem*, p. 48

¹¹⁸⁰ Fisher George, *Plea Bargaining' Triumph...*, op. cit., p. 58

¹¹⁸¹ *Ibidem*, p. 121

¹¹⁸² *Idem*, p. 114

advance the mandate for which *ad hoc* tribunals have been established. In this respect Scharf observes that *ad hoc* tribunals themselves:

declared that plea-bargaining was inconsistent with [their] unique purpose and functions. The crimes within the jurisdiction of the Tribunal [ICTY] were simply seen as reprehensible to be bargained over. Its sister *ad hoc* tribunal, the Rwanda Tribunal (ICTR), followed suit, sentencing Jean Kambanda, former prime minister of Rwanda, to life imprisonment despite the fact he pled guilty to genocide, enabling the Tribunal to forego a lengthy and uncertain trial.¹¹⁸³

Two factors may be taken into account when deciding on the appropriate mode of disposing of international crimes, namely the seriousness of the crimes, and the strength of the prosecution case. Mather is of the view that “the seriousness of a case refers to a prediction by attorneys of the severity of the sentence to be imposed upon conviction.”¹¹⁸⁴ A prosecutor entering a plea agreement negotiation must first of all evaluate the case and be convinced that it warrants a plea negotiation or not.

Proponents of plea bargaining, like Maynard, argue that plea bargaining as a major means by which cases are funnelled through the criminal justice process, is not a new practice. Plea bargaining was predominantly used in the USA before the Civil War as a means to administer criminal justice. What is new is the amount of attention it received afterwards.¹¹⁸⁵ Judge Rothwax¹¹⁸⁶ concurs with the idea that plea bargaining has been a dominant factor in the U.S. administration of criminal justice.

Maynard and Judge Rothwax discuss the usage of plea bargaining over time, particularly in the common law jurisdictions, and most specifically in the USA. Their argument does not say anything about the usefulness of plea bargaining in furthering criminal justice goals and objectives. Judge Rothwax posits that plea bargaining requires “the defendant to plead guilty to

¹¹⁸³ Scharf P. Michael, “Trading Justice for Efficiency...”, *op. cit.*, p. 1071

¹¹⁸⁴ Mather M. Lynn, *Plea bargaining or Trial?: The process of criminal – case disposition*, Lexington Books, Lexington, Massachusetts, Toronto, 1979, p. 27

¹¹⁸⁵ Maynard W. Douglas, *Inside Plea Bargaining: the language of negotiation*, Plenum Press, New York and London, 1984, p. 1; see also Judge Rothwax suggesting that “Plea bargaining has been a dominant factor of our system since the Warren Court revolution, which established a multitude of procedures and protection for accused persons. The main reason for its dominance is the system’s volume and complexity. We’ll never again have a system that’s so simple that plea bargaining won’t be necessary.” Rothwax J. Harold, *Guilty: The collapse of Criminal Justice*, Random House, New York, 1996, p. 144

¹¹⁸⁶ Rothwax, *op. cit.*

at least some of the charges and that it is close to a truth-finding process.¹¹⁸⁷ Yet, the judge misses the point where through criminal prosecution; truth finding should be an imperative. The real motive around the guilty plea is that, according to Fisher, “obtaining a guilty plea as the result of a plea bargain is the most common method of securing a conviction. The overwhelming majority – 90 percent, by some estimates – of criminal convictions in the United States result from guilty pleas, rather than trials.”¹¹⁸⁸

Fisher praises the triumph of plea bargains. He observes that:

though its victory merits no fanfare, plea bargaining has triumphed. Bloodlessly and clandestinely, it has swept across the penal landscape and driven our vanquished jury into small pockets of resistance. Plea bargaining may be, as some chroniclers claim, the invading barbarian. But it has won all the same.¹¹⁸⁹

The appraisal of plea bargaining revolves around its effectiveness in speeding up criminal proceedings. It leaves unanswered questions about its moral outcome and ethical reliance thereon. Once parties to a criminal litigation agree to a plea, they secure big amounts of financial means that could have been spent to argue a case much deeper. They also secure time that would normally be required to dispose of criminal cases. Victims and other unavailable witnesses are spared of the hardship of trials. If plea bargains are consistently applied, they reduce case logs and eventually reduce crimes in a given society or jurisdiction.

One may however wonder whose interests these are. Does plea bargaining serve the interests of the prosecutor or those of the offender or both? Does it secure the interests of the victims or those of the society? As an outgrowth of negotiations between two parties, the temptation would obviously be to say that it serves both the interests of the prosecution and those of the offender. Plea bargaining is arrived at after intense and secret negotiations between the prosecution represented by legal experts and the offender represented by professional counsels. Maynard unveils plea bargains’ other untold reality by stating that it is the practice that “usually escapes scrutiny because it is carried on by professionals in their offices, in hallways, over the telephone,

¹¹⁸⁷ Ibidem, p. 144

¹¹⁸⁸ Worrall L. John, *Criminal Procedure...*, op. cit., p. 345

¹¹⁸⁹ Fisher George, *Plea Bargaining’ Triumph...*, op. cit., p. 1

or, [...] in open courtroom conferences that are ritually protected from intrusion.”¹¹⁹⁰ Anyone not privy to the negotiations may not know what actually transpired in the process.

On the secrecy surrounding plea bargains, Fisher writes that “as clear as their interest in plea bargaining may have been, prosecutors’ power to bargain was well hidden. Tracking it has absorbed a good many pages.”¹¹⁹¹ Though the prosecutor gains a lot from the practice, he/she is not the only one who hides the steps leading to the deal. The defendant has vested interests as well, even though he is not in full control of the process. Such interests “lay in the difference between the severe sentence that loomed should the jury convict at trial and the more lenient sentence promised by the prosecutor or judge in exchange for a plea.”¹¹⁹²

In the adjudication of international crimes, plea bargaining may be justified by many factors. Factors that are specific to international prosecutions may, for example, be the inability to gather as much evidence as necessary required for a successful prosecution. According to Harmon, a former prosecution counsel at the ICTY, “convicting persons responsible for the serious crimes [...] can only succeed if credible evidence, admissible in a court of law, is at the disposal of the prosecutor. At the end of the day, no matter how much public sentiment is aroused against an accused, prosecutions fail without evidence.”¹¹⁹³

The guilty plea may therefore help where such evidence is lacking and where the prospects for conviction are too scarce. For example, on 5 March 2007 during the trial of Ramush Haradinaj, Chief Prosecutor Del Ponte stated that “we will not be able to bring before this Court evidence of all the crimes that were committed in this part of Kosovo. That would be impossible.”¹¹⁹⁴ The Chief Prosecutor also writes that “during the summer of 2002, the Office of the Prosecutor continued to have trouble amassing evidence of sufficient quality to submit indictments. The investigators continued to have trouble finding evidence linking ranking officers with episodes of

¹¹⁹⁰ Ibidem, pp. 1 - 2

¹¹⁹¹ Fisher George, *Plea Bargaining’ Triumph...*, op. cit., p. 91

¹¹⁹² Ibidem

¹¹⁹³ Harmon Mark, “Plea Bargaining...”, op. cit., p. 171

¹¹⁹⁴ Del Ponte Carla, *Madame Prosecutor: Confrontation with Humanity’s Worst Criminal and the culture of impunity*, Feltrinelli Editore, Milan, 2008, p. 302

criminal behaviour.”¹¹⁹⁵ To camouflage these difficulties, international prosecutors resort to plea bargaining with those suspects who have been arrested in view to secure their cooperation in the investigation and arrest of other more powerful suspects.

Harmon gives another example of the advantages of guilty pleas:

in July of 1995, the OTP opened an investigation into the Srebrenica crimes. We were aware of reports that thousands of Bosnian Muslim men had disappeared and presumably had been killed, but the details about how, where and by whom they had been killed were unknown to the OTP. Severely complicating the investigation was the fact that investigators did not have access to the terrain where the massacres had occurred as it was controlled by the Bosnian Serb authorities who asserted that such allegations were the result of “violent Muslim propaganda.”¹¹⁹⁶

Harmon advances other reasons hampering the proper conduct of investigations. He suggests that:

the work of investigating crimes in far off lands against political, military, police and paramilitary leaders, many of whom remain powerful figures in their countries and continue to exert considerable influence, directly or through their followers, is a daunting task that had been made more difficult by the Tribunal’s structural infirmities: the lack of a police force, the lack of judicial powers to compel the production of evidence, and the absence of immediate and credible sanctions for recalcitrant States that fail to comply with their international obligations to cooperate with the Tribunal or that actively obstruct the work of the Tribunal.¹¹⁹⁷

These are of course easy reasons aimed at justifying why the prosecutor should be permitted to resort to less demanding methods of securing custody and conviction of the suspect, including plea bargaining. It may however be argued that in plea-bargaining, instead of doing its job, the prosecution behaves like a spoiled child believing that the accused has a duty to admit guilt.

Moreover, Alschuler, an outstanding critic of plea bargaining maintains that these procedures “remain an inherently unfair and irrational process, one that turns major treatment consequences upon a single tactical decision irrelevant to any proper objective of criminal proceedings.”¹¹⁹⁸

Other factors that are put forward for plea-bargaining are financial gains and court time. According to the *Kambanda* case,¹¹⁹⁹ guilty plea occasions judiciary economy, save victims the

¹¹⁹⁵ Ibidem, p. 283

¹¹⁹⁶ Harmon Mark, Plea Bargaining..., op. cit., p. 172

¹¹⁹⁷ Ibidem, p. 170

¹¹⁹⁸ Alschuler W. Albert, “The changing Plea Bargaining Debate”, *California Law Review*, Vol. 69, No. 3, 1981, pp. 652 – 730, p. 562.

¹¹⁹⁹ *The Prosecutor versus Jean Kambanda*, Judgment and Sentence, Case No ICTR – 97 – 23 – S, 4 September 1998

trauma of a trial and enhance the administration of justice.¹²⁰⁰ Fisher also lists efficiency as a factor that lead to plea bargaining.¹²⁰¹ Plea bargaining moreover helps prosecutors to secure convictions and thereby “victory in the case.”¹²⁰² Fisher argues however that “what is less obvious is that plea bargaining confers almost the same advantage on judges.”¹²⁰³ Whether judges reap such benefit as well is an untested assumption. Professional upbringing of prosecutors and judges may also be another incentive that encourages plea bargaining.

The other reason is caseloads. In jurisdictions where the plea bargain is mostly used, particularly in the USA, the “case load grew because more defendants exercised their right to appeal from lower tribunals to the Court of Common Pleas. More defendants were coming to court with lawyers, perhaps explaining why more were so bold as to claim an appeal.”¹²⁰⁴ Caseloads hide many other expectations from guilty pleas or reliance thereon. Fisher uncovers those other motivations that increase caseload, and therefore lead the accused to resort to plea bargaining. Once prosecutors felt a general incentive to lighten their workload, they struck plea bargains whenever they had the power to do so – that is, whenever rigid penalty schemes permitted them to manipulate sentences by manipulating charges.¹²⁰⁵ In the opinion of Langbein, from whom Fisher quotes, “plea bargaining arose because trial rules had grown so complex as to make the jury trial an ‘absolutely unworkable’ way to resolve most criminal disputes.”¹²⁰⁶ It is in fact an attempt to avoid the application of complex procedural rules..

McConville and Mirsky think that:

Complexity itself motivated lawyers to avoid trials and to move to instead to a simplified proceeding which, while unencumbered by rules of procedure and evidence, regarded those rules as the basis upon which negotiated justice could be achieved efficiently. This lawyer’s dichotomy, which on the one hand, commentators contend, resulted in the strengthening of trials and improving upon the reliability of outcomes, became, on the other hand, a reason to avoid trial altogether.¹²⁰⁷

¹²⁰⁰ *Ibidem*, para. 54

¹²⁰¹ Fisher George, *Plea Bargaining’ Triumph...*, op. cit., p. 175

¹²⁰² *Ibidem*, p. 176

¹²⁰³ *Idem*, p. 176

¹²⁰⁴ *Idem*, p. 41

¹²⁰⁵ *Idem*, p. 47

¹²⁰⁶ Langbein H. John “Torture and Plea Bargaining.” *University of Chicago Law Review* 46(1978):3, cited in Fisher George, *Plea Bargaining’ Triumph...*, op. cit., p. 9, footnote 30

¹²⁰⁷ McConville Mike & Mirsky L. Chester, *Jury Trials and Plea Bargaining: a true story*, Oxford and Portland, Oregon, 2005, p. 5

Caseloads and the complexity of cases are not only the prosecutor's panacea. It is also the concern of judges, and the general justice administration of a country. Choosing the guilty plea as one way of offloading the criminal court or avoiding complex procedural rules is a short vision approach to the problem. In fact it is such an increasing caseload that obviously put pressure on prosecutors to plea bargain.¹²⁰⁸ Judge Rothwax synthesises the recourse to the practice in suggesting that "we go to plea bargaining out of necessity, not out of desire. It is inescapable."¹²⁰⁹

As far as necessity itself is concerned, Judge Rothwax offers an argument in disfavour of plea bargaining. He suggests that:

No one likes the necessity of plea bargaining. It is a simple fact that plea bargaining sacrifices those values that the unworkable system of adversary jury trial is meant to serve: lay participation in criminal adjudication, proof beyond a reasonable doubt by the prosecutor, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.¹²¹⁰

Moreover Fisher dismisses the claim that guilty pleas lower the caseloads. He argues that:

The sheer efficiency of plea bargaining as a means of clearing cases to some extent has frozen it in place. When prosecutors and judges manage to keep pace with fast-growing workloads either with no increase in staffing or with increases that lag behind the growth in case numbers, any appeal they might make to the legislature for more personnel will fall short. And as staffing fails to keep pace with mounting loads, any hope of easing reliance on plea bargaining fades.¹²¹¹

Neither reason satisfactorily justifies plea bargaining either in domestic jurisdictions or in international crimes generally speaking, especially when balanced towards the goals and objectives of international prosecutions. International prosecutions consume time because they intend to set acceptable standards of justice. They deal with very grave offenses¹²¹² which, in domestic jurisdictions, would also consume money. As to the cost of these trials, it is obvious that a trial setting up acceptable standards of justice comes with a high price. The UN must finance those trials, and it has also been remarked that external contributions are likewise relied upon. Accountability for serious international crimes requires going an extra mile. One such cost is a regular trial not through an abridged procedure like a plea bargain. However, Combs

¹²⁰⁸ *Idem*, p. 44

¹²⁰⁹ Rothwax J. Harold, *Guilty: The collapse of Criminal Justice*, op. cit., p. 145

¹²¹⁰ *Ibidem*, p. 150

¹²¹¹ Fisher George, *Plea Bargaining' Triumph: a history of plea bargaining in America*, Stanford University Press, Stanford, California, 2003, p. 176

¹²¹² Combs argues for example that "Genocide trials are not cheap: the ICTY and ICTR together employ more than two thousand people and spend more than \$200 million per year to prosecute perhaps a dozen people."

observes that “although the international community has of late manifested a firm rhetorical commitment to the cause of criminal accountability, its financial commitment to that end has been less than steadfast.”¹²¹³ Lack of finances should therefore be dismissed as one justification for guilty pleas.

Caseloads in international prosecution are also relatively insignificant. As seen earlier, not all international criminals can be investigated and prosecuted. The tendency is moreover to prosecute those ‘senior leaders most responsible’ for the gravest crimes. The targets are few, and they are accused of the most serious crimes of international law. So, why is plea bargaining necessary? Justifying such pleas with traditional domestic reasons of financial gains, court time or caseloads management is not enough.

6.2.3. Plea bargaining’s legal requirements

To be acceptable, a guilty plea must meet at least four legal requirements. Namely, it must be voluntary, informed, unequivocal, and establish sufficient facts pointing to the accused’s responsibility for the crime or crimes he is charged with. Any court dealing with plea bargaining ordinarily goes through this checklist before accepting the plea. In domestic jurisdictions it is not quite clear whether judges insist in meeting these four conditions to accept a plea. For example, in *Alford’s* case:

the U.S. Supreme Court [...] reversed the court of appeals and upheld the defendant’s plea of guilty. The Court stated that the standard should be whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. That *Alford* would have pleaded except to eliminate the death penalty did not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice.¹²¹⁴

In this case, it appears that the court looked at only two conditions: that the plea was voluntary and informed. The ICTY may therefore be credited to have established and explained the four requirements in more detail. This groundbreaking intervention was set in the case of *Drazen Erdemovic*.¹²¹⁵

¹²¹³ Combs N. Amoury, *Guilty Pleas in International Criminal Law: ...*, op. cit., p. 2

¹²¹⁴ Rothwax J. Harold, *Guilty: The collapse of Criminal Justice*, Random House, New York, 1996, p. 147

¹²¹⁵ *The Prosecutor v. Drazen Erdemovic*, Sentencing Judgment, Case No IT-96-22 - T, 29 November 1996

6.2.4. The ICTY groundbreaking in the *Erdemovic* case

Drazen Erdemovic was a foot soldier in the 10th Sabotage Detachment of the Bosnian Serb army that was operating in a farm near *Pilica*, northwest of *Zvornik* in the *Zvornik* Municipality. The ICTY prosecutor indicted Erdemovic on one count of a crime against humanity and on an alternative count of a violation of the laws of war.¹²¹⁶ The facts of the case were that:

on or about 16 July 1995, Drazen Erdemovic did shoot and kill and did participate with other members of his unit and soldiers from other brigade in the shooting and killing of unarmed Bosnian Muslim men at the *Pilica* collective farm. These summary executions resulted in the deaths of hundreds of Bosnian Muslim male civilians.¹²¹⁷

This defendant was “the first person to plead guilty before an international tribunal. [...]. He told the court that he was forced to shoot the civilians at a collection site outside of *Srebrenica*. It was shoot or be shot, he said.”¹²¹⁸ Erdemovic admitted “to machine-gunning seventy unarmed Muslim civilians at *Srebrenica*”¹²¹⁹ following its fall.¹²²⁰ He claimed that he received orders from his commander to prepare himself along with seven members of his unit for a mission the purpose of which they had absolutely no knowledge. It was only when they arrived on-site that the members of the unit were informed that they were to massacre hundreds of Muslims.¹²²¹ At the time of the massacre, Erdemovic was 23 years old¹²²², had a wife and a nine months old son. In his plea, he asserted that he immediately refused to execute the orders but added:

I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: “If you are sorry for them, stand up, line up with them and we will kill you too.” I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me. That is all I wish to add.¹²²³

After the plea Erdemovic was found guilty on one count of a crime against humanity for his participation in the execution of approximately 1,200 unarmed civilian Muslim men and sentenced to 10 years imprisonment.¹²²⁴ He appealed the sentence, basically, on the grounds that “the offenses were committed under duress and without the possibility of another moral choice,

¹²¹⁶ See *The Prosecutor v. Drazen Erdemovic*, Judgment, Case No IT-96-22-A, 7 October 1997, paragraph 3 referring to the Indictment against the accused.

¹²¹⁷ *Ibidem*, para. 3

¹²¹⁸ Scharf P. Michael, *Balkan Justice*, op. cit., p.133

¹²¹⁹ *Ibidem*, p. 67

¹²²⁰ *The Prosecutor v. Drazen Erdemovic*, para. 76

¹²²¹ *Ibidem*, para. 80

¹²²² *Idem*, para. 109

¹²²³ *Idem*, para. 4

¹²²⁴ *Idem*, para. 1

which is, in extreme necessity, and on the grounds that he was not accountable for his acts at the time of the offense, nor was the offense premeditated.”¹²²⁵ He also advanced some other minor arguments.

Proprio motu and in *limine litis*, the Appeals Chamber raised the issue concerning the validity of the guilty plea. The first question was whether duress “affords a complete defence to a charge of crimes against humanity and/or war crimes. The second question was that, if the first question is answered in the affirmative, “was the plea entered by the accused at his initial appearance equivocal in that the accused, while pleading guilty, invoked duress.”¹²²⁶ Finally, was such a plea valid “in view of the mental condition of the accused at the time the plea was entered. If not, was this defect cured by statements made by the accused in subsequent proceedings?”¹²²⁷ In answering these questions, members of the Appeals’ Chamber were too divided as they had different opinions regarding the matter.¹²²⁸ Some found that the plea was valid¹²²⁹, while others found that “duress does not afford complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.”¹²³⁰ Some judges were of the opinion that the plea was equivocal; others found that it was not informed.¹²³¹

The case was remitted to a new Trial Chamber for re-trial. The trial chamber took a fresh plea from Erdemovic on 14 January 1998.¹²³² The accused was “allowed to re-plead with full knowledge of both the nature of the charges against him and the consequences of his plea.”¹²³³ On 5 March 1998, he was sentenced to five years imprisonment. This judgment was also appealable, though Erdemovic did not appeal.

¹²²⁵ *The Prosecutor v. Drazen Erdemovic*, Judgment, para. 11

¹²²⁶ *Ibidem*, para. 16(2)

¹²²⁷ *Idem*, para. 16(3)

¹²²⁸ *Idem*, para. 17. It is quite surprising when one considers the length of the majority judgment compared to separate opinions. The Majority Judgment, titled “*Prosecutor v. Drazen Erdemovic*, Judgment, Case No IT-96-22-A, 7 October 1997” totalizes 18 pages; while the *Joint Separate Opinion of Judge McDonald and Judge Vohrah* delivered the same day as usual amounts to 52 pages with a six pages corrigendum; the Separate and Dissenting Opinion of Judge Stephen totals 31 pages; the *Separate Opinion of Judge Li* amounts to 10 pages.

¹²²⁹ *The Prosecutor v. Drazen Erdemovic*, Judgment, para. 18

¹²³⁰ *Ibidem*, para. 19

¹²³¹ *Idem*, para. 20

¹²³² *The Prosecutor v. Drazen Erdemovic*, Sentencing Judgment, Case No IT-96-22-T bis, 5 March 1998, para. 8

¹²³³ *Ibidem*, para. 7

It is pursuant to the Appeals' Chamber judges separate opinions that legal requirements were set as authorities to subsequent cases heard by the ICTY and the ICTR.¹²³⁴ Judge McDonald and Vohrah directed their separate opinion on two main issues, namely whether the plea was equivocal and whether duress offers a defence for a soldier who has committed a crime against humanity or a war crime. Judge Stephen in his separate and dissenting opinion expressed that “while the requirement of voluntariness was satisfied in the present case, the requirement that the plea be an informed plea was not satisfied.”¹²³⁵ Judge Stephen also argued that the plea was ambiguous. In his suggestion, “its ambiguity arises from the view [of] the possible availability to the Appellant of a defence of duress, in light of his repeated statements which presented circumstances which could found such a defence.”¹²³⁶ The separate and dissenting opinions registered demonstrate how plea bargaining is such a problematic and at the very least an undesirable procedure before the *ad hoc* tribunals.

6.2.4.1. A plea must be made freely and voluntarily

In ensuring that the Erdemovic plea was made freely and voluntarily, the first Trial Chamber did not set forthwith details of such a condition. The Chamber was only of the view that:

The choice of pleading guilty relates not only to the fact that the accused was conscious of having committed a crime and admitted it, but also to his right, as formally acknowledged in the procedures of the International Tribunal and as established in common law legal systems, to adopt his own defence strategy. The plea is one of the elements which constitute such a defence strategy.¹²³⁷

The Chamber's holding did not differentiate between international and domestic practices of plea bargaining. In *Kambanda* case, an ICTR trial chamber was of the opinion that a voluntary plea is one where the appellant is “mentally competent to understand the consequences of his actions when pleading guilty.”¹²³⁸ In addition, such a plea must not have been the result of any threat, inducement or promises other than the expectation of receiving credit for a guilty plea by way of

¹²³⁴ Judge McDonald and Vohrah stated that there was “no international jurisprudence or authority to lend us further assistance in the interpretation of the guilty plea as it exists in the Statute and the Rules., we are of the opinion that we may have regard to national common law authorities for guidance as to the true meaning of the guilty plea and as to the safeguards for its acceptance.” *The Prosecutor v. Drazen Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, Case No IT-96-22-A, 7 October 1997, para. 6 in fine

¹²³⁵ *The prosecutor v. Drazen Erdemovic*, Separate and Dissenting Opinion of Judge Stephen, Case No It96-22-A, 7 October 1997, para. 5

¹²³⁶ *Ibiden*, para. 5 in fine

¹²³⁷ *The Prosecutor v. Drazen Erdemovic*, Judgment, Case No IT-96-22-A, 7 October 1997, para. 13

¹²³⁸ *The prosecutor versus Jean Kambanda*, Judgment, ICTR – 97 – 23 – A, 19 October 2000, para. 61

some reduction of sentence.¹²³⁹ This means that the plea must not be the result of an improper solicitation. The concept of improper solicitation or undue influence must be understood in a wider sense than “free and voluntary” seems to suggest. In *R v. Zwane*, Judge De Beer put it that “the fact that a statement is free and voluntary does not necessarily exclude the possibility that influence may have been applied to its maker. Where the voluntariness of a confession is impaired by undue influence it may obviously be impugned on both grounds.”¹²⁴⁰

As set out in the separate opinion of Judge McDonald and Judge Vohrah in *Erdemovic*, the accused must be able to understand the immediate consequences which befall him. He must be aware that he is forfeiting his “entitlement to be tried, to be considered innocent until proven guilty, to test the prosecution case by cross-examination of the prosecution witnesses and to present his own case.”¹²⁴¹

The time the accused has spent in detention and his familiarity with the crimes underlying his charges should be considered as well. An objective test, among many others factors, may for instance be to ask the accused whether he actually initiated the process of plea bargaining. For example, an accused who voluntarily surrenders, and who subsequently pleads guilty, is commendable. As was held in the *Ruggiu* case, a plea should reflect the accused’s “genuine awareness of his guilt”¹²⁴² which can only be arrived at after the accused had undergone deep personal reflection.¹²⁴³ Moreover, the accused must reveal “a desire to assume responsibility for his acts”¹²⁴⁴ and be “fully aware of the real and direct threat to his personal safety that a guilty plea would cause.”¹²⁴⁵ This is quite contrary to a marathon prosecution calculation aimed at striking a deal with an accused in order to secure a conviction.

¹²³⁹ *Ibidem*, para 61; see also *The Prosecutor v. Drazen Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, para. 8

¹²⁴⁰ *R v Zwane* 1950(3) SA 717(O), cited in Zeffertt DT, Paizes AP and Skeen A St Q, *The South African Law of Evidence*, LexisNexis Butterworths, Durban, 2003, p. 478

¹²⁴¹ *The Prosecutor v. Drazen Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, para. 8

¹²⁴² *The Prosecutor v. Georges Ruggiu*, Judgment and Sentence, Case No ICTR-97-32-I, 1 June 2000, para. 54

¹²⁴³ *Ibidem*, para. 54

¹²⁴⁴ *Idem*, para. 54

¹²⁴⁵ *Idem*, para. 54

The practice before the *ad hoc* tribunals has proved that prosecutors, in most cases, initiate the process. The accused is only offered the opportunity to accept or decline the offer, in which case the prosecutor adopts a vindictive attitude. Enabling judges to ask preliminary questions, though commendable, is not enough for anyone privy to the practice of tribunals where formalism overrides substance. In the *Erdemovic* case, for instance, apart from this formalism, no legal details were provided for a plea made freely and voluntarily. In fact by pleading guilty, *Erdemovic* offered a defence of “moral duress” that led him to commit illegal acts. He indeed presented a defence instead of pleading guilty entirely.

6.2.4.2. A plea must be informed

An informed plea comprises two distinct things. First it is whether the accused understands the nature and consequences of pleading guilty. Second, it is whether the accused understands the nature of the charges in the indictment, though not in their legal detailed technicalities. In *Erdemovic*, the first Trial Chamber did not make such a distinction to enable the accused to understand both legs. The defendant was found guilty of a crime against humanity while he could have pleaded for a war crime which is lighter than a crime against humanity. The Appeals Chamber found that, at Trial, the exchange between the presiding judge with *Erdemovic* and his counsel was no more than establishing that the:

Appellant was advised by his counsel regarding the Indictment before he entered a plea, that the indictment was available to the Appellant in a language he understood, and that the Appellant understood that the Indictment charged him with two offenses. There is no indication that the Appellant understood the nature of the charges. Indeed, there is every indication that the Appellant had no idea what a war crime or a crime against humanity was in terms of the legal requirements of either of these two offenses.¹²⁴⁶

Even the defence counsel did not understand such a distinction. The Appeals judges concluded that, in their view:

the Appellant did not understand the nature of the charges he was facing nor the charges to which he pleaded guilty. Although the Appellant did repeat his plea of guilty on several occasions, he remained on each of these occasions, and probably even to this day, ignorant of the true nature of each of the two charges against him, as it was never adequately explained to him either by the Trial Chamber or by defence counsel.¹²⁴⁷

It was incumbent upon the Trial chamber to explain the charges to the accused until he understood.

¹²⁴⁶ *The Prosecutor v. Drazan Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, para. 18

¹²⁴⁷ *Ibidem*, para. 18 in fine

On appeal, judges underscored that “the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty.”¹²⁴⁸ Having looked at the formal explanation of the presiding judge during the initial appearance, the Appeals’ judges opined that they felt “unable to hold with any confidence that the Appellant was adequately informed of the consequences of pleading guilty.”¹²⁴⁹ They further emphasised that “the defence counsel consistently advanced arguments contradicting the admission of guilt and criminal responsibility implicit in guilty plea.”¹²⁵⁰ According to Judge McDonald and Judge Vohrah, “if the defence had truly understood the nature of guilty plea, it would not have persisted in its arguments which were obviously at odds with such a plea.”¹²⁵¹

Despite this quite clear position of the appeals’ judges, one judge of the second Trial Chamber registered a separate opinion.¹²⁵² Judge Shahabuddeen posed a question as follows: “To ensure that the accused understands the nature of the charges, must this Trial Chamber, before which the matter has now come, explain them element by element? Or, is it sufficient if, without doing that, the Trial Chamber satisfies itself by reasonable inquiries that the accused understands the nature of the charges?”¹²⁵³

The opinion of judge Shahabuddeen clearly reflects the formalistic approach which unfortunately misses the substance of the matter. Judge Shahabuddeen also revolted against the findings of the appeals’ judges. Nevertheless he was of the view that, after recalling the provisions of Article 20 of the Statute and Article 62(ii) of the Rules, “neither the Statute nor the Rules, however, elaborate how the statutory duty to ‘confirm that the accused understands the indictment’ is to be discharged.”¹²⁵⁴ It is arguable that this duty falls squarely in the functions of any court through an objective inquiry rather than through “reasonable inquiries.” There is nothing offensive or inappropriate when a court does so; and this does not amount to requiring a Trial Chamber “to

¹²⁴⁸ *Prosecutor v. Drazan Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, para. 8

¹²⁴⁹ *Ibidem*, para. 15

¹²⁵⁰ *Idem*, para. 16

¹²⁵¹ *Idem*, para. 16

¹²⁵² *The Prosecutor v. Drazan Erdemovic, Separate Opinion of Judge Shahabuddeen*, Case No IT-96-22-T *bis*, 5 March 1998, p. 3

¹²⁵³ *Ibidem*, p. 3

¹²⁵⁴ *Idem*, p. 4

advise the accused of the legal ingredients of the crime with which he is charged”¹²⁵⁵ as Judge Shahabuddeen suggests in his separate opinion. Judge Shahabuddeen’s opinion is strikingly self-destructive and contradictory as he also held that “naturally, the graver the charge, the more onerous is the responsibility of the trial judge.”¹²⁵⁶ This was in fact the case in *Erdemovic* where both the accused’s counsel and the Trial Chamber failed to explain the distinction between a crime against humanity and a war crime.

The standard for an informed plea must reflect that the accused understands not only the nature of the guilty plea and the consequences of pleading guilty in general, but also “the nature of the charges against him, and the distinction between any alternative charges and the consequences of pleading guilty to one rather than the other.”¹²⁵⁷ In this case, the appeals’ judges remarked that:

the difference between a crime against humanity and a war crime was not adequately explained to the Appellant by the Trial Chamber at the initial hearing nor was there any attempt to explain the difference to him at any later occasion when the Appellant reaffirmed his plea. The Presiding Judge appears to assume that the Appellant had been advised by his counsel as to the distinction between the charges and that the Prosecution ‘will make things very clear.’¹²⁵⁸

The assumption made does not reflect the reality of a situation. Judges should consider the consequences of a guilty plea, especially when a defendant pleads to a more serious offence as an alternative to a less serious one. The sentence is not the same.

6.2.4.3. An unequivocal plea

At trial, Erdemovic defended his illegal actions by orders that he allegedly received from a superior. According to him, failure to execute those orders could have resulted in his own death. Moreover, he was very worried about his young wife and child. The Appeals’ Chamber judges stated that a non-equivocal plea “must not be accompanied by words amounting to defence contradicting an admission of criminal responsibility.” Judge Shahabuddeen in a subsequent re-plea before another trial chamber also argued that the “explanation offered by the accused has

¹²⁵⁵ *Idem*, p. 4

¹²⁵⁶ *Ibidem*, p. 5

¹²⁵⁷ *The prosecutor versus Jean Kambanda*, Judgment, ICTR – 97 – 23 – A, 19 October 2000

¹²⁵⁸ *Prosecutor v. Drazen Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, para.19

the effect of contesting the allegations of the prosecution relating to one or more of [the legal] ingredient[s].”¹²⁵⁹

It was also the position of the first Trial Chamber that “the very contents of a declaration which is ambiguous or equivocal might affect the plea’s validity.”¹²⁶⁰ Erdemovic was justifying why he had committed the crimes for which he was charged. It was a way of inviting the Trial Chamber to take his explanation into consideration. In other words, Erdemovic was suggesting that though he accepted criminal responsibility, the fact that he was ordered to kill innocent civilians should diminish his guilt, either by exonerating him or mitigating his guilt. The Trial Chamber went further in holding that:

In order to explain his conduct, the accused argued both an obligation to obey the orders of his military superior and physical and moral duress stemming from his fear for his own life and that of his wife and child. In and of themselves, these factors may mitigate the penalty. Depending on the probative value and force which may be given to them, they may also be regarded as a defence for the criminal conduct which might go so far as to eliminate the *mens rea* of the offence and therefore the offence itself. In consequence, the plea would be invalidated. The Trial Chamber considers that it must examine the possible defence for the elements invoked.¹²⁶¹

Yet, the first Trial Chamber went ahead and found that the plea was unequivocal. On appeal, two judges argued that “the requirement that a plea must be unequivocal is essential to uphold the presumption of innocence and to provide protection to an accused against forfeiture of the right to a trial where the accused appears to have a defence which he may not realize.”¹²⁶² At trial, it is crystal clear that Erdemovic attempted to explain – in fact to defend himself on an aspect of the charges, his behaviour and actions. A court faced with such a situation should not proceed with accepting the plea; rather it may dismiss it or give time to the defendant until he sets his mind right and straight. The two judges explained that where the accused pleads guilty but persists with an explanation of his actions which in law amounts to a defence, the court must reject the plea and have the defence tested at trial.”¹²⁶³ The court should not rush to sentencing the accused who persists in offering explanations. It is a consistent practice “in common law jurisdictions all over the world, except in the United States.”¹²⁶⁴ The exception of the USA is a constitutional

¹²⁵⁹ *The Prosecutor v. Drazen Erdemovic*, Separate Opinion of Judge Shahabuddeen, p. 6

¹²⁶⁰ *The prosecutor v. Drazen Erdemovic*, Sentencing Judgment, para. 14

¹²⁶¹ *Ibidem*, para. 14

¹²⁶² *The Prosecutor v. Drazen Erdemovic*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 29

¹²⁶³ *Ibidem*, para. 29

¹²⁶⁴ *The Prosecutor v. Drazen Erdemovic*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 29

one, because, “it would appear that in the United States the constitutional right to plead as one chooses outweighs any requirement that a defence be tested on the merits at trial.”¹²⁶⁵ In the USA, courts only satisfy themselves with three conditions, namely that the plea was voluntary, informed and has a factual basis.¹²⁶⁶ Other common law jurisdictions reject pleas which are reserved, qualified or equivocal.¹²⁶⁷ Even if the two appeals’ judges went further and examined whether duress constituted a defence when a crime against humanity was committed; this alone does not preclude the trial chamber from rejecting the plea as equivocal.

The question is not whether the accused may succeed in leading this defence as a matter of law, but whether he intended to rely on it as a matter of procedure. The two judges erred on a question of law in concluding that they did not “consider [that] the plea of the Appellant was equivocal as duress does not afford a complete defence in international law to a charge of a crime against humanity or a war crime which involves the killing of innocent human beings.”¹²⁶⁸

6.2.4.4. The plea must be based on sufficient facts for the crime and the accused’s participation

In *Erdemovic* the trial Chamber did not inquire into the sufficiency of the facts of the matter. The Chamber relied only on facts as they transpired in the prosecutor’s indictment without having the defendant attest to their validity, reliability and accuracy. With the first plea of guilty registered by the International Tribunal, the factual basis upon which the plea was accepted did not appear clearly. It is with subsequent pleas that the matter was resolved.

¹²⁶⁵ *Ibidem*, para. 29

¹²⁶⁶ *Idem*, para. 29

¹²⁶⁷ Judge McDonald and Vohrah give the example of *PP v. Cheah Chooi Chuan* [1972] 1 M.L.J. 215

¹²⁶⁸ *The Prosecutor v. Drazan Erdemovic, Joint Separate Opinion of Judge McDonald and Judge Vohrah*, para. 89

6.2.5. The *ad hoc* tribunals plea bargain practice after Erdemovic

6.2.5.1. Overview

Before the ICTY, indicted persons “have pleaded guilty to directly committing or being responsible for specific crimes during the wars in the former Yugoslavia.”¹²⁶⁹ Those pleas, in the Henham’s view, favour “a pragmatic model of trial justice.”¹²⁷⁰

The ICTR registered less pleas made under completely different circumstances compared to ICTY.¹²⁷¹ With this in mind, Jones observes that “the use of a negotiated plea agreement was

¹²⁶⁹ See <http://www.icty.org/sid/203>, accessed on 2 July 2011. At the ICTY, the following individuals have pleaded guilty to crimes and responsibility in crimes following their names, Milan Babić, "RSK"; *The Prosecutor v. Milan Babic*, Sentencing Judgment, Case No IT-03-72-S, 29 June 2004; *The Prosecutor v. Milan Babic*, Judgment on Sentencing Appeal, Case No IT-03-72-A, 18 July 2005; Predrag Banović "Omarska and Keraterm Camps"; *The Prosecutor v. Predrag Banovic*, Sentencing Judgment, Case No IT-02-65/1-S, 28 October 2003; Miroslav Bralo "Lašva Valley"; Ranko Češić "Brčko"; *The Prosecutor v. Ranko Cesic*, Sentencing Judgment, Case No IT-95-10/1-S, 11 March 2004; Miroslav Deronjić "Glogova"; *The Prosecutor v. Miroslav Deronjic*, Sentencing Judgment, Case No IT-02-61-S, 30 March 2004; *The Prosecutor v. Miroslav Deronjic*, Judgment on Sentencing Appeal, Case No IT-02-61-A, 20 July 2005; Damir Došen "Keraterm Camp"; *The Prosecutor v. Dusko Sikirika, Damir Dosen and Dragan Kolundzija*, Sentencing Judgment, Case No IT-95-8-S, 13 November 2001; Dražen Erdemović "Pilica Farm"; *The Prosecutor v. Drazen Erdemovic*, Sentencing Judgment, Case No IT-96-22-T, 29 November 1996; *Prosecutor v. Drazen Erdemovic*, Judgment, Case No IT-96-22-A, 7 October 1997; *The Prosecutor v. Drazen Erdemovic*, Judgment, Case No IT-96-22-T bis, 5 March 1998; Miodrag Jokić "Dubrovnik"; Dragan Kolundžija "Keraterm Camp"; *The Prosecutor v. Dusko Sikirika, Damir Dosen and Dragan Kolundzija*, Sentencing Judgment, Case No IT-95-8-S, 13 November 2001; Darko Mrđa "Vlašić Mountain"; *The Prosecutor v. Darko Mrda*, Sentencing Judgment, Case No IT-02-59-S, 31 March 2004; Dragan Nikolić "Sušica Camp"; *The Prosecutor v. Dragan Nikolic*, Sentencing Judgment, Case No IT-94-2-S, 18 December 2003; Momir Nikolić "Srebrenica"; *The Prosecutor v. Momir Nikolic*, Sentencing Judgment, Case No IT-02-60/1-S, 2 December 2003; *The Prosecutor v. Momir Nikolic*, Judgment on Sentencing Appeal, Case No IT-02-60/1-A, 8 March 2006; Dragan Obrenović "Srebrenica"; *The Prosecutor v. Dragan Obrenovic*, Sentencing Judgment, Case No IT-02-60/2-S, 10 December 2003; Biljana Plavšić "Bosnia and Herzegovina"; *The Prosecutor v. Biljana Plavsic*, Sentencing Judgment, Case No IT-00-39&40/1-S, 27 February 2003; Ivica Rajić "Stupni Do"; *The Prosecutor v. Ivica Rajic a.k.a Viktor Andric*, Sentencing Judgment, Case No IT-95-12-S, 8 May 2006; Duško Sikirica "Keraterm Camp"; *The Prosecutor v. Dusko Sikirika, Damir Dosen and Dragan Kolundzija*, Sentencing Judgment, Case No IT-95-8-S, 13 November 2001; Milan Simić "Bosanski Šamac"; Stevan Todorović "Bosanski Šamac"; *The Prosecutor v. Stevan Todorovic*, Sentencing Judgment, Case No IT-95-9/1-S, 31 July 2001; Dragan Zelenović "Foča"; *The Prosecutor v. Dragan Zelenovic*, Sentencing Judgment, Case No IT-96-23/2-S, 4 April 2007; *The Prosecutor v. Dragan Zelenovic*, Judgment on Sentencing Appeal, Case No IT-96-23/2-A, 31 October 2007

¹²⁷⁰ Henham Ralph, “The ethics of plea bargaining in international criminal trials”, op. cit., p. 224

¹²⁷¹ Those who pleaded guilty include, Jean Kambanda, the Prime Minister of the Interim Government; *The Prosecutor versus Jean Kambanda*, Judgment and Sentence, Case Number ICTR – 97 – 23 – S, 4 September 1998; *The prosecutor versus Jean Kambanda*, Judgment, ICTR – 97 – 23 – A, 19 October 2000; Vincent Rutaganira, a former counselor of a cell; *The Prosecutor v. Vincent Rutaganira*, Judgment and Sentence, Case No. ICTR-95-1C-T, 14 March 2005; Joseph Nzabirinda, a former communal employee; *The Prosecutor v. Joseph Nzabirinda*, Case No. ICTR-2001-77-T, 23 February 2007; Paul Bisengimana; *The Prosecutor v. Paul Bisengimana*, Judgment and Sentence, Case No. ICTR-00-60-T, 13 April 2006; Juvénal Rugambarara, a former municipal mayor; *The Prosecutor v. Juvénal Rugambarara*, Sentencing Judgment, Case No. ICTR-00-59-T, 16 November 2007; Joseph Serugendo, a former television technician; *The Prosecutor v Joseph Serugendo*, Judgment and Sentence, Case

observed to have been the exception rather than the rule at the ICTR. The lack of plea bargaining has been cited as one of the reasons for the slow progress attributed to the work at the ICTR.”¹²⁷² The practice of the ICTR differs substantially with that of the ICTY. The ICTR plea agreements are kept confidentially and completely unknown to the general public. It is even questionable whether the guilty pleas at the ICTR comply with all the legal requirements as set out in the rules.

The ICTR uses a simplistic approach to guilty pleas. For example, in the *Rutaganira* case, a Trial Chamber held that:

Pursuant to Rule 62(B) (i) to (iii) of the Rules, the Chamber proceeded to satisfy itself of the validity of the said guilty plea. In so doing, it asked the Accused if his plea was voluntary, if he had made it freely, knowingly and without coercion, threat or promise; if the Accused had understood well the nature of the charges and the consequences of his plea; if he was aware that the guilty plea was incompatible with any ground of defence; if he had indeed signed the Agreement containing his plea. The Accused having responded in the affirmative to all these questions, the Chamber found the guilty plea of Vincent Rutaganira to have been done freely and voluntarily, to have been an informed, unequivocal and sincere plea.¹²⁷³

Conversely, in *Goran Jelusic* case, an ICTY Trial Chamber emphasised that:

A guilty plea is not in itself a sufficient basis for the conviction of an accused. Although the Trial Chamber notes that the parties managed to agree on the crime charged, it is still necessary for the judges to find something in the elements of the case upon which to base their conviction both in law and in fact that the accused is indeed guilty of the crime.¹²⁷⁴

Before the ICTY, a separate “Factual Basis”¹²⁷⁵ document is formally signed between the parties despite the existence of a “Plea Agreement.” The ICTR may have registered factual basis; yet

No. ICTR-2005-84-I, 12 June 2006; George Ruggiu, the only white man in the Rwandan saga and former journalist at the RTLM; *The Prosecutor v. Georges Ruggiu*, Judgment and Sentence, Case No ICTR-97-32-I, 1 June 2000; and Omar Serushago, a former militia local leader; *The prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, 5 February 1999.

¹²⁷² Jones A. Nicholas, *The courts of genocide: politics and the rule of law in Rwanda and Arusha*, Routedledge, Abingdon and New York, 2010, p. 172

¹²⁷³ *The Prosecutor v. Vincent Rutaganira*, Judgment and Sentence, para. 28

¹²⁷⁴ *The Prosecutor v. Goran Jelusic*, Judgment, Case No IT-95-10-T, 14 December 1999, para. 25

¹²⁷⁵ See for example Statement of Facts as set out by *Dragan Obrenovic* with (Tab A to ‘Annex A’ to the ‘Joint Motion for Consideration of Plea Agreement Between *Dragan Obrenovic* and the Office of the Prosecutor’); *The Prosecutor v. Vidoje Blagojevic, Dragan Obrenovic and Dragan Jokic*, Joint Motion for Consideration of Plea Agreement between *Dragan Obrenovic* and the Office of the Prosecutor”, Case No. IT-02-60-T, 20 May 2003; *The Prosecutor v. Ivica Rajic a.k.a Viktor Andric*, Factual Basis, Case No. IT-95-12-PT, 25 October 2005; *The Prosecutor v. Ivica Rajic a.k.a Viktor Andric*, Confidential Plea Agreement, 25 October 2005; *The prosecutor v. Dragan Zelenovic*, Joint Submission of Annex to Plea Agreement, Case No. IT-96-23/2-PT, 16 January 2007; *The Prosecutor v. Zeljko Meakic, Momcilo Gruban, Dusan Fustar, Predrag Banovic and Dusko Knezevic*, Annex 1 to Plea Agreement (Factual Basis of Plea Agreement) (Confidential and Under Seal), Case No. IT_02-65-PT, 2 June 2003.

those documents have never been disclosed for public scrutiny or research purposes.¹²⁷⁶ Rather than referring to the “Factual Basis”, the ICTR judgments frequently refer to the charges in the Indictment. Judges do not require an existing, available and separate “Factual Basis.”

For example, there is no single reference to “Factual Basis” in the whole of the *Serugendo* judgment or in any of the pleas the tribunal registered.¹²⁷⁷ The Trial chamber obviates this legal failure by a formula which states that “on the basis of lack of any material disagreement between the parties about the facts presented in support [of the charges], the Chamber found that the guilty plea was based on sufficient facts, firstly, for the crimes charged and, secondly, for the accused’s participation therein.”¹²⁷⁸ The ICTR gives more time to the legal elements of the crimes, though not consistently. The cases of Jean Kambanda and Biljana Plavsic are other examples pointing to the disparities between ICTR and ICTY practices.

6.2.5.2. Jean Kambanda case

Kambanda was appointed Prime Minister of Rwanda on 9 April 1994; three days after the massacres started in that country. At the time of his appointment, it was not yet possible to legally characterise the serious crimes that were being committed, either as genocide, war crimes or crimes against humanity. Mr. Kambanda was later arrested in Kenya on 9 July 1997.¹²⁷⁹ During his initial appearance on 1 May 1998, Kambanda pleaded guilty to six counts contained in the indictment, namely genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity (murder and extermination).¹²⁸⁰

¹²⁷⁶ In *Serugendo*, the Trial Chamber held that “It is recalled that the Chamber is bound by the assessment contained in the Plea Agreement and the factual basis underlying that agreement.” *The Prosecutor v Joseph Serugendo*, Judgment and Sentence, para. 17

¹²⁷⁷ *The Prosecutor v. Omar Serushago*, Sentence, Case No ICTR-98-39-S, 5 February 1999; *The Prosecutor v. Georges Ruggiu*, Judgment and Sentence, Case No ICTR-97-32-I, 1 June 2000; *Omar Serushago v. The Prosecutor*, Reasons for Judgment, Case No ICTR-98-39-A, 6 April 2000; *The Prosecutor v. Paul Bisengimana*, Corrigendum - Judgment and Sentence, Case No. ICTR-00-60-T, 20 April 2006; *The Prosecutor v Joseph Serugendo*, Judgment and Sentence, Case No. ICTR-2005-84-I, 12 June 2006; *The Prosecutor v. Joseph Nzabirinda*, Sentencing Judgment, Case No ICTR-2001-77-T, 23 February 2007

¹²⁷⁸ *The prosecutor v. Omar Serushago*, para. 8

¹²⁷⁹ *The Prosecutor versus Jean Kambanda*, Judgment and Sentence, para. 1

¹²⁸⁰ *The prosecutor versus Jean Kambanda*, para. 3

First of all, the crimes for which Kambanda pleaded guilty were developed in a way that no other accused before the *ad hoc* tribunals can be found guilty. The ICTR cannot and has not, at the same time convicted an accused of both genocide and complicity in genocide. Complicity in genocide and genocide can be charged alternatively¹²⁸¹, and be based on the same facts.¹²⁸² But, where complicity is charged as an alternative to genocide, if the accused is convicted of genocide the complicity charge is generally dismissed.¹²⁸³ It has also become jurisprudence of the tribunal that once a person is accused of both murder and extermination, the latter is retained while no conviction is entered for murder. This is a legal failure on the party of the Trial and Appeals Chambers. Above all, however, Kambanda was forced to plead guilty in very extreme moral conditions imposed upon him by the prosecution team and his counsel who, according to Kambanda, colluded with the prosecution. The Trial Chamber overlooked those harsh conditions likewise.

It is clear that Kambanda's plea was not informed and unequivocal contrary to the holding of the Trial Chamber. The question of whether an accused understands the nature of the charges emerged in *Erdemovic's* case. In the separate opinion of Judge Shahabuddeen¹²⁸⁴, he indicated that though he dutifully joined the majority, he also desired to preserve his individual professional position "against the risk of inference [...] of law by joining" the majority. He based his separate opinion on a question posed by Judge Stephen in the course of the appeal proceedings. Judge Stephen had asked the prosecution "whether there was an obligation when an accused is represented by counsel on the part of the court to state in detail the ingredients of the

¹²⁸¹ *The Prosecutor v Nindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Augustin Bizimungu's Preliminary Motion* (15 July 2004) at para. 44; *Prosecutor v Nzuwonemeye*, No. ICTR-2000-56-T, *Decision on Defence Preliminary Motions* (12 December 2002) at para. 31; *Prosecutor v Sagahutu*, No. ICTR-2000-56-T, *Decision on Sagahutu's Preliminary, Provisional Release, and Severance Motions* (25 September 2002) at para. 26; *Prosecutor v Kanyabashi*, No. ICTR-96-15-I, *Decision on Defence Preliminary Motion for Defects in the Form of the Indictment* (31 May 2000) at para. 5.13

¹²⁸² *The Prosecutor v Simon Bikindi*, *Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and the Prosecutor's Motion Seeking Leave to File an Amended Indictment*, Case No ICTR-2001-72-I, 22 September 2003, para. 25; *The Prosecutor v Karemera et al*, *Decision on Defects in the Form of the Indictment*, Case No ICTR-98-44-PT, 5 August 2005, para. 57; but contra: *The Prosecutor v Bikindi*, *Confirmation of the Indictment*, Case No. ICTR-2001-72-I, 5 July 2001, para. 8

¹²⁸³ *The Prosecutor v Kajelijeli*, *Judgment and Sentence*, Case No ICTR-98-44A-T, 1 December 2003, para. 847; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decisions on Joint Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment* (18 May 2006) at para 9

¹²⁸⁴ *The Prosecutor v. Drazen Erdemovic*, *Separate Opinion of Judge Shahabuddeen*, Case No IT – 96 – 22 – T bis, 5 March 1998

counts that are alleged. I am not certain of the position (if any) taken in the judgment of the Appeals Chamber on that point.”¹²⁸⁵ Two important issues must be very clear in the mind of the accused. Those relate to the facts of the case, and the legal classification of the facts.¹²⁸⁶ Judge Shahabuddeen emphasises that providing such information does not amount to a Trial Chamber giving advises on “legal ingredients of the crime with which he is charged.”¹²⁸⁷ It nevertheless requires the Trial Chamber “to explain each and every element of the charges to the accused.”¹²⁸⁸

The Trial Chamber in Kambanda did not even attempt to ask such a question. The Chamber was of the opinion that Kambanda’s guilty plea was entered voluntarily. In other words, he pleaded guilty freely and knowingly, without pressure, threats, or promises. The Chamber was of the view that Kambanda clearly understood the charges against him as well as the consequences of his guilty plea. The guilty plea was unequivocal. Put another way, Kambanda was aware that the said plea could not be refuted by any line of defence. Allegedly, the accused replied in the affirmative to all these questions.¹²⁸⁹

But, behind the satisfaction of the chamber that the plea met the legal requirements, Kambanda was more or less forced both by the prosecution manoeuvring and by his own counsel. Kambanda is not a lawyer and therefore he could not understand the applicable law and the magnitude of the facts. Kambanda was only motivated by the expectation of a lenient sentence. Had Kambanda been sufficiently informed of the nature of the charges against him, he could not have pleaded guilty. He could also have done so but waiving his right to appeal because the crimes for which he was charged were very grave and the only possible sentence was life.

The Trial Chamber failed its task of ensuring that a trial is fair [...] with full respect for the rights of the accused [...].”¹²⁹⁰ In fact a Trial Chamber must “read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and

¹²⁸⁵ *The Prosecutor v. Drazen Erdemovic*, Separate Opinion of Judge Shahabuddeen. The judge refers to the Appeals Transcript, 26 May 1997, p. 99

¹²⁸⁶ *Ibidem*, p.4

¹²⁸⁷ *Idem*, p. 4

¹²⁸⁸ *Id.*

¹²⁸⁹ *The prosecutor versus Jean Kambanda*, Judgment and Sentence, para. 6

¹²⁹⁰ ICTR Statute, Article 19 and Article 20, para 1 of the ICTY Statute as quoted by Judge Shahabuddeen in his Separate opinion, p. 3

instruct the accused to enter a plea.”¹²⁹¹ Like in *Erdemovic*, the Trial Chamber in *Kambanda* “did not understand its function in that detailed way.”¹²⁹²

By all accounts, by pleading guilty after providing the detailed information, Kambanda could not expect a lenient sentence. A lenient sentence in circumstances of Kambanda would be “misplaced and not [...] fitting.”¹²⁹³ It was “inappropriate to allow plea-bargaining and plea agreements for crimes of extreme gravity.”¹²⁹⁴ Kambanda could expect more or less “a substantial stance of imprisonment”¹²⁹⁵ taking all available accounts in addition to the Trial Chamber discretion to impose any sentence despite the agreement between the parties. Kambanda was charged with genocide, the “crime of crimes”, and related underlying offences.

Having been sentenced to life imprisonment, Kambanda appealed his sentence and recanted his guilty plea. On appeal, in addition to other grounds less poignant, Kambanda challenged the validity of his guilty plea.¹²⁹⁶ He filed a supplementary Notice of Appeal in which he, not only, sought revision of the entire sentence “but primarily asks the Appeals Chamber to quash the guilty verdict and order a new trial.”¹²⁹⁷ Moreover, the appellant sought to adduce new evidence, namely “a number of documents relating to the three most recently-added grounds of appeal, those seeking to the guilty verdict and to call seven witnesses before the Appeals Chamber.”¹²⁹⁸

The Appeals Chamber authorised Kambanda to testify “on the question of whether his guilty plea was voluntary, informed, and unequivocal and based on sufficient facts for the crimes and

¹²⁹¹ *Ibidem*, p. 4. The same wording is found in Article 19, para. 3 of the ICTY Statute and in Rule 62 (A), as follows:

Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or a Judge shall

- (i) Satisfy itself of himself that the right of the accused to counsel is respected;
- (ii) Read or have the indictment read to the Accused in a language he understands, and satisfy itself or himself if the Accused understands the indictment;
- (iii) Call upon the Accused to enter a plea of guilty or not guilty [...]

¹²⁹² *The Prosecutor v. Drazen Erdemovic*, Separate Opinion of Judge Shahabuddeen, p.6

¹²⁹³ *The prosecutor v. Biljana Plavsic*, Sentencing Judgment, Case No IT – 00 – 39&40/1 –S, 27 February 2003, para. 60

¹²⁹⁴ Henham Ralph, “The ethics of plea bargaining in international criminal trials...”, op. cit., p. 215

¹²⁹⁵ *The prosecutor v. Biljana Plavsic*, Sentencing Judgment, para. 60

¹²⁹⁶ *The prosecutor versus Jean Kambanda*, Judgment, para. 3

¹²⁹⁷ *Ibidem*, para. 3

¹²⁹⁸ *Idem*, para. 6

the accused participation in it.”¹²⁹⁹ The Appeals Chamber dismissed the motion for new evidence. One important ground of appeal raised, though later dismissed by the Appeals Chamber, was the:

acceptance of the validity of the plea agreement without a thorough investigation of whether the plea was voluntary and/or informed and/or unequivocal; and [the Trial Chamber] failure to satisfy itself that the guilty plea was based on sufficient facts for the crime and the accused’s participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case.¹³⁰⁰

Reasonably speaking, the acts of genocide, war crimes and crimes against humanity that were committed in Rwanda, at face value, were so grave in their factual complexity and numeracy as they were in their legal elements, characterisation and consequences.

Under ground one, the appellant complained about the “failure to consider the denial of the right to be defended by a counsel of one’s own choice.”¹³⁰¹ It is true that the issue of counsel was a very weak argument if one goes into the surrounding circumstances and facts put before the Appeals Chamber.

Under the second ground of appeal on the unlawful detention and when testifying in The Hague, Kambanda “introduced the argument that his place of detention contributed to an oppressive atmosphere which compelled him to sign the plea agreement.”¹³⁰² In dismissing this contention, the Appeals Chamber argued that Kambanda waived his right by not raising the issue at trial. The Appeals Chamber held that Kambanda appeared “five times before the Tribunal in total, [namely] on 14 August 1997; 16 September 1997; 1 May 1998; 3 September 1998 and 4 September 1998. He pleaded guilty at the initial appearance on 1 May 1998. At no stage did he raise any objections to his place or conditions of detention.”¹³⁰³

The Appeals Chamber advanced many other arguments, none of which, however, responded to the crucial question of whether Kambanda had actually been detained in isolation. In the affirmative the critical issue was whether or not isolation was a commendable detention practice.

¹²⁹⁹ *Idem*, para. 6

¹³⁰⁰ *Idem*, para.10(3)

¹³⁰¹ *Idem*, para. 10(1)

¹³⁰² *The prosecutor versus Jean Kambanda*, Judgment, para. 39

¹³⁰³ *Ibidem*, para. 42

It was also important to uncover whether or not the Appellant had deliberately chosen to be detained in isolation. In fact the poignant question the Appeals Chamber could have responded to at its discretion and as a matter of law and natural justice, was about the motives behind the detention in isolation in the remote town of Dodoma in central Tanzania? Normally the UNDF is located at the seat of the Tribunal in Arusha. Instead of conducting this inquiry, the Appeals Chamber argued that Kambanda presented two contradictory arguments. One possibility is that the Appellant was unaware of his rights and therefore he did not raise the alleged violation with the Trial Chamber. Kambanda could also have been aware of them but did not have the freedom to say what [he] thought because of his oppressive situation.¹³⁰⁴ The reasoning of the Appeals Chamber lacks substance and is only a mechanical reliance on procedure. The Appeals Chamber reasoned that:

The Appeals Chamber takes seriously any allegation of pressure brought to bear upon persons accused before the Tribunal. However, the Appellant has not demonstrated that he suffered any such pressure. Vague suggestions of lack of ‘freedom to say what I thought’ are inadequate to substantiate a claim that the principle of waiver should not apply. In reaching this conclusion the Appeals Chamber is mindful of the education and professional experience of the Appellant, culminating in his position as Prime Minister of his country.¹³⁰⁵

The two arguments advanced by the Appeals Chamber do not respond to the merit of the questions posed. Though one is mindful of the strictness of motions on appeal, it was not up to Kambanda to prove that he suffered from pressure. The mere fact that he was not detained at the ordinary detention facility was on its own a violation of Kambanda’s rights. The Appeals’ Chamber could have decided on *proprio moto* as a matter of natural justice using its inherent discretion. As some noted, in this way the Appeals Chamber ignored extensive scientific evidence of the mental and psychological effects of such confinement which could affect the voluntariness of a detainee’s confession.¹³⁰⁶

In its submission to the South African Truth and Reconciliation Commission (TRC), the National Association of Democratic Lawyers (NADEL) suggested that “solitary confinement on its own

¹³⁰⁴ *Idem*, para. 45

¹³⁰⁵ *Idem*, para. 47

¹³⁰⁶ *The role of lawyers and the legal system in the gross human rights violations of apartheid*, Submission by the National Association of Democratic Lawyers to the South African Truth and Reconciliation Commission, National Association of Democratic Lawyers, [referred to as NADEL Submissions], Cape Town, 1998, p. 28

could affect the voluntariness of a statement and render it inadmissible.”¹³⁰⁷ NADEL refers to a well-known holding of the U.S Chief Justice Warren in *Miranda v. Arizona*, when he notes that:

[...] coercion can be mental as well as physical...the blood of the accused is not the only hallmark of an unconstitutional inquisition...It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity...Unless protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement can truly be the product of his free choice.¹³⁰⁸

According to NADEL, “solitary confinement was in itself a form of stressful, if not cruel treatment.”¹³⁰⁹ For unrelated reasons to the ground of appeal registered by Kambanda, the Appeals Chamber considered that “this is the Chamber of last resort for the Appellant facing life imprisonment on the basis of his guilty plea, and as the issues raised in this case are of general importance to the work of the Tribunal, the Appeals Chamber deems it important to consider the question of the validity of the guilty plea.”¹³¹⁰

This position does not adequately respond to the concerns of the Appellant. It may also suggest that the Appeals Chamber itself deemed that the plea was not valid. The Appeals Chamber went on and held that:

Although the Appellant claims that the Trial Chamber should have made it ‘clear to the accused that by pleading guilty the only possible sentence would be life imprisonment and that a plea agreement would never mitigate the penalty seeing the gravity of the offence’, the Appeals Chamber cannot accept this argument. The duty of a Trial Chamber to inform an accused person of the possible sentence is not to be mechanically discharged. The proceedings have to be read as a whole, inclusive of the submissions of the parties. The transcripts show that both parties accepted that the imposition of a sentence of life imprisonment was a possibility.¹³¹¹

This argument contradicts the position of Judge McDonald and Vohrah in *Erdemovic*. Moreover, this opinion is very deceptive because the Chamber could not ignore the practice at the ICTY where the accused is clearly informed at the outset that the imposition of a life sentence is more or less the available sentence for crimes of grave severity like genocide and related crimes.

What is also striking is the interference of the Appeals Chamber in the relationship between Kambanda and his counsel. The Chamber held that “the Appellant has failed to identify any

¹³⁰⁷ NADEL Submission, p. 28

¹³⁰⁸ 384 US 436 at 457-8, cited in NADEL Submission, pp. 28 - 29

¹³⁰⁹ NADEL Submission, p. 29

¹³¹⁰ *The prosecutor versus Jean Kambanda*, Judgment, para. 55

¹³¹¹ *Ibidem*, para. 76

specific instances that would support a claim that the Appellant’s counsel was uninformed about the nature of the charges and the consequences of pleading guilty, and that counsel had failed to inform properly the Appellant.”¹³¹² The Appellant had contended that he had ineffective assistance of counsel. Kambanda maintained that the counsel assigned to him did not take affirmative action on his behalf. In the space of two years the counsel and the accused had only one hour’s consultation. Lastly the counsel could not study the case completely nor did the investigations in order to evaluate the file and to inform Kambanda properly. Kambanda argued that he did not plead guilty in an informed manner.¹³¹³

It is quite unreasonable for an Appeals Chamber to consider that an accused of Kambanda’s calibre, charged with the most serious crimes, consulted enough with his counsel whom he met with for only one hour in the space of two years. As it did in the *Erdemovic* case, the Appeals Chamber could have directed “that the accused be allowed to re-plead with full knowledge of both the nature of the charges against him and the consequences of his plea before another Trial Chamber”¹³¹⁴ and be allowed to consult enough with a counsel. There is no difference between a Prime Minister and a foot soldier when both are to face a judicial institution to plead to a complexity of a matter involving the death of millions of people. The complexity of the matter required the careful attention of the Chambers. The developed practices at the ICTY provide that “the major developments over time have been in the interest of ensuring that the rights of the accused are sufficiently protected. Tribunals must be especially careful when accepting guilty pleas since an accused is making a judicial admission of guilt, and is waiving or obviating the need for a trial to establish guilt.”¹³¹⁵

The overriding criteria, one may argue; is that in Kambanda, “little effort was made to capitalize on the accused’s confessions and admissions of guilt in an attempt to advance the process of

¹³¹² *The prosecutor versus Jean Kambanda*, Judgment, para. 77

¹³¹³ *Ibidem*, para. 67

¹³¹⁴ *The Prosecutor v. Drazan Erdemovic*, Sentencing Judgment, para. 7

¹³¹⁵ *ICTY Manual on Developed Practices*, prepared in conjunction with UNICRI, as part of a project to preserve the legacy of the ICTY, ICTY – UNICRI 2009, UNICRI Publisher, Italy, 2009, p. 69

reconciliation at the local level.”¹³¹⁶ The practice is slightly different before the ICTY as it transpires from the *Biljana* case.

6.2.5.3. *Biljana Plavsic* case

Biljana case involved another controversial guilty plea. The case is a telling illustration of the lack of genuineness on the side of the accused; and a calculated policy of the prosecution to secure rapid conviction and assistance to prosecute complex cases.

Plavsic was born in Bosnia and Herzegovina in 1930. She enjoyed an outstanding academic career with a distinguished professorship of Natural Sciences and as the Dean of Faculty in the University of *Sarajevo*.¹³¹⁷ She later embraced politics rising to a leadership position with the Serb Republic of Bosnia and Herzegovina. At one time, “she was elected as a Serbian Representative to the Presidency of the Socialist Republic of Bosnia and Herzegovina.”¹³¹⁸ She occupied many other positions of that level including membership “of the collective and expanded Presidency of Republika Srpska.”¹³¹⁹

According to Chief Prosecutor Del Ponte, “the tribunal had indicted Plavsic for genocide, crimes against humanity, and war crimes.”¹³²⁰ On 10 January 2001, Plavsic surrendered voluntarily to the ICTY pursuant to a sealed indictment against her.¹³²¹ At her initial appearance she pleaded not guilty to the counts of genocide, complicity in genocide, persecutions, extermination and killings, deportation and inhumane acts as crimes against humanity.¹³²² On 30 September 2002, the accused concluded a Plea Agreement with the Prosecutor.¹³²³ The plea concerned the count of persecution; the remaining counts being dismissed by a decision of the Trial Chamber on 20 December 2002.¹³²⁴

¹³¹⁶ Henham Ralph, “The ethics of plea bargaining...”, p. 223

¹³¹⁷ *Prosecutor v. Biljana Plavsic*, Sentencing Judgment, para. 10

¹³¹⁸ *Ibidem*, para. 10

¹³¹⁹ *Idem*, para. 10

¹³²⁰ Del Ponte Carla with Sudetic Chuck, *Madame Prosecutor ...*, p. 160

¹³²¹ *Prosecutor v. Biljana Plavsic*, Sentencing Judgment, para. 1

¹³²² *Ibidem*, paras. 2 - 3

¹³²³ *Idem*, para. 5

¹³²⁴ *Idem*, para. 5

The case also comprised a written and detailed factual basis “for the crime described [...] and for the participation of Plavsic therein.”¹³²⁵ At the hearing of 2 October 2002 she pleaded guilty to persecutions, as a crime against humanity. On 9 January 2003, the Trial Chamber issued an order that Plavsic should testify in the case of Stakic.¹³²⁶ In addition to the detailed factual basis and a statement by Ms Plavsic at the hearing¹³²⁷, the court heard evidence “in relation to the gravity of the offence.”¹³²⁸ After a lengthy sentencing hearing, the Trial Chamber sentenced Mrs Biljana Plavsic to eleven years’ imprisonment with a “credit of 245 days.”¹³²⁹ Plavsic did not appeal. Commenting the judgment, Scharf writes that:

Though Mrs Plavsic admitted responsibility for the killing of tens of thousands of civilians and steadfastly refused to cooperate in any other way with the tribunal (including turning down a request to testify [against] former Yugoslav President, Slobodan Milosevic), the Trial Chamber sentenced her to all of the 11 years’ imprisonment – with full credit for time already served and the possibility of early release for good behaviour. Plavsic was sent to serve her term in a posh Swedish prison that reportedly provides prisoners with the use of a sauna, solarium, massage room and horse-riding paddock, among other amenities.¹³³⁰

Whereas Scharf’s observation is full of personal emotion, the gist of his argument shows a clear deceptive outcome of guilty pleas. One may believe that, because Plavsic voluntarily surrendered, she expressed a profound remorse of the crimes committed. She did not. The prosecution was also misdirected in not maintaining the most serious charges against Plavsic and requiring a heavy sentence against her. The Prosecutor has calculated that Plavsic would become a “key witness against Milosevic, Karadzic, and other accused Serbian and Bosnian Serb leaders.”¹³³¹ Despite this misguided calculation, the prosecution “wanted to seek life imprisonment against her.”¹³³²

Del Ponte also regrets that the prosecution dropped the charges of genocide. She was quoted saying “My fundamental error was not obliging her to agree on paper to testify against the other accused. I accepted verbal assurances and was deceived.”¹³³³ In fact Plavsic refused to testify

¹³²⁵ *Idem*, para. 9

¹³²⁶ *Idem*, para. 7

¹³²⁷ *Idem*, para. 19

¹³²⁸ *Idem*, para. 30

¹³²⁹ *Idem*, para. 134

¹³³⁰ Scharf P. Michael, *Trading Justice for Efficiency...*, op. cit., p. 1071

¹³³¹ Del Ponte Carla with Sudetic Chuck, *Madame Prosecutor...*, p. 161

¹³³² *Ibidem*, p. 161

¹³³³ *Idem*, p. 161

against Momcilo Krajisnik¹³³⁴ when called to. The prosecution attempted to re-open the case by leading a normal trial. The Trial Chamber seized of the request declared itself lacking jurisdiction to decide the question. Del Ponte appeared but to no avail.¹³³⁵

6.2.6. Observations on guilty pleas registered by the *ad hoc* tribunals

A comparative review of the plea bargaining practice at the ICTY and the ICTR has demonstrated a huge disparity on the facts and the applicable law. It may be argued further that plea bargaining at the *ad hoc* tribunals are far from being consistent in terms of their factual basis, and jurisprudential outcomes. The ICTY has registered 19 guilty pleas¹³³⁶, while the ICTR registered only 8.¹³³⁷ Apart from legal technicalities, *Kambanda* case demonstrated that the plea was not voluntary. It was also not informed and its factual basis was unclear. Later on, Kambanda rightly contested his plea and claimed his innocence, accepting only political responsibility.

The ICTY registered the guilty plea of Biljana Plavsic pursuant to her surrender to the tribunal's authorities. Though she initially believed in her plea, and the prosecution intended to use her as a key witness in other high profiles cases, this calculation did not work. She declined cooperation with the prosecutor and claimed her innocence as did Kambanda. The prosecutor attempted to put her on a new trial without success. This also shows how plea bargaining lacks the genuineness of both the prosecutor and the accused. Commenting on the *Obrenovic*¹³³⁸ and *Momir Nikolic*¹³³⁹, Henham notes that “the rationalizations offered for the explicit institutionalization of plea agreements in the ICTY remain unconvincing, and indeed illustrate the paradoxical nature of the ideological justification for international penalty.”¹³⁴⁰

Despite the factual and legal flaws highlighted, Kambanda received the heaviest sentence after pleading guilty. In fact, he did not benefit from his plea. He was sentenced to life imprisonment.

¹³³⁴ *Idem*, p. 161

¹³³⁵ *Idem*, p. 162

¹³³⁶ See supra note 1266

¹³³⁷ See supra note 1268

¹³³⁸ *The Prosecutor v. Obrenovic*, Case No. IT-02-60/2-S, Sentencing Judgment, 10 December 2003

¹³³⁹ *The Prosecutor v. Momir Nikolic*, Case No. IT-02-60/1-S, Sentencing Judgment, 02 December 2003

¹³⁴⁰ Henham Ralph, “The ethics of plea bargaining ...”, *op. cit.*, p. 216

The ICTR has not developed a comprehensive approach to evaluating the facts underpinning plea bargaining. The ICTR relies only on facts of the indictment and formal understandings between the parties without further inquiry. The tribunal has further surrounded those understandings with top secrecy. Persons accused and convicted by the ICTR after plea bargaining have received penalties ranging from six to fifteen years¹³⁴¹, except Kambanda who was sentenced to life. Whether this is due to the fact that he was the first most senior accused before the tribunal when it was still establishing itself, is only one explanation among many others. At the ICTY, the heaviest penalty was 40 years against Goran Jelusic. Other sentences range from five to 20 years.¹³⁴²

Another surprising feature is that at the ICTR, only Kambanda and Serushago lodged appeals; Serushago's appeal was based on the sentence he received. At the ICTY, appeals were lodged mainly on matters of facts and within a legal framework. Appeals permitted the development of international law in this area. Plea bargaining still poses problems in the adjudication of grave crimes. It should be resorted to only when the defendant expressly confesses, and is not induced to do so. Judicial notice is another technique highly used; yet with flawed outcomes.

6.3. Judicial notice

As a general rule in criminal cases, all facts relevant to the issue must be proven by evidence at trial. Keefe and others realise, however, that “not every fact is proved during the course of a law suit – *manifesta probatione non indigent* (what is known need not be proved).”¹³⁴³ In fact, according to McNaughton:

proof by formal evidence is dispensed within two situations. First, where the parties in some manner agree to the truth of the proposition, thus removing it entirely from controversy, and, second, where the court is

¹³⁴¹ Omar Serushago (12 years); Georges Ruggiu (12 years); Vincent Rutaganira (6 years); Paul Bisengimana (15 years); Juvénal Rugambarara (11 years); Joseph Nzabirinda (6 years); Joseph Serugendo (6 years)

¹³⁴² Ranko Cesic (18 years), Goran Jelusic (40 years), Darko Mrda (17 years), Dragan Nikolic (20 years), Momir Nikolic (20 years), Dragan Obrenovic (17 years), Ivica Rajic (12 years), Dusko Sikirica (15 years), Dragan Zelenovic (15 years), Predrag Banovic (8 years), Damir Dosen (5 years), Drazen Erdemovic (5 years), Miodrag Jokic (7 years), Dragan Kolundzija (3 years), Stevan Todorovic (10 years), Milan Babic (13 years), Miroslav Deronjic (10 years), Biljana Plavsic (11 years)

¹³⁴³ Keefe Arthur John, Landis B. William and Shaad B. Robert, “Sense and Nonsense about judicial notice”, *Stanford Law Review*, Vol. 2, Iss.4, 1950, pp. 664 – 690, p. 664

justified by general considerations in ascertaining the truth of propositions by methods other than through the formal reception of evidence.¹³⁴⁴

Parties may therefore agree to facts or propositions, and submit their agreement to the approval of the court. Likewise, courts may, on their own, take judicial notice. These two scenarios do not say why such a path should be taken or whether it is the appropriate one in adjudicating international crimes. McNaughton's point does not either clearly indicate what is to be judicially noticed. Light is then to be found elsewhere.

According to Watt, "judicial notice is a principle or rule of evidence that dispenses with proof of matters of fact or law in criminal proceedings. The trial judge accepts the existence of a proposition of fact or law, notwithstanding that no party to the proceedings has proven it by admissible evidence before the trier of fact."¹³⁴⁵ A combination of Watt's definition and the words of Keeffe and others shows that "the doctrine divides itself logically into two phases, judicial notice of fact and of law."¹³⁴⁶ Nevertheless, Mcnaughton observes that the expression remains of "obscure origin."¹³⁴⁷ There is however, no need to discuss the origin of this concept. What matters is instead to understand how it works.

So, "when judicial notice involves a matter of fact, it constitutes an exception to the general rule that matters of fact are established by the introduction of evidence or by admission."¹³⁴⁸ This means that when judicial notice has been taken, no evidence of facts or law is needed anymore. According to McConville, "judicial notice is the acceptance by the court of the truth of a matter without formal evidentiary proof."¹³⁴⁹ This statement is relevant in domestic affairs as it is in international criminal law.

¹³⁴⁴ McNaughton T. John, "Judicial Notice – Excerpts relating to the Morgan – Wigmore controversy", *Vanderbilt Law Review*, Vol. 14, Iss.3, 1961, pp. 779 – 806, pp. 780 - 781

¹³⁴⁵ Watt David, *Watt's Manual of Criminal Evidence*, op. cit., pp. 105 - 106

¹³⁴⁶ Keeffe Arthur John, Landis B. William and Shaad B. Robert, "Sense and Nonsense ...", op. cit., p. 666

¹³⁴⁷ McNaughton T. John, *Judicial Notice ...*, op. cit., p. 779 and 782

¹³⁴⁸ Watts David, *Watts's Manual of Criminal Evidence*, op. cit., p. 106

¹³⁴⁹ McConville Michael, "The doctrine of judicial notice and its relationship to evidence", *The Liverpool Law Review*, Vol. 1, Iss.1, 1979, pp. 62 – 84, p. 62

The agreement in both situations, it may be so suggested, is that this tool is a procedural one¹³⁵⁰, having however a bearing on the substance of a matter. As such, it needs to be explored a bit further to find out which kind of truth is being discussed here. Moreover, it is important to understand the relevance of this doctrine in international crimes adjudication. In the opinion of Garner, judicial notice is “a court’s acceptance, for purposes of convenience and without requiring a party’s proof, of a well-known and indisputable fact.”¹³⁵¹ Something done for convenience sake is always questionable, so should be judicial notice.

It is critical to understand the effectiveness of the doctrine as far as the objectives, aims and goals of *ad hoc* tribunals are concerned. Only then can a position be taken as to whether it is a commendable, appropriate and useful tool or an unnecessary impediment, unworthy of being maintained.

6.3.1. The concept of taking judicial notice

The first question to ask is about the *raison d’être* of the concept. So, why resort to judicial notice? Why not prove a fact by leading evidence at trial? Why take the short-cut? Is it a possibility that judicial notice masks the inability of proving all facts pertaining to a violation of international criminal law? If it is appropriate in domestic jurisdictions, does that mean that it must also have a place in international crimes adjudication? The reason for posing all these questions is that crimes that are the subject matter of international concern are so serious and so atrocious. To ensure that they are eradicated, they need to be dealt with firmly with rules and principles that are proper to their regime. We must get to the bottom of the matter.

The proponents of judicial notice, like Keeffe and others¹³⁵² advance the *raison d’être* of judicial notice by considering the overcrowding of the court and the time that can be saved if courts and

¹³⁵⁰ According to Watts “judicial notice is a principle or rule of evidence that dispenses with proof of matters of fact or law in criminal proceedings.” Watts David, *Watts’s Manual of Criminal Evidence*, op. cit., p. 105

¹³⁵¹ Garner A. Bryan (editor in chief), *Black’s Law Dictionary*, Seventh Edition, West Group, Saint-Paul, MINN., 1999, p. 851

¹³⁵² Keeffe Arthur John, Landis B. William and Shaad B. Robert, *Sense and Nonsense ...*, op. cit., p. 664

parties find an alternative. Here, the alternative is judicial notice. By avoiding unnecessary proof, it helps ease the overcrowding of courts and save time.¹³⁵³

Judicial notice is, according to this opinion, a remedy to the avalanche of cases. Whether securing time is a material consideration to attain justice is another inquiry. Keeffe and others maintain nevertheless that “judicial notice is a tool – an aid in shortening and improving trial procedure. Failure to use it tends daily to smother trials with technicalities and monstrously lengthen them out, and in some cases [...] actually denies due process, thus breeding contempt for our judicial system.”¹³⁵⁴ MacConville concurs with Keeffe and others. According to him, taking judicial notice “rests heavily upon the idea that the purpose of judicial notice is to expedite the trial of cases, enabling the judge to dispense with time-consuming formal evidence when the matter in question is likely to be true.”¹³⁵⁵

The concern may however be that justice is sacrificed by securing time or anything of that nature. This is one reason why Richardson cautions the courts to be extremely attentive in treating a factual conclusion as obvious, even though the man in the street would unhesitatingly hold it to be so.¹³⁵⁶ By securing time for example, it is obvious that resources are likewise secured. At which cost should that be? Knowlton suggests that judicial notice may be taken, and therefore formal proof dispensed, “under circumstances wherein such proof would add little or nothing to the accuracy of the finding [...]. Also, judicial notice is utilized to avoid decisions plainly unwarranted in the light of present knowledge.”¹³⁵⁷

This passage answers the question regarding why judicial notice should be taken. Simply stated, it is to save court time and resources and to ensure consistent court decisions. The next step is to know the kind of facts that must be judicially noticed and when judicial notice is appropriately taken.

¹³⁵³ *Ibidem*, p. 664

¹³⁵⁴ Keeffe Arthur John, Landis B. William and Shaad B. Robert, *Sense and Nonsense ...*, *op. cit.*, p.665

¹³⁵⁵ McConville, *op. cit.*, p. 70

¹³⁵⁶ Richardson, (ed.), *Archibold: Criminal Pleading, Evidence and Practice*, Sweet & Maxwell, Thomson Reuters, 2010, 10-71, p. 1429 [further references omitted]

¹³⁵⁷ Knowlton E. Robert, “Judicial Notice”, *Rutgers Law Review*, Vol. 10, Iss.3, 1956, pp. 501 – 511, p. 501

6.3.2. Judicial notice of fact

According to Zeffert et al. “a court takes judicial notice of a fact when it accepts it as established, although there is no evidence on the point.”¹³⁵⁸ A fact to be judicially noticed must qualify as “either so notorious as not to be the subject of reasonable dispute, or which are capable of immediate and accurate demonstration by resort to sources of indisputable accuracy.”¹³⁵⁹

In the opinion of Richardson:

courts may take judicial notice of matters which are so notorious, or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary; and local courts are not merely permitted to use their local knowledge, but to be regarded as fulfilling a constitutional function if they do so.¹³⁶⁰

What is striking is the nuance that surrounds the meaning of the word ‘notorious’. A fact is so notorious if it is “generally known and accepted that [it] cannot reasonably be questioned.”¹³⁶¹ In a jurisdiction, notorious facts may be divided into two categories: “first, there are matters of general knowledge, and second, there are specific facts which are notorious within the locality of the court.”¹³⁶² Common terminologies, international holidays and matters of nature are notorious facts.¹³⁶³ The date of Easter in a particular year is an example of the second category.¹³⁶⁴

The notoriety of the fact does not necessarily mean that everyone is aware of it. According to Currie, “the test is not whether everybody knows it, but whether it is knowledge which every intelligent or well informed person has.”¹³⁶⁵ Even for the judicial officer, “it is not sufficient [...] to be satisfied in his or her own mind that the fact is correct. It must be so notorious, either generally or within his or her particular area, as to be incapable of dispute among reasonably informed and educated people.”¹³⁶⁶ When a fact passes this test it therefore becomes “a matter of

¹³⁵⁸ Zeffert DT, Paizes AP and Skeen A St Q, *The South African Law of Evidence*, op. cit., p. 715

¹³⁵⁹ *Ibidem*, p. 715

¹³⁶⁰ Richardson, (ed.), *Archibold...*, op. cit., p. 1429 citing *Mullen v. Hackney L.B.C.* [1997] 1 W.L.R. 1103, CA (Civ. Div.)

¹³⁶¹ Watts David, *Watts's Manual of Criminal Evidence*, op. cit., p. 108

¹³⁶² Zeffert DT, Paizes AP and Skeen A St Q, op. cit., p. 717

¹³⁶³ Watts gives examples of O.D to mean overdose in relation to drugs, for example, Watts David, op. cit., p. 111

¹³⁶⁴ *Ibidem*, p. 715

¹³⁶⁵ Currie R. George, “Appellate Courts Use of Facts outside of the Record by Resort to Judicial Notice and Independent Investigation”, *Wisconsin Law Review*, Vol. 1960, Iss.1, 1960, pp. 39 – 53, p.39

¹³⁶⁶ Zeffert DT, Paizes AP and Skeen A St Q, *The South African Law of Evidence*, op. cit., p. 715

common or general knowledge.”¹³⁶⁷ The extent of this knowledge is not defined. How wide should this knowledge be? The point of disagreement subsists therefore. MacConville underscores this by writing that:

a court will more easily take judicial notice of general than of specific facts. If by this is meant that notice normally involves matters of a general nature as opposed to matters specifically related to a particular party, then, as a matter of practice, this is probably true. Once again, however, it is difficult to see any grounding in theory for restricting the doctrine to general matters.¹³⁶⁸

An ignorant, uneducated or illiterate man may not be aware that Mount Everest is found in China. Yet this lack of knowledge on the side of the man and others in the same situation will not prevent Mount Everest to be a location of common knowledge to those who know about it. The same logic prevails for historic facts. If you do not know of their existence, you cannot blame anyone but yourself.

Unfortunately, judicial notice does not stop here because “the tendency is to extend judicial notice beyond the field of facts of common knowledge to the sphere of those facts capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.”¹³⁶⁹ Zeffertt et al. call those facts “readily ascertainable.”¹³⁷⁰ These are facts “which one would hardly expect everyone to have at his or her fingertips but which can easily be ascertained from sources of indisputable authority.”¹³⁷¹ People of intellect may however legitimately disagree on this category of fact, not because they do not know by ignorance; but because the sources are not the same, or that they are questionable, or that their methodologies differ. Yet this, according to Morgan, “is the rock of reason and policy upon which judicial notice of facts is built.”¹³⁷² In both situations however, Knowlton suggests that:

the propriety of such notice [of fact] does not depend upon the judge’s private knowledge but rather upon whether the fact exists or a proposition is true according to common knowledge. Also, it is conceded that the existence of the fact or the validity of the proposition must be established as certain in common knowledge. Similarly, there is no doubt that there is a second test, which allows judicial notice of facts or propositions which, although not common knowledge, are readily ascertainable from accessible sources of undisputed accuracy.¹³⁷³

¹³⁶⁷ Currie R. George, *op. cit.*

¹³⁶⁸ McConville, Michel, *The Doctrine of judicial notice...*, *op. cit.*, p.78

¹³⁶⁹ Currie R. George, *Appellate Courts Use of Facts...*, *op. cit.*, p. 40

¹³⁷⁰ Zeffertt DT, Paizes AP and Skeen A St Q, *op. cit.*, p. 723

¹³⁷¹ *Ibidem*, p. 723

¹³⁷² Morgan, *Judicial Notice*, 57 *Harv. L. Rev.* 269, 273 (1944), cited in Knowlton E. Robert, *Judicial Notice*, *op. cit.*, p. 501, footnote 4

¹³⁷³ Knowlton E. Robert, *Judicial Notice*, *op. cit.*, p. 507

To find common grounds upon which judicial notice of facts may be taken, courts will, firstly, “take judicial notice of ‘scientific facts which have been well established by authoritative scientists and are generally accepted as irrefutable by living scientists.’” For example, “that a birth which occurs 270 days after the accidental death of the father falls within the normal gestation period”¹³⁷⁴ is an uncontested scientific research finding. And of “historical facts [...] a document ‘worthy of confidence’ may be used by the courts to ascertain historical facts of which to take judicial notice.”¹³⁷⁵ Secondly, if a party contests the veracity or truth of a fact or proposition, he must be entitled to a hearing. Knowlton suggests that “the requirement of a hearing is to allow the noticing of a fact or proposition and then to allow rebuttal evidence at the trial as to the existence of the fact or the truth of the proposition.”¹³⁷⁶

Such an objection is not an easy one, rather it is substantial. This is so because “the proponent can utilize all sources of information to achieve notice, while his opponent is limited to formal proof subject to all of the applicable exclusionary principles.”¹³⁷⁷ After the hearing of all parties then the fact or proposition is noticed and will not be subsequently disputed among those parties. This means that third parties may dispute the fact or proposition so noticed. McConville expresses this view quite well by saying that “if the range of matter noticed is kept within the boundaries so fixed, there is no need to avoid utilizing the concept of judicial notice.”¹³⁷⁸ This is where the trick of the matter lies. Courts may also take judicial notice of law.

6.3.3. Judicial notice of law

Keeffe et al. suggest a general rule justifying the taking of judicial notice of law. Their view is that “the very purpose of a judicial system requires that the courts take notice of the law prevailing in the forum whether the law is written or unwritten.”¹³⁷⁹ Knowlton proposes specific laws and courts which are entitled to take judicial notice. According to him, “the common law

¹³⁷⁴ Currie R. George, *Appellate Courts Use of Facts...*, op. cit., p. 41 (for both quotations)

¹³⁷⁵ Currie R. George, *Appellate Courts Use of Facts...*, op. cit., p. 41

¹³⁷⁶ Knowlton E. Robert, *Judicial Notice*, op. cit., p. 507

¹³⁷⁷ *Ibidem*, p. 507

¹³⁷⁸ McConville, op. cit., p. 84

¹³⁷⁹ Keeffe Arthur John, Landis B. William and Shaad B. Robert, “Sense and Nonsense...” op. cit. p. 672

established an elaborate classification system concerning the law of the jurisdiction of the forum. This system distinguished cases on the basis of the type of court making the decision, the source or the rule to be applied, and the nature of the law itself.”¹³⁸⁰

In domestic jurisdictions, courts have taken notice of pieces of legislation at states and federal levels. In Canada, for example, a court held that “judicial notice must be taken of statutory instruments, including regulations, published in the *Canada Gazette*. It is not a pre-condition that the *Gazette* or a consolidation published by the *Queen’s Printer* be produced prior to notice being taken. The fact of publication needs no proof.”¹³⁸¹

In South Africa, for example, “judicial notice is taken of public Acts of the South African Parliament and the proclamation by which they are promulgated or brought into force.”¹³⁸² However, Zeffertt et al. note that “at common law the courts do not take judicial notice of delegated legislation such as proclamations made under statutory authority, government notices or regulations, or municipal or railway by-laws. They must be specifically pleaded and proven by the party who seeks to rely upon them.”¹³⁸³

Customs and foreign law must, as a general rule, be proven. Zeffertt et al. are of the view that “customs which have already been recognized by the courts, [...] be judicially noticed.”¹³⁸⁴ They even go as far as to suggest that “judicial notice may be taken of general customs which have never been proved by evidence.”¹³⁸⁵

Regarding foreign law, Stern raises a series of questions to answer before a determination can be made as to whether or not a law may be judicially noticed. In his view:

when rules of conflict of laws point to the applicability of the law of a foreign country, the question arises, how should the court acquire knowledge of the foreign law involved? May or, indeed, should the court take

¹³⁸⁰ Knowlton E. Robert, *Judicial Notice*, op. cit., p. 502

¹³⁸¹ R v. “Eugenia Chandris” (The), [1977] 2 S.C.R. 97, 27 C.C.C. (2d) 241, cited in Watt David, op. cit., p. 106

¹³⁸² Zeffertt DT, Paizes AP & Skeen A St Q, op. cit., p. 725

¹³⁸³ *Ibidem*, pp. 725 - 726

¹³⁸⁴ *Idem*, p. 727

¹³⁸⁵ *Idem*, p. 727

judicial notice of the foreign law? Or should the foreign law be proved by the parties and be disregarded if they fail to comply with their burden of proof?¹³⁸⁶

Those questions have meanings. Keefe and others point to the fact that:

Foreign law presented a question of fact to the courts of the forum. This apparently ridiculous proposition seems to have arisen because the foreign law required production of testimony of experts, certifications by foreign officials, and sworn translations. Testimonial evidence is necessary because the judge himself could hardly be expected to have sufficient knowledge of the foreign law and language to make his own investigation and come to a correct conclusion without assistance, and because the arguments of local counsel were not likely to enlighten him to any marked extent.¹³⁸⁷

Foreign law “cannot be proved unless pleaded. Moreover, neither trial nor appellate courts can consider decisions or statutes of the foreign jurisdiction unless they are offered in evidence.”¹³⁸⁸

The reason for pleading a foreign law as any other ordinary fact is, according to Stern, the inability for a court to “acquire knowledge of the foreign law involved.”¹³⁸⁹ This is obvious for all the foreign laws that are unknown or which are to ascertain in a given system of law.

There is an exception to this general rule. In South Africa, for example, the *Law of Evidence Amendment Act* of 1988, provided that “ Any court may take judicial notice of the law of a foreign state [...] in so far as such law can be ascertained readily and with sufficient certainty.”¹³⁹⁰ This is predicated on the fact that some foreign laws are known and readily accessible to the judge of the forum.

6.3.4. Judicial notice is either inappropriate or should be resorted to cautiously in international crimes adjudication

Though taking judicial notice has invaded the empire of international crimes where parties agree to some facts, or judges can *proprio moto* or upon request take judicial notice, the practice may seem inappropriate. In domestic systems as well as in international criminal systems, it is a principle that “judgments be based on proven facts in accordance with evidentiary rules.”¹³⁹¹ By

¹³⁸⁶ Stern B. William, “Foreign Law in the Courts: Judicial Notice and Proof”, *California Law Review*, Vol. 45, Iss.1, 1957, pp. 23 - 48

¹³⁸⁷ Keefe Arthur John, Landis B. William and Shaad B. Robert, “Sense and Nonsense...”, op. cit., p. 674

¹³⁸⁸ *Ibidem*, p. 675

¹³⁸⁹ Stern B. William, “Foreign Law in the Courts...”, op. cit.,

¹³⁹⁰ As cited in Zeffertt DT, Paizes AP & Skeen A St Q, *The South African Law of Evidence*, op. cit., p. 727

¹³⁹¹ Haskell and Waldorf, op. cit., p. 78

doing so, this requirement “confers legitimacy on otherwise contested facts. In addition, trials may reveal evidence that might not otherwise have seen the light of day.”¹³⁹²

To this suggestion Keeffe and others add that: “neither a trial court nor an appellate court can ever take judicial notice of a fact when there is any doubt about it. The danger of injustice is too great. In the case of doubt, the opportunity to establish the truth by hearing witnesses must always be afforded.”¹³⁹³ This suggests that to be fair, a trial must be a result of the views expressed by parties that meet the conviction of the court. This does not necessarily mean there is truthfulness regarding the proposition or situation.

The other reason is quite simple. Haskell and Waldorf observe that “what is true and what is undisputed are two different things.”¹³⁹⁴ What is undisputed is what parties agree to, and not necessarily what is actually true. According to these writers for example, “prior to 1492, counsel would not have disputed that the world was flat. Yet since that date it is equally undisputed that the world is round. [...] what one generation regards as beyond dispute the next may well laugh at.”¹³⁹⁵ This relates to the exactitude of a proposition or of a fact. In fact, there is the reality of a thing and how accommodative people find the thing. The reality of a thing or a situation is one despite what people want the thing to be in order to accommodate themselves. One example is found in the *United States v. Aluminium Company of America*, quoted by Knowlton. In this case:

the court took notice of facts relating to the remedies which were found in the report of the Truman Committee. In so doing, it stated that the facts noticed would not be conclusively established. On closer scrutiny, it would appear that the facts contained in the report do not meet the test of common knowledge nor is the report necessarily of indisputable accuracy. As a result, the most that should be noticed is that the report is an official document and as such, an exception to the hearsay rule. This being true, the report may be admitted as evidence of the facts contained therein, but such evidence would, of course, be subject to disproof by other stronger evidence if it were available. This case would seem, therefore, to represent a failure to determine with precision what is being noticed.¹³⁹⁶

This example, it may be argued, vests relevance as the taking of judicial notice before the *ad hoc* tribunals are concerned. With due respect to the wisdom of judges and the authoritative standing

¹³⁹² *Ibidem*, p. 78

¹³⁹³ Keeffe Arthur John, Landis B. William and Shaad B. Robert, “Sense and Nonsense...”, *op. cit.*, p. 672

¹³⁹⁴ Haskell and Waldorf, *op. cit.*, p. 78

¹³⁹⁵ Keeffe Arthur John, Landis B. William and Shaad B. Robert, “Sense and Nonsense...”, *op. cit.*, p. 665

¹³⁹⁶ Knowlton E. Robert, “Judicial Notice”, *op. cit.*, p. 510

of courts in any criminal law system, it is true that maintaining the judicial notice is a legal shortcut. It serves more or less the speedy administration of justice. Judicial notice, as any other shortcuts, aims at narrowing the matter in dispute. There is no problem with facts of common knowledge like locations and widely accepted historical facts. However, there is a misuse and abuse of facts of “immediate and accurate demonstration by resort to sources of indisputable accuracy.” Sources themselves differ. Academics and authorities also disagree on many issues. Judicial notice of a substantial matter of a dispute should then be avoided.

Knowlton has therefore proposed ways in which judicial notice may be taken. He suggests for instance a balancing of the interests between judicial administration and the rights of the litigants which requires that the doctrine be applied strictly.¹³⁹⁷ For him, “the necessity of a hearing wherein each party participates should be most helpful.”¹³⁹⁸ As a procedural tool, “it is therefore surely pertinent to question how such [a] self-serving device can be morally justified in the case of those indicted for the ‘crime of crimes’.”¹³⁹⁹ The inappropriateness and inconsistency of judicial notice at the *ad hoc* tribunals may better be explained through an analysis of that practice.

6.3.5. The *ad hoc* Tribunals’ practice in judicial notice

The Rules of Procedure and Evidence of both the ICTR and ICTY provide for taking judicial notice of facts of common knowledge and adjudicated facts. According to Rule 94(A) of the ICTR Rules of Procedure and Evidence, which is in fact the same as the ICTY, “in the interest of judicial economy, a Trial Chamber will not require proof of facts that involve common knowledge, but will instead take judicial notice of such facts.”¹⁴⁰⁰ A trial chamber may do so on its own initiative or upon a motion moved by a party. The Chamber must first of all determine whether the fact is of common knowledge, and take judicial notice thereafter. This is not a discretionary power.

¹³⁹⁷ *Ibidem*, p. 509

¹³⁹⁸ *Idem*, p. 510

¹³⁹⁹ Henham Ralph, “The ethics of plea bargaining...”, *op. cit.*, p. 223

¹⁴⁰⁰ ICTY Developed practices, citing Rule 94(A) of the ICTY Rules, p. 67

It is however worthy to highlight some opposing or misdirected views in this respect where a Trial Chamber believed to be vested with discretion to take judicial notice under Rule 94(A). According to the Appeals Chamber, “judicial notice under Rule 94(A) is not discretionary.”¹⁴⁰¹ In the *Semanza* Appeal Judgment, however, quoting an initial decision on Judicial Notice, the Trial Chamber was of the view that Semanza “having entered a plea of not guilty to all counts in the indictment, the Accused has placed even the most patent of facts in dispute. However, this alone cannot rob the Chamber of its discretion to take judicial notice of those facts not subject to dispute among reasonable persons.”¹⁴⁰² Therefore, those facts were qualified as facts of common knowledge. In contrast to the purported discretion in *Semanza*, the *Karemera et al.* Appeal Decision on Judicial Notice emphasised that the “standard is not discretionary.”¹⁴⁰³ Further, the Appeals Chamber held that:

But the general rule that the Trial Chamber has discretion in those areas is superseded by the specific, mandatory language of Rule 94(A); as noted above, the Trial Chamber has no discretion to determine that a fact, although ‘of common knowledge’, must nonetheless be proven through evidence at trial. For these reasons, a Trial Chamber’s decision whether to take judicial notice of a relevant fact under Rule 94(A) is subject to *de novo* review on appeal.¹⁴⁰⁴

It is possible that the Trial Chamber in *Semanza* erred on this point of law. Unfortunately, on appeal, though the Appeals Chamber remarked and corrected the error of law, it did not clearly indicate that the Trial Chamber committed such an error. Under Rule 94(B), “at the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.” Taking a judicial notice in this instance remains a discretionary power of the court.

In *Karemera et al.* the Appeals Chamber held that “facts judicially noticed pursuant to Rule 94(B) of the Rules are merely presumptions that may be rebutted with evidence at trial. The legal effect of judicially noticing an adjudicated fact is only to relieve the Prosecution of its initial

¹⁴⁰¹ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Decision on prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, Case No. ICTR-98-44-AR73(C), 16 June 2006, para. 29

¹⁴⁰² *Laurent Semanza v. The Prosecutor*, Judgment, Case No. ICTR-97-20-A, 20 May 2005, para. 194

¹⁴⁰³ *Ibidem*, para. 22

¹⁴⁰⁴ *Idem*, para. 23

burden to produce evidence on the point.”¹⁴⁰⁵ The defence may put the adjudicated fact into question by introducing reliable and credible evidence to the contrary.¹⁴⁰⁶

Having made these distinctions, it is important to also understand how the *ad hoc* tribunals define facts of common knowledge and adjudicated facts. The relevant definitions can be found once again in the landmark decision of the Appeals Chamber June 16, 2006 in the *Karemera et al.* case¹⁴⁰⁷ referred to above. In this decision, the Appeals Chamber explained in detail how Rule 94 (A) and (B) of the Rules should be understood. Subsequent decisions either from the ICTR or ICTY heavily relied on this decision; particularly it’s reasoning and legal foundations.

Initially a fact of common knowledge has been defined in the *Semanza* Appeals judgment, as one that “encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute.”¹⁴⁰⁸ This definition differs slightly from the one given by Watt. For him, facts of common knowledge are those which are:

- i. so notorious or generally accepted as not to be the subject of debate among reasonable persons; or
- ii. capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.¹⁴⁰⁹

In the *Karemera et al.* Appeal decision, the Chamber emphasised that “whether a fact qualifies as a ‘fact of common knowledge’ is a legal question.”¹⁴¹⁰ The problem here has to do with whether or not reasonable people may always agree on legal questions. The door should be left open for some reasonable disagreement on legal questions. The Appeals Chamber defined adjudicated facts as:

facts that have been established in a proceeding between other parties on the basis of the evidence the parties to that proceeding chose to introduce, in the particular context of that proceeding. For this reason,

¹⁴⁰⁵ *Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera v. The Prosecutor*, Decision on Joseph Nzirorera’s Appeal of Decision on admission of evidence rebutting adjudicated facts, op. cit., para. 13

¹⁴⁰⁶ *Ibidem*, para. 14

¹⁴⁰⁷ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Decision on prosecutor’s Interlocutory Appeal of Decision on Judicial Notice

¹⁴⁰⁸ *Laurent Semanza v. The Prosecutor*, Judgment, op. cit., para. 194 (footnotes omitted)

¹⁴⁰⁹ Watt David, Watt’s Manual of Criminal Evidence, op. cit., p. 107

¹⁴¹⁰ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Decision on prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, op. cit., para. 23

they cannot simply be accepted, by mere virtue of their acceptance in the first proceeding, as conclusive in proceedings involving different parties who have not had the chance to contest them.¹⁴¹¹

The Appeals Chamber moreover sorted out the difference between facts of common knowledge from adjudicated facts. One such difference is “built into the Rule”¹⁴¹², while the other is “established by the Tribunal’s jurisprudence.”¹⁴¹³ According to the first difference and in the opinion of the Appeals Chamber, “whereas judicial notice under Rule 94(A) is mandatory, judicial notice under Rule 94(B) is discretionary, allowing the Trial Chamber to determine which adjudicated facts to recognize on the basis of a careful consideration of the accused’s right to a fair and expeditious trial.”¹⁴¹⁴ This difference was discussed above. The second difference is premised on the consequences of judicial notice. In the opinion of the Appeals Chamber, once again, “whereas facts noticed under Rule 94(A) are established conclusively, those established under Rule 94(B) are merely presumptions that may be rebutted by the defence with evidence at trial.”¹⁴¹⁵

The *ad hoc* tribunals also pointed out the aims of judicial notice. According to an ICTY trial chamber, “Rule 94(B) aims at achieving judicial economy and harmonizing judgments of the Tribunal by conferring on the Trial Chamber discretionary power to take judicial notice of facts or documents from other proceedings.”¹⁴¹⁶ It is “not a mechanism that may be employed to circumvent the ordinary requirement of relevance and thereby clutter the record with matters that would not otherwise be admitted.”¹⁴¹⁷ When a Chamber takes judicial notice under Rule 94(B), it must ensure that a balance is achieved between “promoting these aims and safeguarding the fundamental rights of the accused to a fair trial.”¹⁴¹⁸ Furthermore, an amendment of Rule 94(B)

¹⁴¹¹ *Karemera et al.* Appeal Decision on Judicial Notice, para. 40

¹⁴¹² *Ibidem*, para. 41

¹⁴¹³ *Idem*, para. 42

¹⁴¹⁴ *Idem*, para. 41

¹⁴¹⁵ *Idem*, para. 42

¹⁴¹⁶ *The Prosecutor v. Radovan Karadzic*, Decision on Fifth prosecution motion for Judicial Notice of Adjudicated Facts, Case No. IT-95-5/18-T (D36424 – D36376), 14 June 2010, para. 12; *The Prosecutor v. Zdravko Tolimir*, Decision on prosecution motion for judicial notice of adjudicated facts pursuant to Rule 94(B), Case No. IT-05-88/2-PT, 17 December 2009, para. 6

¹⁴¹⁷ *The Prosecutor v. Radovan Karadzic*, Decision on Fifth prosecution motion for Judicial Notice of Adjudicated Facts, *op. cit.*, para. 18

¹⁴¹⁸ *The Prosecutor v. Zdravko Tolimir*, Decision on prosecution motion for judicial notice of adjudicated facts pursuant to Rule 94(B), *op. cit.*, para. 6

“only allows a Chamber to take judicial notice of the authenticity of documentary evidence which has been admitted in prior proceedings.”¹⁴¹⁹

In *Stanisic and Simatovic*¹⁴²⁰, an ICTY Trial Chamber held that a “decision on taking judicial notice of an adjudicated fact is a two-step process. Firstly, the Chamber has to consider if a purported adjudicated fact fulfils the admissibility requirements as developed by the jurisprudence of the Tribunal.”¹⁴²¹ The second step is that “even if the chamber is satisfied that a purported adjudicated fact fulfils the [...] criteria, it always retains the right to withhold judicial notice of a fact when it believes that such notice would not serve the interests of justice.”¹⁴²² This is a novelty gained from the jurisprudence of the *ad hoc* tribunals. Yet, it is a dangerous one.

¹⁴¹⁹ *The Prosecutor v. Radovan Karadzic*, Decision on the prosecution’s motion for judicial notice of intercepts related to the Sarajevo component and request for leave to add one document to Rule 65 *ter* exhibit list, Case No. IT-95-5/18/T, 4 February 2011, para. 12

¹⁴²⁰ *The Prosecutor v. Jovica Stanisic and Franko Simatovic*, Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, Case No. IT-03-69-T, 28 January 2010; *The Prosecutor v. Zdravko Tolimir*, Decision on prosecution motion for judicial notice of adjudicated facts pursuant to Rule 94(B), *op. cit.*, para. 7;

¹⁴²¹ *Ibidem*, para. 24. According to the Chamber, those requirements are: (footnotes omitted)

- (i) The fact must be distinct, concrete and identifiable;
- (ii) It must be relevant to the case;
- (iii) It must not include findings or characterizations that are of an essentially legal nature;
- (iv) It must not be based on a plea agreement or facts voluntarily admitted in a previous case;
- (v) It must not have been contested on appeal, or, if it has, the fact has been settled on appeal;
- (vi) It must not relate to the acts, conduct or mental state of the accused;
- (vii) The formulation proposed in the moving party’s motion for admission must not differ in any significant way from the way the fact was expressed when adjudicated in the previous proceeding.

In a subsequent decisions, other trial chambers added more requirements. In *Karadzic* and *Tolimir* cases, for example, it was added that:

- the fact must not be unclear or misleading in the context in which it is placed in the moving party’s motion. In addition, the fact must be denied judicial notice ‘if it will become unclear or misleading because one or more of the surrounding purported facts will be denied judicial notice.’
- The fact must be identified with adequate precision by the moving party.

The Prosecutor v. Radovan Karadzic, Decision on Fifth prosecution motion for Judicial Notice of Adjudicated Facts, *op. cit.*, para. 14; *The Prosecutor v. Zdravko Tolimir*, Decision on prosecution motion for judicial notice of adjudicated facts pursuant to Rule 94(B), *op. cit.*, para. 8. In a subsequent *Karadzic* decision, a Trial Chamber added and précised that these facts must:

- Relate to the indictment;
- Are final and against which no appeal or review proceedings are under way;
- Cannot reasonably be contested by the opposing party;
- Do not compromise the right of the Accused to a fair trial

The Prosecutor v. Vojislav Seselj, Decision on prosecution motion for judicial notice of facts adjudicated by Krajisnik case, Case No. IT-03-67-T, 23 July 2010, para. 7

¹⁴²² *The Prosecutor v. Jovica Stanisic and Franko Simatovic*, Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, *op. cit.*, para. 25

Briefly stated, and according to the *Rules of Procedure and Evidence*, *ad hoc* tribunals take judicial notice of (1) facts of common knowledge and (2) adjudicated facts. The *ad hoc* tribunals' aims of taking judicial notice do not differ from those at municipal levels. It is to achieve judicial economy in terms of time and money as well as harmonising Tribunals' judgments.

Both the rules of the ICTY and ICTR do not make provisions regarding whether or not the judges can take judicial notice of matters of law. In fact the rules are silent on this issue. However, a reading of some judgments reveals that these tribunals have frequently resorted to pieces of laws and legislations that prevailed in both Rwanda and the former Yugoslavia. The Trial Chambers have not required proof of those laws, but have instead referred to them as proven and acceptable.

A review of the decisions both at trial and appellate levels shows that *ad hoc* tribunals have in the majority taken judicial notice of adjudicated facts under Rule 94(B).¹⁴²³ But judicial notice of facts of common knowledge has also been taken, albeit in few instances compared to adjudicated facts. Under Rule 73*ter* (B)(i), at the pre-defence conference, a Trial Chamber or a Judge may order that the Defence file "admissions by the parties and a statement of other matters which are not in dispute." Rarely however have parties conceded to any of the facts constituting their respective cases. Where facts have been conceded by a party, they did not constitute a party of argument anymore.

Though it is the functions of any court to ensure that the proceedings are not delayed by legal technicalities, it is counterproductive to rush a case by judicial notice particularly when the

¹⁴²³ See for example *The Prosecutor v. Zoran Kupresic et al.*, Case No. IT-95-16-A, Decision on the Motion of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to admit additional evidence pursuant to Rule 115 and for judicial notice taken pursuant to Rule 94(B), 8 May 2001; *The Prosecutor v. Slobodan Milosevic*, Decision on prosecution Motion for Judicial Notice of Adjudicated Facts, Case No.IT-02-54-AR73.5, 28 October 2003; *Momir Nikolic v. The Prosecutor*, Decision on Appellant's Motion for Judicial Notice, Case No. IT-02-60/1-A, 1 April 2005; *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice; *The Prosecutor v. Dragomir Milosevic*, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts and Prosecutor's Catalogue of Agreed facts, Case No.IT-98-29/1-AR73.1, 26 June 2007; *The Prosecutor v. Momcilo Perisic*, Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, Case No. IT-04-81-PT, 26 June 2008; *The Prosecutor v. Radovan Karadzic*, Decision on the Prosecutor's motion for judicial notice of intercepts related to the Sarajevo component and request for leave to add one document to the Rule 65 *ter* exhibit list, Case No. IT-95-5/18-T, 4 February 2011

parties have not moved any motion in this respect. Judicial notice taken *proprio motu* fall in this category. In *Ndindiliyimana et al.* the Trial Chamber *proprio motu* took judicial notice that:

The tribunal was established in the aftermath of the Rwandan genocide in 1994. Since then the tribunal has heard extensive factual and legal analysis of the genocide, the armed conflict between the RPF and the Rwandan Armed Forces, and the historical context of the events occurring between April and July 1994. Rule 94 permits the Trial Chamber to take judicial notice of “facts of common knowledge” or that “are not reasonably subject to dispute.” Given the ICTR’s substantial jurisprudence surrounding the period between 1990 and July 1994, the Chamber takes judicial notice of the existence of genocide against the Tutsi of Rwanda, the widespread and systematic killing of Tutsi and Hutu civilians, and of a non-international armed conflict during the period covered by the Indictment against the Accused and, where relevant, during the period preceding it.¹⁴²⁴

This practice lacks rigor and instead portrays a sort of bias in handling complex matters like the Rwandan case. If for example, one takes an aspect of these judicial notices about the “widespread and systematic killing of Tutsi and Hutu civilians”; another trial chamber has initially taken judicial notice that “widespread or systematic attacks against a civilian population based on Tutsi ethnic identification occurred during that time.”¹⁴²⁵ The key issue here is about whether or not the widespread and systematic nature of the attacks was directed only against Tutsis or a civilian population composed of both Hutu and Tutsi. Again, these judicial notices may be misleading rather than helpful. The reason is that the mandate of the ICTR covers the whole year 1994. The period comprised between 6 April 1994 and 14 July 1994 coincides with active fighting between RPF and the Rwandan Armed Forces. But there has been ample evidence heard by the Chambers pointing to the widespread and systematic nature of the attacks against the civilian population going beyond 14 July 1994.

It has been observed that sometimes Trial Chambers take judicial notice of contested or contestable matters. In the *Akayesu* case, for example, the Chamber took judicial notice of a number of United Nations reports, which extensively document the massacres which took place in Rwanda in 1994.¹⁴²⁶ Elsewhere in this research it has been demonstrated that those reports were not accurate as such, and could only constitute *prima facie* evidence of the commission of

¹⁴²⁴ *Ndindiliyimana et al.*, para. 105

¹⁴²⁵ *Laurent Semanza v. The Prosecutor*, Judgment, para. 192

¹⁴²⁶ See list in *Akayesu*, TC, para. 165. Those reports are *Final Report of the Commission of Experts established pursuant to Security Council Resolution 935(1994)*, S/1994/1405, U.N. Doc. S/1994/1405 (1994), 9 December 1994; *Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions*, Bacre Wally Ndiaye, on his mission to Rwanda from 8 – 17 April 1993, U.N. Doc. E/CN.4/1994/7/Add.1(1993)

crimes in Rwanda. Those reports were incomplete. Even if one could accept the competence, expertise and authoritative standing of people who initiated those reports, it is also a fact that they were drafted without thorough investigations. They were a result of short term missions performed by a limited number of staff in troubled areas. Taking judicial notice of those facts is really not serious.

Taking judicial notice has likewise been an uneven practice before the Trial chambers depending on the moving party. When moved by the Defence, Trial Chambers were reluctant or unwilling to take judicial notice. When it was the prosecution, Trial Chambers were too ready to proceed. For example, in *Semanza*, a Trial Chamber “partially granted a Defence motion filed on 13 November 2001 and took judicial notice of the following documents: *Décret-Loi No. 10/75: Organisation et fonctionnement de la prefecture [au Rwanda]*, and *Décret-Loi No. 18/75 du 14 août 1978*, to the extent that it amended or otherwise modified *Décret-Loi No. 10/75*.”¹⁴²⁷ This decree was an already uncontested law in Rwanda. It did not need to be judicially noticed.

In *Kajelijeli*, the Chamber took Judicial Notice of the fact that between 1 January 1994 and 17 July 1994, Rwanda was a state Party to the Genocide Convention on the Prevention and Punishment of the Crime of Genocide. Rwanda had acceded to the convention on 12 February 1975. Rwanda was also a Contracting Party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977 to which it had acceded on 5 May 1964 and on 19 November 1984 respectively.¹⁴²⁸ Neither the prosecutor, nor the defence could, in the presence of these instruments with accurate references, contest the fact that Rwanda was bound by these conventions. Taking judicial notice of the conventions was an unnecessary exercise.

6.4. Summary on the need and use of guilty plea and judicial notice

This chapter has revealed that guilty plea is used in common law jurisdictions mostly to dispose of petty crimes. It is a waiver of one’s right to trial for an expected lenient sentence. It helps the court to speed up its work, save time and financial resources; and may therefore be efficient in this respect. Its genuineness in domestic jurisdiction is still doubtful.

¹⁴²⁷ *The Prosecutor v. Laurent Semanza*, Judgment and Sentence, op. cit., para. 28

¹⁴²⁸ *The Prosecutor v. Juvénal Kajelijeli*, Judgment and Sentence, op. cit., para. 744

Using guilty plea to adjudicate international crimes is counterproductive for many reasons. Guilty plea does not respond to the concerns highlighted in domestic jurisdictions. The international crimes at issue are of an extreme gravity and seriousness and the guilty plea does not assist in resolving them.

The chapter demonstrated moreover that there is no consistency and harmony in the *ad hoc* tribunals' practice of judicial notice. Knowlton suggests that "the failure to state accurately what is noticed and the failure to evaluate correctly the significance of the matter noticed have undoubtedly been contributing causes of much of the confusion in the area."¹⁴²⁹ This is the situation at both the ICTY and ICTR. What is noticed does not reflect the extent and completeness of a situation. It is rather a way of assisting the prosecution in leading its case. Judicial notice taken in these circumstances does not really secure court time and resources let alone ensuring jurisprudential harmony. Only facts of common knowledge need to be noticed. The rest should be proved by evidence.

These two legal techniques are traded at the beginning or in the course of a criminal case. The road leading to inefficiency and ineffectiveness of the *ad hoc* tribunal does not end here. It continues until criminal responsibility is imputed. Joint criminal enterprise and command responsibility are the doctrines that are most often used to impute criminal responsibility. The *ad hoc* tribunals have developed these two doctrines exponentially. Yet, the heavy reliance on them may in the near future become unbearable with unexpected and uncontrollable outcomes. At the least, they may defeat the very ends for which international crimes prosecution is undertaken. The next chapter critically analyses these modes of imputing criminal responsibility.

¹⁴²⁹ Ibidem, p. 510

CHAPTER 7: JOINT CRIMINAL ENTERPRISE AND COMMAND RESPONSIBILITY: PREFERRED MODES OF IMPUTING CRIMINAL LIABILITY

7.1. Introduction

Joint criminal enterprise and command responsibility have gained excessive importance in the judgments of the *ad hoc* tribunals. Scholars are divided over the concept of joint criminal enterprise. Some call joint criminal enterprise a “vague legal construction”¹⁴³⁰ or “legal fiction.”¹⁴³¹ Others praise the doctrine as a mode of liability that can “be applied judiciously and that, in particular, its third, extended form can be defined in a manner that does not infringe on the rights of the defendant.”¹⁴³² They go as far as suggesting that “liability for participation in some form of plan has existed in international law since at least 1945”¹⁴³³ and that “in some national jurisdictions it has existed for many years before the Second World War.”¹⁴³⁴ Cassese holds that the doctrine crystallised after World War II, and was a customary rule of international criminal law since then.¹⁴³⁵

¹⁴³⁰ Chouliaras Athanasios, “From ‘Conspiracy’ to ‘Joint Criminal Enterprise’: in search of the organizational parameter”, in Stahn Carsten & Van den Herik (eds.), *Future Perspectives on International Criminal Justice*, T.M.C. Asser Press, The Hague, 2010, p.547. This author uses also the terms “creative judicial reconstruction of reality.”

¹⁴³¹ Osiel Mark, “The banality of good: aligning incentives against mass atrocities”, *Columbia Law Review*, Vol. 105, Iss.6, 2005, pp. 1751 – 1862, p. 1771 (footnote 92 and accompanying text), p. 1802.

Osiel Mark, *Making Sense of Mass Atrocity*, op. cit., p. 6

¹⁴³² Provost René, *Amicus Curia Brief*, submitted by the Centre for Human Rights and Legal Pluralism, McGill University, Montreal (Québec) Canada, in the Matter of the co-prosecutors’ appeal of the closing order against Kaing Guek Eav “Duch” dated 8 August 2008, Case File No. 001/18-07-2007-ECCC/OCIJ(PTC 02), 28 October 2008. Though this document is an *amicus curiae* brief, it is useful to highlight the outstanding position of its author, Professor René Provost who specialises in this area.

¹⁴³³ *Idem*, para. 7

¹⁴³⁴ *Id.* ; See also Du Toit Peter, “Thebus and Tadic: comparing the application of the doctrine of common purpose in South Africa to its application in the Yugoslav tribunal”, *South African Journal of Criminal Justice*, Vol. 20, Iss.3, 2007, pp. 361 – 371. This author suggests that the South African Constitutional Court has held that the doctrine of common purpose is constitutionally compliant.

¹⁴³⁵ Antonio Cassese, *Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise*, Criminal Case File No. 001/18/07-2007-ECCC/OCJ (PTC 02), 27 October 2008. The authority of Professor Cassese in international criminal law is beyond dispute. So is the expertise of the members of the Journal of International Criminal Justice who contributed to the Amicus Brief, namely Mary De Ming Fan, Vanessa Thalmann and Salvatore Zappala.

Unlike joint criminal enterprise, command responsibility “is more clearly stated than consistently applied”¹⁴³⁶ by the *ad hoc* tribunals. According to Williamson, the judgments of the ICTR reveal that the application of command responsibility can still give rise to a number of difficulties.¹⁴³⁷ In fact, “without command responsibility as a means of holding government officials who instigated the violence liable, the ICTR would not have accomplished as much as it has.”¹⁴³⁸

Both joint criminal enterprise and command responsibility have been used in a way that tends to break the link between criminal law and punishment. Such a link is the actual commission of a punishable crime with a required state of mind. It has been argued that “to make a man liable to imprisonment for an offense which he does not know he is committing and is unable to prevent is repugnant to the ordinary man’s conception of justice and brings the law into contempt.”¹⁴³⁹ Ashworth concurs by suggesting that: “the core conception of the criminal law [is] to punish those who have culpably (rather than accidentally) done wrong.”¹⁴⁴⁰ A thorough analysis of joint criminal enterprise and command responsibility proves that they do not respond to these imperatives. This is another reason why the judgments of the *ad hoc* tribunals are ineffective.

¹⁴³⁶ Peters C. William, “Adjudication Deferred: Command Responsibility for War Crimes and US Military Justice from MY Lai to Haditha and Beyond”, *Nationalities papers*, Vol. 37, No. 6, 2010, pp. 925 – 952, p. 925. Lippman believes however that the doctrine’s parameters’ remain imprecise, see Lippman Matthew, “Humanitarian Law; the uncertain contours of command responsibility”, *Tulsa Journal of Comparative and International Law*, Vol. 8, Iss.2, 2001, pp. 1 – 93, p. 1

¹⁴³⁶ Williamson A. Jamie, “Command responsibility in the case law of the International Criminal Tribunal for Rwanda”, *Criminal Law Forum*, Vol. 13, 2002, pp. 365 – 384, p. 366

¹⁴³⁷ Williamson A. Jamie, “Command responsibility in the case law of the International Criminal Tribunal for Rwanda”, *Criminal Law Forum*, Vol. 13, Iss.3, 2002, pp. 365 – 384, p. 366. Jamie Williamson is a former Legal Officer at the ICTR.

¹⁴³⁸ Libby Sean, “[D] Effective control: Problems arising from the application of non-military command responsibility by the International Criminal Tribunal for Rwanda,” *Emory International Law Review*, Vol. 23, Iss.1, 2009, pp. 201 – 229, p. 205

¹⁴³⁹ The Mental Element in Crime (Law Com. Working Paper No. 31), p. 4 cited in Richardson, (ed.), *Archibold: Criminal Pleading, Evidence and Practice*, Sweet & Maxwell, Thomson Reuters, 2010, 17-2, p. 1858

¹⁴⁴⁰ Ashworth Andrew, “Conceptions of Overcriminalization”, *Ohio State Journal of Criminal Law*, Vol. 5, Iss.2, 2008, pp. 407 – 425, p. 411

7.2. Joint criminal enterprise doctrine

Osiel calls joint criminal enterprise a “legal fiction” that exemplifies “creative legal theory to enable the prosecution of complex crimes.”¹⁴⁴¹ What do others say about it? Cassese, one vehement advocate of joint criminal enterprise, argues that the notion of joint criminal enterprise is “more crucial in international criminal law than at the domestic level.”¹⁴⁴² In support of his argument, he evokes the concept of the “world community.” He then insists that in the world community international crimes such as war crimes, crimes against humanity, genocide, torture and terrorism share the common feature of tending to be the expression of collective criminality, in that they are perpetrated by groups of individuals, military details, paramilitary units or government officials acting in unison or in pursuance of a policy.¹⁴⁴³ He suggests that not prosecuting those crimes would be contrary to the general purpose of criminal law as well as a moral failure.¹⁴⁴⁴ In *Karemera et al.*, an ICTR Trial Chamber held; in support of the *rationale* of joint criminal enterprise and referring to the *Tadic* appeals’ case¹⁴⁴⁵ that:

To hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.¹⁴⁴⁶

Both Cassese’s arguments and the ICTR Trial Chamber’s point of view lack vigour. They do not explain how and why from “collective criminality”¹⁴⁴⁷, one forges individual criminal liability. Suggesting that everyone in a collective criminality must be punished for moral reasons, is either

¹⁴⁴¹ Laughland John, *Travesty: the trial of Slobodan Milosevic and the corruption of international justice*, Pluto Press, London, 2007, p. 119; see Chouliaras talking about another mode of imputing responsibility and holding the view that it is also a prosecution’s weapon. “Conspiracy is a concept employed mainly in the Anglo-American common-law systems, and generally speaking, supplies the prosecution with an effective legal weapon in the fight against ‘organized crime,’ however defined. It is a very complex and highly controversial category that ‘became the monster it is now’ is by a process of judicial improvisation.” Chouliaras Athanasios, “*From ‘Conspiracy’ to ‘Joint Criminal Enterprise’*”, op. cit., p. 552

¹⁴⁴² Cassese Antonio, “The Proper limits of Individual responsibility ...”, op. cit., p. 110; see also Cassese Antonio, *Amicus Curiae Brief*, op. cit., p. 12. He suggests that “The world community must defend itself from this collective criminality by holding those responsible for the full extent and reach of their crimes.”

¹⁴⁴³ Cassese Antonio, “The Proper limits of Individual responsibility...”, op. cit., p. 110

¹⁴⁴⁴ *Ibidem*, p. 110

¹⁴⁴⁵ *Prosecutor v. Dusko Tadic*, Judgment, Case No. IT – 94 – 1 – A, 15 July 1999

¹⁴⁴⁶ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumutse, Joseph Nzirorera and André Rwamakuba*, Decision on the preliminary motion by the defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba and Mathieu Ndirumutse challenging jurisdiction in relation to Joint Criminal Enterprise, Case No. ICTR-98-44-T, 11 May 2004, para. 36 quoting *Tadic*, Appeals, para. 192

¹⁴⁴⁷ See also Professor Provost writing on the “emergence of international recognition of individual liability for collective criminal endeavour...”; Provost René, *Amicus Curia Brief*, op. cit.

hypocrisy or a simple expression of intention. It is not legally articulated. The effort should be put, as suggested elsewhere, on investigating the role and extent as well as moral predisposition of every alleged perpetrator, which seems to have not been the case before the *ad hoc* tribunals. Cassese, as a judge at the ICTs and as a scholar, knew that all associates in violation of international crimes in the Former Yugoslavia and Rwanda were not punished. There has instead been an over-punishment of the few who have been apprehended and prosecuted. It is a fact that many culpable individuals escaped prosecution. The reality is also that those who have been prosecuted were convicted “in a way that exaggerates the true extent of their blameworthiness.”¹⁴⁴⁸ Osiel sums up the situation as one that in which “the law’s reach is thus at once too timid and too ambitious, both over-inclusive and under-inclusive *vis- à- vis* the actual distribution of responsibility.”¹⁴⁴⁹ He moreover maintains that:

Law and evidence permit liability far beyond the few individuals who can practically be prosecuted; yet even these few can be convicted only through theories of indirect liability that blame them for wrongs beyond their control or contemplation. Since so few can actually be tried, the impulse to blame those prosecuted for wrongs beyond their culpability becomes overwhelming.¹⁴⁵⁰

There is therefore no point to justify joint criminal enterprise by relying on moral responsibility. Besides this, there is a great risk of sacrificing traditional principles of criminal law in favour of this new concept. Cassese’s allusion to “world community” is also not persuasive. It is fictitious; though, according to Osiel:

fictions assuredly play an important role in the law – a legitimate role, when acknowledged as such – and are justified insofar as they enable law to advance justice by comparing a novel phenomenon with a more familiar one that is already well understood. The idea of ‘the international community’ may be just such a fiction, insofar as it is generally invoked – despite its lack of sociological substance, in a dense web of social ties – to advance the claims of justice by analogy to those that any genuine, nonfictional community might make on its members. Implicitly, the speaker is saying the following: if most of humankind truly felt itself to be members of a single community, as perhaps it should and eventually it may, then surely they would endorse – well, whatever its advocate is advocating. This is the role that fiction often plays in legal argument.¹⁴⁵¹

So, defending a fictitious entity with fictitious means is, in the view of Ohlin “wrong on a philosophical level.”¹⁴⁵² A defendant who makes a small contribution is not as guilty as someone who makes a large contribution. Evidence is always needed as to whether the contribution is

¹⁴⁴⁸ Osiel Mark, *Making Sense of Mass Atrocity*, op. cit., p. 2

¹⁴⁴⁹ *Ibidem*, p. 2

¹⁴⁵⁰ *Idem*, pp. 3-4

¹⁴⁵¹ Osiel Mark, *Making Sense of Mass Atrocity*, op. cit., p. 76

¹⁴⁵² Ohlin Jens David, “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise”, *Journal of International Criminal Justice*, Vol. 5, Iss.1, 2007, pp. 69 – 90, p. 85

small or large. To hold otherwise is to violate the principle of individual moral responsibility. Such a defendant may only happen to be found “in the wrong place, at the wrong time, belonging to the wrong ethnic group, doing what is natural for such a person.”¹⁴⁵³

7.2.1. The “magic weapon” and its categories

Joint criminal enterprise gained momentum before the *ad hoc* tribunals because it facilitated the prosecution of mass atrocities. The more proponents of joint criminal enterprise contributed to its growth, the more it attracted the attention of its opponents. According to Damgaard, joint criminal enterprise is “one of the most extensively used, yet also one of the most controversial modes of liability labelled the ‘common purpose doctrine’ or the ‘joint criminal enterprise doctrine.’¹⁴⁵⁴ In concurring with this argument, Laughland says that:

In spite of its highly dubious nature, the concept of ‘joint criminal enterprise’ is used by the ICTY to obtain convictions for the most serious crimes, including genocide. Following the formulation of joint criminal enterprise in *Tadic* in 1999 and the conviction of Krstic in 2001, the first indictment, which relied explicitly on joint criminal enterprise, was issued on 25 June 2001. Sixty-four per cent of all indictments issued between then and 1 January 2004 have relied explicitly on joint criminal enterprise, and Milosevic were among them.¹⁴⁵⁵

Recalling writings on the matter by Schabas¹⁴⁵⁶ and Danner¹⁴⁵⁷, Lyons¹⁴⁵⁸ worries by suggesting that joint criminal enterprise as:

a judicially interpreted doctrine [which] has become a ‘hallmark’ mode of liability at the international tribunals. This concept has been referred to as the ‘magic bullet of the OTP’ and the ‘nuclear bomb of the international prosecutor’s arsenal. It is obvious as to why: with these three words, the prosecution has charged collective and institutional guilt, in one fell swoop.¹⁴⁵⁹

¹⁴⁵³ Laughland John, *Travesty: The trial of Slobodan Milosevic ...*, op. cit., p. 123. He cites the “Extended Joint Criminal Enterprise in International Criminal Law”, Master thesis, Faculty of Law, University of Lund, June 2005, p. 60

¹⁴⁵⁴ Damgaard Ciara, *Individual Criminal Responsibility for Core International Crimes: selected pertinent issues*, Springer, Verlag Berlin Heidelberg, 2008, p. 127

¹⁴⁵⁵ Laughland John, *Travesty: the trial of Slobodan Milosevic ...*, op. cit., pp. 122 – 123; see also Haan Verena, “The development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia”, op. cit., pp. 167 – 201. She suggests that this mode of liability has been applied in several cases before the ICTY.

¹⁴⁵⁶ Schabas A. William, “*Mens Rea* and the International Criminal Tribunal for the Former Yugoslavia”, 37 NEW ENG. L. REV. 1015, 1032(2003), cited in Lyons S. Beth, Tortured Law/Tortured “Justice”..., op. cit., footnote 2

¹⁴⁵⁷ Allison Marston Danner & Jenny S. Martinez, Guilty Associations : Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law, 93 CAL. L. REV. 75, 137(2005), cited in Lyons S. Beth, Tortured Law/Tortured “Justice”..., op. cit., footnote 3

¹⁴⁵⁸ Lyons S. Beth, “Tortured Law/Tortured “Justice” – Joint Criminal Enterprise in the case of Aloys Simba”, *ILSA Journal of International & Comparative Law*, Vol. 17, No. 2, 2010 – 2011, pp. 459 - 471

¹⁴⁵⁹ Lyons S. Beth, Tortured Law/Tortured “Justice”..., op. cit., p. 459

Joint criminal enterprise was first used by the ICTY in the *Tadic* Appeals judgment in 1999.¹⁴⁶⁰ Since then it has quickly emerged as the most important mode of liability in modern international criminal law. Indeed, it is charged in almost every indictment at the ICTY.¹⁴⁶¹ This is not due to it being the most genuine, “new and autonomous form of criminal imputation”¹⁴⁶² that expresses the extent to which an individual accused has been involved in a crime. Rather it is the most convenient tool easy to put forward as a mode of imputation of responsibility. So it is considered “to be the most effective tool which can be employed to convict individuals of core international crimes, where there is no direct evidence of the actual participation of the accused in the crime in question.”¹⁴⁶³ It is particularly used where “it may prove even more difficult to collect evidence about the exact participation of members of the crowd in the crimes.”¹⁴⁶⁴

Ambos¹⁴⁶⁵ argues that “the common ground of joint criminal enterprise and command responsibility is the need and desire to overcome evidentiary problems.”¹⁴⁶⁶ This is not a rigorous legal argument. According to *Stakic*'s case, “joint criminal enterprise is only one of several interpretations of the term ‘commission’ under article 7(1) of the Statute and that other definitions of co-perpetration must equally be taken into account.”¹⁴⁶⁷

To ridicule its overambitious reach, Osiel argues that:

Enterprise participation does not require prosecutors to delineate specifically even such simple structures as wheels and chains; much less the more complex social networks through which mass atrocity generally occurs. The weaker the ties necessary to link one person's contribution to another's, the easier it becomes to define both as participants in each other's endeavours.¹⁴⁶⁸

According to Cassese, the doctrine must be used “to ensure accountability for the full gravity of crimes, where the exact role that each participant in a common purpose may be obscured by the

¹⁴⁶⁰ Ambos Kai, Amicus Curiae Brief in the matter of the co-prosecutors' appeal of the closing order against Kaing Guek Aav “Duch” dated 8 august 2008. The amicus was published as Ambos Kai, “Amicus Curiae Brief in the matter of the co-prosecutors' appeal of the closing order against Kaing Guek Aav “Duch” dated 8 august 2008”, *Criminal Law Forum*, Vol. 20, No. 3, 2009, pp. 353 – 388, p. 355

¹⁴⁶¹ Ohlin D. Jens, “Joint Criminal Confusion”, *New Criminal Law Review*, Vol. 12, Iss.3, 2009, pp. 406 – 419, p. 407

¹⁴⁶² Ambos Kai, “Amicus Curiae...”, op. cit., p. 362.

¹⁴⁶³ Damgaard Ciara, *Individual Criminal Responsibility for Core International Crimes: ...*, op. cit., p. 127 and 235

¹⁴⁶⁴ Cassese Antonio, “The Proper limit of individual responsibility ...”, op. cit., p. 110.

¹⁴⁶⁵ Ambos Kai, “Joint Criminal Enterprise and Command Responsibility...”, op. cit.

¹⁴⁶⁶ *Idem*, p. 181

¹⁴⁶⁷ *The Prosecutor v. Milomir Stakic*, Judgment, Case No IT-97-24-T, 31 July 2003, para. 438

¹⁴⁶⁸ Osiel Mark, *Making Sense of Mass Atrocity*, op. cit., pp. 58 - 59

massive scale and complexity of the crime.”¹⁴⁶⁹ Cassese concurs with Ambos on this point.

Tracing joint criminal enterprise to *Tadic* appeals’ judgment in 1999, Ambos notes:

The Chamber looked for a theory of participation in international crimes which takes sufficiently into account the collective, widespread and systematic context of the commission of such crimes and, thus, helps to overcome the typical problems of proof with regard to the - sometimes hardly visible - contributions of individual participants.¹⁴⁷⁰

Osiel expresses this idea much better when he states that “the doctrine’s appeal thus lies in its ‘unique ability to describe criminal arrangements too complex to fit within traditional theories of criminal liability.’”¹⁴⁷¹ Idiomatically, he calls it a reductionist approach. He sketches the context in which atrocity crimes are committed, and the way responsibility is to be attributed. According to Osiel:

From Dachau to Darfur, it is often surprisingly hard to say precisely who is really responsible for what horrors, for which share of a long and tangled episode of mass atrocity. Historians and social scientists generally pride themselves on explaining such a large event entirely in collective terms, irreducible to the acts or intentions of any participant. [...]. But for lawyers – those who must prosecute such wrongs (and defend the accused) – the devil necessarily lies in the proverbial details of who did which terrible thing to whom, in what manner, at a given time and place, with what purpose in mind. Our approach is thus unabashedly “reductionist,” in the sense of reducing all large abstractions to the most concrete particulars. Yet can this lawyerly reductionism offer a coherent and defensible account of and response to massive genocide?¹⁴⁷²

Here again, the applicable principle when there is difficulty in uncovering evidence of an allegation are well established in criminal law. Three outstanding scholars and advocates of joint criminal enterprise, namely Ambos¹⁴⁷³, Cassese¹⁴⁷⁴ and Provost¹⁴⁷⁵ are in fact suggesting that, confronted with the difficulties of uncovering the exact role of every single individual in a crime perpetrated by many, the solution is to hold everyone accountable. Whoever is caught must respond to the whole extent of the crime. For them in fact, this “collective criminal responsibility serves as [a] substitute where individual criminal responsibility cannot be proven.”¹⁴⁷⁶ Yet, this collective responsibility runs against the very idea of criminal law, punishment and culpability. This is a too light and simplistic approach to the problem.

¹⁴⁶⁹ Antonio Cassese, Amicus Curiae Brief ..., op. cit., para. 21

¹⁴⁷⁰ Ambos Kai, Amicus Curiae ..., op. cit., p. 4

¹⁴⁷¹ Osiel Mark, *Making Sense of Mass Atrocity*, op. cit., p. 54

¹⁴⁷² Ibidem, p. 1

¹⁴⁷³ Supra, note 1455

¹⁴⁷⁴ Supra, note 1430

¹⁴⁷⁵ Supra, note 1427

¹⁴⁷⁶ Vogel Joachim, How to determine individual Criminal Responsibility in systemic contexts: twelve models, [no other indications provided but on file with author]

Judge Schomburg¹⁴⁷⁷, one of the long-serving judges at both the ICTY and ICTR appeals Chamber underscores the principle *in dubio pro reo*. According to him, this principle

creates to a certain extent an imbalance in favour of an accused. This, however, is necessary and justified because a human being can only be deprived of his or her liberty if the Judges come to the conclusion that he or she is guilty beyond reasonable doubt. Again, not to be misunderstood, I am fully aware that some victims and, in particular, those who have taken the burden to testify before the ICTY, may be disappointed with the outcome of a concrete case. But it is mandatory to acquit in whole or in part an accused instead of running the risk that, based on the evidence before us, an innocent human being is found guilty and deprived of his or her liberty without justification. Any search for truth in international criminal proceedings must be adequately balanced against the fundamental rights of the accused. The presumption of innocence and the principle of individual guilt are absolute and cannot be disregarded.¹⁴⁷⁸

Schomburg is largely supported by Damgaard who acknowledges the concern of punishing perpetrators so that “justice can be seen to be done.”¹⁴⁷⁹ Yet, “punishment of the perpetrators of core international crimes should not come at any cost to the basic rights of the accused. If this were to happen, this would prove more damaging to the legitimacy of the international criminal law system in the long run, than any reports of perpetrators evading justice ever would.”¹⁴⁸⁰ The principle of doubt is not the only one that joint criminal enterprise infringes. It trashes the principle of individual criminal responsibility, which is acclaimed to be the aim of the whole project of international criminal prosecutions. For many years, and throughout the world, group crimes have been committed. Such being the case, however, Bogdan¹⁴⁸¹ re-emphasises the principle of individual criminal responsibility. His view is that:

contemporary international criminal law refrains from imposing liability on the group as a whole and seeks to individualize responsibility associated with the commission of crimes. Adjudication of individual responsibility is important specifically because it avoids the stigmatizations associated with the assignment of mass guilt. Thus, although individuals often act together in situations of conflict or war, the purpose behind international criminal trials remains the equitable allocations or responsibility between the individuals who engaged in conduct prohibited by international criminal law.¹⁴⁸²

The supporters of joint criminal enterprise seem to deliberately ignore these core principles of general criminal law by explaining the necessity of joint criminal enterprise with external, yet

¹⁴⁷⁷ Schomburg Wolfgang, “Some thoughts about the role of the ICTY in establishing the truth”, *Inter Alia Michaelmas*, 2006, pp. 73 - 76

¹⁴⁷⁸ *Idem*, pp 74 - 75

¹⁴⁷⁹ Damgaard Ciara, *Individual Criminal Responsibility for Core International Crimes: ...*, op. cit., p. 249

¹⁴⁸⁰ *Ibidem*; see also *The prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Separate and Dissenting Opinion of Judge Dolenc, Case No. ICTR-99-46-T, 25 February 2004, para. 3

¹⁴⁸¹ Bogdan Attila, “Individual Criminal responsibility in the Execution of a ‘joint Criminal Enterprise’ in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia”, *International Criminal Law Review*, Vol. 6, 2006, pp. 63 – 120, at p. 64

¹⁴⁸² *Idem*

unpersuasive factors. They recognise that the joint criminal enterprise “would ensure consistency in the application of law among international and hybrid tribunals that have historically applied joint criminal enterprise liability and that are continuing to apply the doctrine today in contexts as diverse as the former Yugoslavia, Rwanda, Sierra Leon, East Timor, as well as Iraq.”¹⁴⁸³ While no one can reasonably dispute the idea that joint criminal enterprise was to be applied in a consistent manner, it is questionable as to whether this is always the case. An analysis of the case law regarding how this doctrine has been applied before the *ad hoc* tribunal shows that there is no consistent application of joint criminal enterprise.

The scholarship on joint criminal enterprise divides the doctrine into three categories. This division is not yet unanimous. According to Ohlin, “the first scenario involves a conspiracy where all members carry the intent to commit the crime, although the criminal action is only executed by one member of the conspiracy.”¹⁴⁸⁴ Cassese believes that this mode is the “more widespread category.” This mode exists where parties to a crime agree to some acts “either when making the common plan or design or when such [a] plan materialized extemporaneously.”¹⁴⁸⁵ Additionally, “all participants shared the intent to commit the concerted crime, regardless of whether the accused was the one who actually physically perpetrated the crime.”¹⁴⁸⁶ Cassese’s take is that “all are responsible, whatever their role and position in carrying out the common criminal plan.”¹⁴⁸⁷ The problem here is one of detaching the act from its perpetrator(s). For a crime to be complete there must be an act, a criminal intention and a legal criminalisation of the act. People cannot share an intention of something that does not exist yet. Proving that people intended to achieve the same result should be approached with necessary caution, not lightly as the advocates of joint criminal enterprise purport to suggest.

According to Ohlin, the second scenario involves:

concentration camps, where all members have knowledge of the system of mistreatment in the camp and carry the intention to further that system of ill-treatment. In that case, each participant in the common design is criminally liable for all acts of mistreatment by other members of the concentration camp, even if the defendant has no knowledge or intent with regard to the specific crime or action.¹⁴⁸⁸

¹⁴⁸³ Cassese Antonio, Amicus Curiae Brief ..., op. cit., para. 21

¹⁴⁸⁴ Ohlin Jens David, “Three Conceptual Problems ...”, op. cit., p. 75

¹⁴⁸⁵ Cassese Antonio, Amicus Curiae Brief..., op. cit., para. 23

¹⁴⁸⁶ Ibidem, para. 23

¹⁴⁸⁷ Idem, para. 23

¹⁴⁸⁸ Ohlin Jens David, “Three Conceptual Problems...”, op. cit., p. 75

This second variant of joint criminal enterprise is called “systemic.” According to Cassese, it “applies to persons carrying out a task within a criminal design implemented in an institutional framework such as an internment or a concentration camp.”¹⁴⁸⁹ The reasoning is reduced to the fact that: “a person who knowingly and willingly contributes to the functioning of the system will be responsible for the offence even if he or she does not immediately participate in the commission of the offence, if the offence can be foreseen in the framework of the system.”¹⁴⁹⁰ The concentration camp example is an unnecessary over-generalization of World War II prosecutions to cases before the *ad hoc* tribunals. The reason is that, according to *Krnjelac*¹⁴⁹¹ Trial Chamber, “the only basis for the distinction between these two categories made by the *Tadic* Appeals Chamber is the subject matter with which those cases dealt, namely concentration camps during World War II.”¹⁴⁹² This Trial Chamber went ahead in pinpointing the reasons why this category was considered. It reasoned that:

Many of the cases considered by the *Tadic* Appeals Chamber to establish this second category appear to proceed upon the basis that certain organizations in charge of the concentration camps, such as the SS, were themselves criminal organizations, so that the participation of an accused in the joint criminal enterprise charged would be inferred from his membership of such criminal organization. As such those cases may not provide a firm basis for concentration or prison camp cases as a separate category.¹⁴⁹³

The architects and tenets of this category do not say whether it only applies to a concentration camp where prisoners are mistreated, or whether it applies to an institutional framework. If this variant concerns only an “internment camp where inmates are severely ill-treated and even tortured”¹⁴⁹⁴, what about other situations where people, not necessarily prisoners are ill-treated? Why choose concentration camps? What if this happens in a military barracks or in a school or at a workplace?

For example, it was revealed that at the *Walter Reed Army Medical Centre* in the U.S, wounded soldiers received ill-treatment.¹⁴⁹⁵ On 1 March 2007, Major General George W. Weightman, the general in charge of *Walter Reed* was relieved of his command after it appeared that soldiers

¹⁴⁸⁹ Cassese Antonio, Amicus Curiae Brief..., op. cit., para. 24

¹⁴⁹⁰ Vogel Joachim, “How to determine individual responsibility ...”, p. 158

¹⁴⁹¹ *The Prosecutor v. Milorad Krnjelac*, Judgment, Case No. IT-97-25-T, 15 March 2002

¹⁴⁹² *Krnjelac*, TC, para. 78

¹⁴⁹³ *Ibidem*

¹⁴⁹⁴ Cassese Antonio, Amicus Curiae Brief..., op. cit., para. 24

¹⁴⁹⁵ Sengheiser Jason, “Command responsibility for omission and detainee abuse in the “war on terror”, *Thomas Jefferson Law Review*, Vol. 30, Iss.2, 2008, pp. 693 – 721, p. 694

being treated as outpatients were living in dilapidated quarters and enduring lengthy waits for treatment.¹⁴⁹⁶ The following day, “Army Secretary Francis J. Harvey was forced to resign due to his handling of information that wounded soldiers were receiving poor treatment.”¹⁴⁹⁷ On 12 March, Lieutenant General Kevin Kiley, the Army Surgeon General was forced into retirement.¹⁴⁹⁸ It may be argued that the “bureaucratic bungling”¹⁴⁹⁹ at *Walter Reeds* does not violate any international law. Can it be said, at least, that these three officers were “discharging administrative duties indispensable”¹⁵⁰⁰ for the health of American soldiers? All three bear responsibility because “they have knowledge of the serious abuses being perpetrated and willingly take part in the functioning of the institution?”¹⁵⁰¹ Though the measures taken against the U.S. officers were disciplinary in nature, they could also be charged criminally pursuant to the second mode of joint criminal enterprise liability. Yet, this does not come out of Cassese’s analysis of the three categories of joint criminal enterprise.

For the third category of joint criminal enterprise, “the Accused must have intended to participate in and further the common criminal activity or plan, design or purpose of the individuals concerned, and to contribute to the joint criminal enterprise, or in any event to the commission of a crime by the group.”¹⁵⁰² In the course of committing the crime agreed upon, one or multiple participants commit an incidental crime not agreed upon by all the participants.

There are in fact two separate crimes, and two separate intentions. According to Cassese, “this mode of liability only arises if the participant, who did not have the intent to commit the ‘incidental’ offence, was nevertheless in a position to foresee its commission and willingly took the risk.”¹⁵⁰³ Vogel schematizes this mode by stating that “he who runs with the pack is responsible for what the pack will do.”¹⁵⁰⁴ Vogel argues, however, that “knowledge and intention are not sufficient to make a person individually responsible [...] you also need some contribution

¹⁴⁹⁶ *Ibidem*, p. 694

¹⁴⁹⁷ *Idem*, p. 694

¹⁴⁹⁸ *Id.*, p. 694

¹⁴⁹⁹ *Idem*, p. 695

¹⁵⁰⁰ Cassese Antonio, Amicus Curiae Brief ..., op. cit., para. 24

¹⁵⁰¹ *Idem*, para. 24

¹⁵⁰² *Tadic A*, para. 228; *Mucic et al. A*, para. 366

¹⁵⁰³ Cassese Antonio, Amicus Curiae Brief..., op. cit., para. 26

¹⁵⁰⁴ Vogel Joachim, “How to determine individual responsibility...”, op. cit., p. 158

in form of an act or an omission in breach of legal duty.”¹⁵⁰⁵ Ohlin agrees with this argument. In his view:

to suggest that defendants should be liable for the criminal acts of co-conspirators, even when these actions fall outside the scope of the original criminal agreement, is a strong and unwarranted conclusion, especially when the statute governing the ICTY restricted liability to planning, instigating, and aiding and abetting.¹⁵⁰⁶

Badar expresses this opinion as “a major source of concern with regard to the applicability of joint criminal enterprise III in the sphere of international criminal law [...] that under the objective and subjective standards, the participant is unfairly held liable for criminal conducts that he neither intended nor participated in.”¹⁵⁰⁷ In the opinion of Cassese, the “incidental criminal liability [is] based on foresight and risk [...]. The ‘extra-crime’ is the outgrowth of the common criminal purpose for which each participant is already responsible.”¹⁵⁰⁸ Cassese goes further and suggests that:

there is a causation link between the agreed-upon crime, the awareness in the secondary offender that an extra offence might be committed, his failure to prevent or stop it, and the occurring of such extra offence. The extra offence is predicated upon the agreed upon crime, and is made possible by the fact that the participant in the joint criminal enterprise who intends to perpetrate a further crime is not stopped by the participant who was cognizant of the likelihood that such further crime would be perpetrated (and did not abandon the primary criminal plan for fear that further crime be committed). It follows that the conduct of the secondary offender contributed in some significant way to the occurrence of the extra offence.¹⁵⁰⁹

It is quite clear that Cassese takes the criminal law far beyond its boundaries. What was a matter of “foresight,” “risk” and “likelihood” has been transformed in “awareness” and “cognizance.” There is nothing so speculative than assuming that because A has seen B carrying a weapon while both are on a robbery expedition; necessarily B, by that mere knowledge, “contributed in some significant way to the occurrence of the extra offence.” He might have some knowledge, but not so significant to foresee that B would use the weapon for another offence. Again, it is arguable if both have actually agreed to commit the offence or whether the agreement has been deduced from the concurrence of circumstances. Cassese himself calls it “a chance of predicting the commission of the un-concerted crime.”¹⁵¹⁰ The true nature of this mode of liability would

¹⁵⁰⁵ Ibidem, p. 156

¹⁵⁰⁶ Ohlin Jens David, “Three Conceptual Problems...”, op. cit., p. 76

¹⁵⁰⁷ Badar Elewa Mohamed, “Just Convict Everyone! – Joint Perpetration: From Tadic to Stakic and Back Again”, *International Criminal Law Review*, Vol. 6, Iss.2, 2006, pp. 293 – 302, p. 301

¹⁵⁰⁸ Cassese Antonio, Amicus Curiae Brief..., op. cit., para. 26

¹⁵⁰⁹ Idem, para. 26

¹⁵¹⁰ Cassese Antonio, “The proper limits of individual responsibility...”, op. cit., p. 113

instead be, according to Ambos¹⁵¹¹, another staunch advocate of joint criminal enterprise, “essentially based on the membership in the group pursuing the joint criminal enterprise and, as such, conflicts with the principle of culpability.”¹⁵¹²

Cassese’s construction of this third category of joint criminal enterprise is also founded on hypothetical situations taken from “domestic criminal law.”¹⁵¹³ The first such hypothesis is a “bank robbery”¹⁵¹⁴ in which, supposedly, robbers agreed to rob a bank and one of them carrying a gun kills a teller. Cassese finds that all are guilty of murder. The second hypothesis is a “gang of thugs”¹⁵¹⁵ who agrees to rob a bank with fake weapons with one of them carrying a real weapon; a fact known by one or some among the group. The third hypothesis is a “paramilitary unit”¹⁵¹⁶ that occupies a village with the purpose of detaining all the women and enslaving them.”During the operation one soldier rapes a woman. Cassese says that the rape is “in line with enslavement, since treating other human beings as objects may easily lead to raping them.”¹⁵¹⁷ In these situations, the *actus reus* and *mens rea* which are necessary elements of any crime, are missing.

Cassese’ approach confuses what *English Law* calls “conduct crimes” and “result crimes.”¹⁵¹⁸

Leigh suggests that:

the general rule, expressed in the maxim, *actus non facit reum nisi mens sit rea*, is that an offence can be committed only where criminal conduct accompanied by some element of fault, the precise fault element required depending upon the particular offence involved. There are nevertheless many offences of strict liability, in which no fault element need be proved.¹⁵¹⁹

Leigh further emphasises that “in theory, there can be no criminal liability based on *mens rea* alone, but if the *actus reus* element of a crime is defined very widely (as is sometimes the case) a ‘guilty mind’ may turn an objectively innocent act into the *actus reus* of that offence.”¹⁵²⁰

¹⁵¹¹ Ambos Kai, “Amicus Curiae...”, op. cit., para. 2

¹⁵¹² Idem, para. 2

¹⁵¹³ Cassese Antonio, “The proper limits of individual responsibility...”, op. cit., p. 113

¹⁵¹⁴ Cassese Antonio, Amicus Curiae Brief..., op. cit., para. 26

¹⁵¹⁵ Idem

¹⁵¹⁶ Id.

¹⁵¹⁷ Id.

¹⁵¹⁸ See Leigh Leonard et al, Criminal Law, Part A, [...], p. 3

¹⁵¹⁹ Ibidem, p. 3

¹⁵²⁰ Idem, p. 4

joint criminal enterprise in all its categories does not meet this rule. Under joint criminal enterprise category III, the so-called perpetrator has the intention of committing an agreed upon crime, but he does not have the intention of committing the foreseeable crime. Whether his intention can be deduced from his negligence or recklessness is disputable. He must only have acted in the realm of the reasonable man. Where both the *actus reus* and *mens rea* of the incidental crime are missing altogether, it would be hard to ascribe responsibility. All that is present is the so-called enterprise. To borrow again from Leigh, the matter needs to be clarified as follows:

The general rule is that, to be guilty of a criminal offence requiring *mens rea*, an accused must possess that *mens rea* when performing the act or omission in question, and it must relate to that particular act or omission. If, for example, D accidentally kills his wife in a car crash on Monday, the fact that he was planning to cut her throat on Tuesday does not make him guilty of her murder, even if he was thinking about the planned murder at the time of the accident, and even if he is subsequently delighted to find that his wife has died.¹⁵²¹

Cassese ignores this rule and brings more arguments to create more confusion of an already artificial and imperfect doctrine.

7.2.2. Joint criminal enterprise is a confusing, imperfect, artificial and fictitious mode of imputation of criminal liability

The advocates of joint criminal enterprise disagree among themselves about the concept itself, what its elements are and what its purpose is. There is only an apparent argumentative competition between them to design and maintain joint criminal enterprise survival. An important aspect of criminal law in general is its primary purpose of holding individuals accountable for their crimes.¹⁵²² The other aspect is to preserve “individual autonomy and development.”¹⁵²³ Hannah Arendt, commenting on *Eichmann’s* trial stated that: “the purpose of a criminal trial is to render justice, and nothing else; even the noblest ulterior motives [...] can only detract from the law’s main business: to weight the charges brought against the accused, to render judgment, and to mete out punishment.”¹⁵²⁴

¹⁵²¹ Id.

¹⁵²² Darcy Shane, op. cit., p. 379

¹⁵²³ Sistare C. T., *Responsibility and Criminal Liability*, op. cit., p. 11

¹⁵²⁴ H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994 [1963], at 253, cited in Darcy, op. cit., p. 379

Joint criminal enterprise in all its categories does not meet these criteria. Joint criminal enterprise denies especially the goal of justice and the recognition of personal freedom. To forcefully attempt to establish that people have been engaged in a criminal enterprise to be able to impute criminal responsibility to each one of them, robs them their freedom. Osiel suggests that those people:

might be ignorant of one's contributions to the enterprise and of their own role within its functioning, which may be entirely dispensable. The notion that such participants subscribe to a common purpose is itself often just as fictional, in that parties to it would likely define it differently in scope – temporally and spatially, in the reach of its aims or ambitions.¹⁵²⁵

Even in the real world where people compete by putting forward various ideas to build up a project, it is common that those people will not, indeed cannot:

uniformly share its avowed objectives, but rather employ it to their own ends – frequently at odds with official ones. To view their sundry activities – their assorted comings and goings – as reflecting a single, shared purpose, plan, or agreement is to miss all that is tragic and comic in the social life of organizations, a considerable portion.¹⁵²⁶

How does it come that people share intent in a fictitious criminal design, sometimes not known until it is established? This establishment is only designed to find the people who intend to continue further criminal activities. Yet the same people cannot share such intent in a visible and structured organization aiming at a good outcome.

Joint criminal enterprise is also a fictitious concept. It has been demonstrated how joint criminal enterprise category III grew up from hypothetical and unproven assumptions. In addition to this uncertainty the Trial Chamber in *Krnjelac* defined the existence of a joint criminal enterprise as follows:

A joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.¹⁵²⁷

There is nothing so confusing and uncertain than the content of this paragraph. First there is an affirmation that the enterprise exists in a form of an agreement though not expressed; this means that it is not traceable, especially when the prosecution drafts an indictment. This is the first

¹⁵²⁵ *Ibidem*, p. 29

¹⁵²⁶ *Idem*, p. 63

¹⁵²⁷ *Krnjelac*, TC, para. 80

fiction. The agreement needs not to have been reached at any time before the crime is committed. This may suggest that prosecutors and judges evoke the existence of a joint criminal enterprise from the moment that a crime has been committed by a plurality of perpetrators.

Frequently international prosecutors have charged crimes and imputed responsibility pursuant to joint criminal enterprise. Yet the prosecutor was waiting that such enterprise be inferred from the totality of evidence if that was the only reasonable inference available. The courts have reached different conclusions. This is the second legal fiction, unsupported by reality. Moreover, the existence of “an unspoken understanding” may be inferred from the circumstances of the commission of the crime only after having heard the full case, meaning at the close of the Prosecution and Defence cases. This is another fictitious situation and a very dangerous setting. The *Krnojelac* judgment states further that:

Even where a particular crime charged has not been specifically pleaded in the Indictment as part of the basic joint criminal enterprise, a case based upon the Accused’s participation in a basic criminal enterprise to commit that crime may still be considered by the Trial Chamber if it is one of the crimes charged in the Indictment and such a case is included in the Prosecution’s Pre-Trial Brief.¹⁵²⁸

This is quite an unreasonable and unsafe approach and development of law whereby every loophole is filed in view to get an accused found guilty. The Trial Chamber opened the can of worms for abuse of discretion by the Chamber itself, and by the Prosecutor. In this respect, Osiel remarks that “it is also true, as one Trial Chamber has speculated, that the prosecution deliberately injects a studied vagueness into the indictment’s delineation of the enterprise, in order to mould its case in a substantial way during the trial, according to how its evidence actually turns out.”¹⁵²⁹ Despite this nebulosity, the *ad hoc* tribunals apply joint criminal enterprise unabatedly.

7.2.3. The *ad hoc* tribunals’ application of joint criminal enterprise

The ICTY and the ICTR have been caught in a puzzle by the manufacture of the doctrine of joint criminal enterprise. At the ICTY, though the notion of common purpose was eventually apparent from the prosecution’s submissions at the outset, it was to be understood as nothing more than

¹⁵²⁸ *Krnojelac*, TC, para. 85

¹⁵²⁹ Osiel mark, *Making Sense of Mass Atrocity*, op. cit., p. 77

aiding and abetting. At the ICTR, the prosecution unsuccessfully attempted to prove the crime of conspiracy to commit genocide¹⁵³⁰, but it failed. Proving a crime and a mode of commission of the crime are quite different matters. When things did not work out, the prosecution moved to rely on the doctrine of joint criminal enterprise as a mode of commission, but the practice amounted more or less to an attempt to fit an elephant in a pigeon hole. Some cases decided by the *ad hoc* tribunals reveal that joint criminal enterprise's application remains practically inconsistent and normatively problematic. Haan writes that "the way some Chambers interpret joint criminal enterprise seems to fall outside the scope of the Statute."¹⁵³¹ All the misconceptions and misapplications of the doctrine have a source in its origin, namely the *Tadic* Appeals' case. Some of the scholarships that treated this case did not analyse the facts and the law in detail. Some aimed at only praising the concept, while few questioned it seriously. Those who praised the doctrine were only delighted to write and emulate in arguing the new concept without questioning its merit. It is therefore imperative to revisit the facts of the case before analysing how joint criminal enterprise was forcefully introduced.

7.2.3.1. The facts at the origin of joint criminal enterprise

The indictment against Dusko Tadic¹⁵³² alleged that on 14 June 1992, armed Serbs including the defendant entered the area of *Jaskici* and *Sivci* in *Opstina Prijedor*. They allegedly went house to house calling out residents and separating men from women and children.¹⁵³³ Without any further indications as to when and who, the indictment only states that the Armed Serbs killed five men named in the indictment in front of their homes. They also beat seven others and took them from the area to an unknown destination. Tadic was charged with the wilful killing as a grave breach of the Geneva Conventions; murder as a violation of the laws of war and as a crime against humanity; and wilfully causing great suffering or serious injury to body or health, cruel

¹⁵³⁰ See for example, *The prosecutor v. Théoneste Bagosora, Decision on the Prosecutor's request for leave to amend the Indictment*, Case No. ICTR-96-7-T, 12 August 1999. The prosecution theory of the case was that "the case against the accused formed part of an extremely complex investigation, which recently uncovered evidence of a conspiracy to commit genocide, involving the military, the government and political party officials."

¹⁵³¹ Haan Verena, *The development of the concept of Joint Criminal Enterprise...*, op. cit., p. 168

¹⁵³² *Tadic* Indictment, para. 12

¹⁵³³ *The Prosecutor v. Dusko Tadic, aka "Dule"*, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 342

treatment and inhumane acts.¹⁵³⁴ The Chamber heard evidence “regarding those events of 14 June 1992 coming from 6 witnesses, either surviving former residents of *Jaskici* and *Sivci* or who had sought refuge there.”¹⁵³⁵

Deciding whether *Tadic* killed or participated in the killing of the five victims, the Trial chamber was of the opinion that it cannot “on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men or any of them. Save that four of them were shot in the head, nothing is known as to who shot them or in what circumstances.”¹⁵³⁶

Moreover, the trial Chamber held that:

the bare possibility that the deaths of the *Jaskici* villagers were the result of encountering a part of that large force would be enough, in the state of the evidence, or rather, the lack of it, relating to their deaths, to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths. [...] it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered *Sivci*, for which the accused cannot be held responsible, that caused their death.¹⁵³⁷

It is of particular importance to note that the panel of judges that decided this case was composed of Judge Gabrielle Kirk McDonald, of the United States; Judge Ninian Stephen of Australia and Judge Lal Chand Vohrah of Malaysia. The Prosecution team was made of Mr. Grant Nieman, from Australia, as team leader.¹⁵³⁸ It also comprised three American prosecutors, namely “Lt. Col. Brenda Hollis of the Air Force Judge Advocate General’s Office; Major Michael Keegan of the Marine Corps Judge Advocate General’s Office; and Alan Tieger, who had successfully prosecuted the four Los Angeles police officers for beating of Rodney King.”¹⁵³⁹ There was also Commander William Fenrick, Director of Law for Operations and Training in the Canadian Department of Defense. The prosecution team consisted of three-fourths Americans.¹⁵⁴⁰

¹⁵³⁴ *Idem*, para. 343

¹⁵³⁵ *Idem*, para. 344

¹⁵³⁶ *Idem*, para. 373

¹⁵³⁷ *Id.*, para. 373

¹⁵³⁸ See Scharf P. Michael, *Balkan Justice...*, op. cit., p. 112

¹⁵³⁹ *Ibidem*, p. 112

¹⁵⁴⁰ Scharf notes that:

although the prosecution wanted to avoid the appearance that this was ‘an American show’, the fact that three-fourths of the prosecution team was American was unavoidable, explain Michael Keegan. ‘United States was the first country to provide lawyers to the Tribunal, and we were immediately assigned to the Prijedor/Omarska investigation, which was the first investigation undertaken. Since the *Tadic* case flows out of that investigation, it just made sense that we should be the trial attorneys.

Scharf P. Michael, op. cit., p. 112

Considering that all three judges came from a Common Law tradition as well as the entire prosecution team; all were fully familiar with the doctrine of common purpose. Yet, this mode of participation was not charged in the indictment...indeed it could not be because it was not provided for in the Statute. What had been pleaded was that Tadic was responsible under Article 7(1) of the Statute without any further clarification as to which mode of responsibility was involved.

But the prosecution theory of the case could clearly be read in the *Celebici*¹⁵⁴¹ case, decided 18 months later. In this case, the prosecution expressly relied on the “common purpose” doctrine, “the gist of which is said to be that a person who knowingly participates in a criminal venture with others may be held criminally liable for illegal acts that are the natural and probable consequences of their common purpose.”¹⁵⁴² It was the prosecution case that the accused, through his act(s) either aided or abetted in the commission of the unlawful act, or that he participated in a common enterprise or transaction which resulted in the death of the victim. The prosecution did not go outside of the Statute of the ICTY as did the Appeals’ Chamber in *Tadic*. Rather, they interpreted only one word: “committing.”

In *Tadic*, there was no evidence suggesting “who shot the victims and in what circumstances”¹⁵⁴³ as contended the Defence on appeal. In fact there was doubt that the accused could have benefited as a matter of general criminal law. The reasoning of the Trial Chamber was also correct on two grounds. First, there was doubt as to who killed and in what circumstances the victims died – as indicated above. Second, the Trial Chamber did not exclude the possibility that another group of armed men could have killed the victims. Even without this latter possibility, there was nothing whatsoever linking Tadic to the killing of the victims, not even a causal link. The circumstances of the case could therefore have involved many inferences. Yet, these inferences could only be arrived at after weighing all the evidence available provided that such inferences were the only ones possible and reasonable.

¹⁵⁴¹ *The Prosecutor v. Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Judgment, Case No. IT-96-21-T, 16 November 1998 (hereinafter *Mucic et al.*)

¹⁵⁴² *Mucic et al.*, TC, para. 322

¹⁵⁴³ *Tadic*, A, para. 176

The Prosecution lodged an appeal. In its submissions, it fully accepted the findings of fact at trial. It however contended that, firstly, “the Trial Chamber misdirected itself on the application of the law on the standard of proof beyond reasonable doubt.”¹⁵⁴⁴ Secondly, the Prosecution submitted that “the Trial Chamber misdirected itself on the application of the common purpose doctrine.”¹⁵⁴⁵ In the absence of precedents in the understanding of the concept of “common purpose”, the prosecution was not referring to anything else besides “aiding and abetting” as was its previous position in *Celebici*.¹⁵⁴⁶

Even the Appeals Chamber recognised that interpretation in its ruling in *Tadic*. It held that “Article 7(1) also sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute.”¹⁵⁴⁷

The Appeals Chambers’ err was rooted in its suggestion that Article 7(1) “covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.”¹⁵⁴⁸ It is also a misconception of Article 7(1) that “responsibility for serious violations of international humanitarian law is not limited to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders [...]”¹⁵⁴⁹

The Appeals’ Chamber clearly erred on a point of law when it understood that Article 7(1) read in the context of the Statute “does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop here.”¹⁵⁵⁰ The Appeals Chamber extended the Statute by only interpreting one word, namely “commission.” Why not others?

¹⁵⁴⁴ *Tadic*, A, para. 173

¹⁵⁴⁵ *Tadic*, A, para. 173

¹⁵⁴⁶ See *infra*, note 1546

¹⁵⁴⁷ *Tadic*, A, para. 186

¹⁵⁴⁸ *Tadic*, A, para. 188

¹⁵⁴⁹ *Tadic*, A, para. 189

¹⁵⁵⁰ *Tadic*, A, para.190

Without further ado, the Chamber concluded that “the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which the Appellant belonged killed the five men in *Jaskici*.”¹⁵⁵¹ This reasoning is unsupported by the facts of the case. It is only an inference drawn by the Appeals’ Chamber. Yet, it is not the only reasonable one from all the circumstances.

It is in fact from this arbitrary conclusion on facts, in the absence of any evidence that *Tadic* or the group to which he belonged actually killed any or all the five men, that the Appeals’ Chamber brainstormed the famous doctrine of joint criminal enterprise. From this wrong factual conclusion, the Appeals Chamber acknowledged that “there is no evidence”¹⁵⁵² that *Tadic* personally killed any of them. It nevertheless went on to question whether *Tadic* could be held criminally responsible as a member of the group which allegedly killed the five men.¹⁵⁵³ What can be said with respect to the panel of five judges¹⁵⁵⁴, who interpreted Article 7(1) of the ICTY, is that they went beyond their mandate. They transformed themselves into legislators, not interpreters of the law thereby creating a very dangerous precedent in law. They abused their powers and to a large extent diluted the law and created more confusion.

7.2.3.2. Inconsistent development of the joint criminal enterprise concept

The issue of concern here was the second leg of the prosecution’s contention in its *Tadic* appeal submissions. The prosecution’s argument was that “the gist of the common purpose doctrine is that if a person knowingly participates in a common activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose.”¹⁵⁵⁵ In fact, the prosecution was complaining that the *Tadic* Trial Chamber could have adopted the same reasoning as the Trial Chamber in *Celebici*. According to *Celebici*, and this was the only available understanding of “common purpose”, it was “a correct statement of the law [...] that

¹⁵⁵¹ *Tadic*, A, para. 177

¹⁵⁵² *Tadic*, A, para. 185

¹⁵⁵³ *Tadic*, A, para. 185

¹⁵⁵⁴ The Panel was composed of Judge Mohammed Shahabuddeen of Guyana, as President; Judge Antonio Cassese, of Italy; Judge Wang Tieya of China; Judge Raphael Nieto-Navia of Columbia and Judge Florence Ndepele Mwachande Mumba of Zambia.

¹⁵⁵⁵ *Tadic*, A, para. 175

aiding and abetting includes all acts of assistance that lend encouragement or support to the perpetration of an offence and which are accompanied by the requisite *mens rea*.”¹⁵⁵⁶ The Trial Chamber in *Celebici* remained in the boundaries of the ICTY Statute. At the outset, the Trial Chamber had set a modest, but clear and unambiguous understanding of Article 7(1) of the ICTY Statute; which goes as follows:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2 to 5 of the present Statute, shall be individually responsible for the crime. As concluded by Trial Chamber II in the *Tadic* Judgment, *there can further be no doubt that this corresponds to the position under international customary law*. However, it is incumbent upon the Trial Chamber to set out more specifically the degree of participation which is necessary for an individual to be considered sufficiently connected with an offence under the Tribunal’s jurisdiction so as to be held criminally responsible under the present provision.¹⁵⁵⁷ [Emphasis added]

Specifically, the Trial Chamber stated that holding individuals criminally responsible for their participation in the commission of offences in any capacity is in clear conformity with general principles of criminal law.¹⁵⁵⁸

The “several capacities” referred to here are the ones contained in Article 7(1) of the ICTY and Article 6(1) of the ICTR Statutes. This was also the understanding of the ICTR in *Akayesu*, which is the first case decided by this tribunal on 2 September 1998. It was the Trial Chamber’s view that “in addition to responsibility as principal perpetrator, the Accused can be held responsible for the criminal acts of others where he plans with them, instigates them, orders them or aids and abets them to commit those acts.”¹⁵⁵⁹ Precisely, the *Akayesu* Trial Chamber emphasised that: “the forms of participation referred to in Article 6(1) cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge.”¹⁵⁶⁰ Then the Trial Chamber defined each mode of liability.¹⁵⁶¹

At least three ICTR judgments, if not more, espoused the reasoning of the Trial Chamber in *Akayesu*. In *Musema*, which was decided on 27 January 2000, the Trial Chamber concurred with those previous rulings. It stated that “in the *Akayesu* judgment, the Chamber issued an opinion on

¹⁵⁵⁶ *Mucic et al*, TC, para. 328

¹⁵⁵⁷ *Muci et al.*, TC, para. 321

¹⁵⁵⁸ *Idem*

¹⁵⁵⁹ *Akayesu*, TC, para. 472; *Musema*, TC, para. 117

¹⁵⁶⁰ *Akayesu*, TC, para. 479

¹⁵⁶¹ *Akayesu*, TC, paras. 480 through 485; see also *Musema*, TC, paras 118 through 126; *Bagilishema*, TC, paras. 29 through 36

the principle of individual criminal responsibility under Article 6(1) of the Statute. The reasoning of this opinion is similar to that in *Tadic*, *Celebici*, *Kayishema* and *Ruzindana*, and *Rutaganda* judgments.”¹⁵⁶² The Chamber maintained that “the aforementioned case-law regarding the principle of individual criminal responsibility, as articulated in the *Akayesu* and *Rutaganda* Judgments, is sufficiently established and is applicable in the instant case.”¹⁵⁶³

In *Rutaganda*, the Trial Chamber, after reviewing some ICTR¹⁵⁶⁴ and ICTY¹⁵⁶⁵ cases, was “of the view that the position as derived from the above-mentioned case law, with respect to the principle of individual criminal responsibility, and as articulated, notably, in the *Akayezu* Judgment is sufficiently established and is applicable in the instant case.” Particularly, the Trial Chamber has held the position that “Article 6(1) of the Statute “sets forth the basic of principles of individual criminal liability, which are undoubtedly common to most national criminal jurisdictions.”¹⁵⁶⁶ This Trial Chamber emphasised however that “in addition to responsibility as principal perpetrator, the accused can be held responsible for the criminal acts of others where he plans with them, instigates them, orders them or aids and abets them to commit those acts.”¹⁵⁶⁷ In this case, moreover, it was the Trial Chamber’s understanding that “Article 6(1) thus appears to be in accord with the Judgments of the *Nuremberg* Tribunal which held that persons other than those who committed the crime, especially those who ordered it, could incur individual criminal responsibility.”¹⁵⁶⁸ The Chamber noted however that the elements of the offences “are inherent in the forms of participation *per se* which render the perpetrators thereof individually responsible for such crimes.

The moral element is reflected in the desire of the Accused that the crime be in fact committed.”¹⁵⁶⁹ According to the Chamber, the intention can even “be inferred from a certain

¹⁵⁶² *The prosecutor v. Alfred Musema*, Judgment and Sentence, Case No. ICTR-96-13-T, 27 January 2000, para. 112 (footnotes omitted)

¹⁵⁶³ *Musema*, TC, para. 113

¹⁵⁶⁴ *The Prosecutor v Clément Kayishema and Obed Ruzindana*, Judgment, Case No ICTR 95 – 1 – T, 21 May 1999; *The Prosecutor v. Jean-Paul Akayezu*, Judgment, Case No ICTR – 96 – 4 – T, 2 September 1998

¹⁵⁶⁵ *Tadic* and *Mucic et al.*

¹⁵⁶⁶ *Akayesu*, TC, para. 471

¹⁵⁶⁷ *Akayesu*, TC, para. 472 in fine.

¹⁵⁶⁸ *Akayesu*, TC, para. 474

¹⁵⁶⁹ *Akayesu*, TC, para. 476

number of factors.”¹⁵⁷⁰ Quite clearly stated is the Chamber’s firm opinion that “the forms of participation referred to in Article 6(1), cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge.”¹⁵⁷¹

This moral requirement was further interpreted in the *Kayishema* and *Ruzindana* cases as “a clear awareness that this participation will lead to the commission of a crime.”¹⁵⁷² In *Akayezu*, the Trial Chamber then elaborated on the meaning of every form of criminal participation under Article 6(1) of the ICTR Statute.¹⁵⁷³ In particular, the Trial Chamber defined “planning”, “as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.”¹⁵⁷⁴ Curiously, the Chamber did not define the term “committing.” The term was not defined in the *Bagilishema* case either. The Trial Chamber was content to conclude that “the actual perpetrator may incur responsibility for committing a crime under the Statute by means of an unlawful act or omission.”¹⁵⁷⁵

Interpreting Article 6(1), the Trial Chamber in *Kayishema* and *Ruzindana* was of the view that “it is necessary to consider the degree of participation required in the crimes delineated in Articles 2 to 4 of the Statute. Only then, and in light of the factual findings set out below, it is possible to identify whether either *Ruzindana* or *Kayishema* are individually criminally responsible pursuant to Article 6(1).”¹⁵⁷⁶

The Trial Chamber, in this case, alluded to a sort of doctrine of joint criminal enterprise without clearly stating it was actually one. It held that “the clear objective of the atrocities throughout Rwanda and the Kibuye Prefecture, in 1994, was to destroy [the] Tutsi population. The perpetrators of these crimes, therefore, were united in this common intention.”¹⁵⁷⁷ Further, the Trial Chamber argued that “the members of such a group would be responsible for the result of any act done in furtherance of the common design where such furtherance would be probable

¹⁵⁷⁰ *Akayesu*, TC, para. 478

¹⁵⁷¹ *Akayesu*, TC, para. 479

¹⁵⁷² *The Prosecutor v Clément Kayishema and Obed Ruzindana*, TC, para. 203

¹⁵⁷³ *Akayesu*, TC, para. 480 (planning), para. 481 (incitation), para. 482

¹⁵⁷⁴ *Akayesu*, TC, para. 480

¹⁵⁷⁵ *The Prosecutor v. Ignace Bagilishema*, Judgment, Case No. ICTR – 95 – 1A – T, 7 June 2001, para. 29

¹⁵⁷⁶ *Kayishema and Ruzindana*, TC, para. 192

¹⁵⁷⁷ *Kayishema and Ruzindana*, para. 203

from those acts.”¹⁵⁷⁸ It however remarked that “the accused need not necessarily have the same *mens rea* as the principal offender.”¹⁵⁷⁹ This holding contradicts the approach taken in *Tadic* where the Appeals Chamber was instead of the view that “it bears emphasizing that by taking the approach just summarized, the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder.”¹⁵⁸⁰

Though *Akayezu*, *Kayishema* and *Ruzindana* as well as *Rutaganda* are among the very first cases decided by the ICTR, it is obvious that judges could have resorted to joint criminal enterprise had it really been intended in the definition of “committing” under Article 6(1) of the Statute. Judges were also aware of *Tadic* which was decided on 15 July 1999. In the *Gacumbitsi* appeal case, which was decided on 7 July 2006, a dissenting appeal judge was of the view that:

For both *ad hoc* Tribunals, the only authority is their Statute. There can be no interpretation of the Statute beyond the wording of its provisions. Even within the scope of the Statute, any interpretation may not exceed what is recognized by international law. For a charge of criminal responsibility under the Statute, it is therefore necessary to plead a specific crime and a specific mode of participation as expressly contained in one of the provisions of the Statute.¹⁵⁸¹

The judge went on and held that:

looking at the wording of Article 6(1) of the ICTR Statute and Article 7(1) of the ICTY Statute, I first wish to point out that it would have been possible to interpret these provisions as following a monistic model (...) in which each participant in a crime is treated as a perpetrator irrespective of his degree of participation. This would have allowed the Prosecution to plead Article 6(1) of the ICTR Statute or Article 7(1) of the ICTY Statute, respectively, in their entirety without having to choose a particular mode of participation. It would have left it to the Judges to assess the significance of an accused’s contribution to a crime under the Statutes at the sentencing stage, thereby saving the Tribunal the trouble of developing an unnecessary “participation doctrine. [...] I wish to add my regrets that the *ad hoc* Tribunals have decided to not compel the Prosecution as matter of fairness to plead its case based on a specific mode of participation or to specify such at least at the end of the presentation of the Prosecution’s case.”¹⁵⁸²

This suggests that neither the ICTR Statute nor the ICTY Statute allows an interpretation of a specific mode of responsibility beyond the general ambit of the Statute. Interpreting “committing” as encompassing participation in a joint criminal enterprise goes beyond the ambit

¹⁵⁷⁸ *Kayishema and Ruzindana*, para. 204

¹⁵⁷⁹ *Kayishema and Ruzindana*, para. 205

¹⁵⁸⁰ *Tadic*, A, para. 211

¹⁵⁸¹ *Gacumbitsi v. The Prosecutor*, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, Case No. ICTR – 2001 – 64 – A, 7 July 2006, para. 5

¹⁵⁸² *Gacumbitsi v. The Prosecutor*, Separate Opinion of Judge Schomburg..., para. 6

of the Statute of both tribunals, and was therefore unwarranted. In support of this argument, Ohlin argues furthermore that:

the ICTY Statute makes explicit reference to planning, instigating, and aiding and abetting – collective modes of liability all. [...] But there is no warrant for extending liability to a joint criminal enterprise simply because the very nature of these crimes is collective. The question is not whether it is collective or not, but what kind of collective action is criminal under the ICTY Statute.¹⁵⁸³

Ohlin arrives at this conclusion after carefully considering all steps the Appeals Chamber took in that *Tadic* case. In this respect, he is confident, stating that:

Of course, the court does not rely on any single argument presented in the preceding text, but combines them to demonstrate that joint criminal enterprise was included in the ICTY Statute: the object and purpose of the statute, the collective nature of war crimes and the long history of conspiracy in international case law. However, none of this changes the fact that neither joint criminal enterprise, nor any of its predecessors, is mentioned in the ICTY Statute.¹⁵⁸⁴

Chouliaras does not even find the necessity of using the Statute as a legal foundation. His analysis is that “in the case of Joint Criminal Enterprise (JCE) it is senseless even to look at the Statute of the ICTY as this doctrine is the brainchild of some ingenious judges.”¹⁵⁸⁵ Bogdan also concurs that joint criminal enterprise “was read into the Statute by the [ICTY] Tribunal judges.”¹⁵⁸⁶

Chouliaras disagrees with the Appeals’ chamber reasoning in *Tadic*. He emphasises that:

according to the reasoning of the Judgment (*Tadic*), the combined interpretation of the Statute’s object and purpose and of the wording of Article 2 to 5 and 7(1) sustained the conclusion that the Statute does not exclude those modes of participation in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is carried out either jointly or by some members of this plurality of persons.¹⁵⁸⁷

Conversely, Jipping argues against legislating from the bench, which he terms “another name for judicial activism.”¹⁵⁸⁸ This is so because in his opinion it “destroys the proper end of judging, and therefore, is the greatest threat to judicial independence, the means to that proper end.”¹⁵⁸⁹

¹⁵⁸³ Ohlin Jens David, *Three Conceptual Problems...*, op. cit., p. 74

¹⁵⁸⁴ *Ibidem*, p. 74

¹⁵⁸⁵ Chouliaras Athanasios, “From ‘Conspiracy’ to ‘Joint Criminal Enterprise...’”, op. cit., p. 561; the *Karemera* Trial Chamber acknowledges this fact as well. It holds that “although Article 6(1) does not explicitly refer to ‘joint criminal enterprise’ (‘JCE’), the Appeals Chamber has held that participating in a JCE is a form of liability which exists in customary international law and that it is a form of ‘commission’ under Article 6(1)”; *The Prosecutor v. Edouard Karemera and Matthieu Ndirumpatse*, TC, para.1433

¹⁵⁸⁶ Bogdan Attila, “Individual Criminal responsibility...”, op. cit., p. 63

¹⁵⁸⁷ Chouliaras Athanasios, “*From ‘Conspiracy’ to ‘Joint Criminal Enterprise’*: ...”, op. cit., p. 562

¹⁵⁸⁸ Jipping L. Thomas, “Legislating from the Bench: the greatest threat to judicial independence”, op. cit., p. 146
¹⁵⁸⁹ *Ibidem*, p. 146

In *Semanza*, rendered on 15 May 2003, it became possible to sense an extension of individual criminal responsibility. According to the Chamber, “Article 6(1) reflects the principle that criminal liability is not incurred solely by individuals who physically commit a crime, but also extends to those who participate in and contribute to a crime in other ways, following principles of accomplice liability.”¹⁵⁹⁰ *Semanza* defined not only the objective elements of the modes of participation, but also the subjective elements of those modes.¹⁵⁹¹ It has been the consistent jurisprudence of the ICTR, at least up until 2004, that “for an accused to incur criminal responsibility pursuant to Article 6(1), it must be shown that his or her participation has substantially contributed to, or has had a substantial effect on, the completion of a crime under the Statute.”¹⁵⁹²

*Mpambara*¹⁵⁹³ may be among the first ever ICTR cases where an accused was allegedly liable under joint criminal enterprise.¹⁵⁹⁴ The indictment against him alleged that he “participated in a joint criminal enterprise whose object, purpose and foreseeable outcome was the destruction of the Tutsi racial or ethnic group throughout Rwanda.”¹⁵⁹⁵ *Mpambara* was allegedly liable under the basic form of joint criminal enterprise.¹⁵⁹⁶ In addition to defining other modes of liability, the Chamber also delineated the difference between joint criminal enterprise and aiding and

¹⁵⁹⁰ *Semanza*, TC, para. 377. In *Kajelijeli*, decided on 1 December 2003, the Trial Chamber adopted the same formula in a re-phrased manner.

Article 6(1) reflects the principle that criminal responsibility for any crime in the Statute is incurred not only by individuals who physically commit that crime, but also by individuals who participate in and contribute to the commission of a crime in other ways, ranging from its initial planning to its execution, as specified in the five categories of acts in this Article: planning, instigating, ordering, committing, or aiding and abetting.

Kajelijeli, TC, para. 757; see also *Kamuhanda*, TC, para. 588

¹⁵⁹¹ *Semanza*, TC, paras 380 through 389; see also *Kajelijeli*, TC, paras 761 through 769; *Kamuhanda*, TC, paras 592 through 600

¹⁵⁹² See *Kamuhanda*, TC, para. 590; *Kayishema and Ruzindanda*, AC, paras. 186 and 198; *Ntakirutimana and Ntakirutimana*, TC, para. 787; *Bagilishema*, TC, paras. 30 and 33; *Musema*, TC, para. 126; *Rutaganda*, TC, para. 43; *Kayishema and Ruzindanda*, TC, para. 199 and 207; *Akayesu*, TC, para. 477

¹⁵⁹³ *The prosecutor v. Jean Mpambara*, Judgment, Case No. ICTR-01-65-T, 11 September 2006

¹⁵⁹⁴ Others are *The Prosecutor v. André Rwamakuba*, Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Case No. ICTR-98-44-AR72.4, 22 October 2004 and *The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Judgment, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004.

¹⁵⁹⁵ *Mpambara*, TC, paras 13 - 14

¹⁵⁹⁶ *Mpambara*, TC, para. 15

abetting¹⁵⁹⁷ for the first time. The Chamber remarked however that the prosecution was confusing joint criminal enterprise and aiding and abetting. It held that:

The fact that the same material facts may prove both aiding and abetting and participating in a joint criminal enterprise does not diminish the importance of distinguishing between the two. To the extent that the Prosecution has, on some occasions in its submissions, suggested that the joint criminal enterprise is proven by aiding and abetting, the Chamber will ignore this legal characterization and consider whether the material facts show either that the accused participated in a joint criminal enterprise, or that the aided and abetted others in the commission of crimes.¹⁵⁹⁸

All allegations against Mpambara were dismissed and he was acquitted the same day.

Some ICTR cases did not develop a separate section on individual criminal responsibility as was initially the practice.¹⁵⁹⁹ Very few cases went on appeal with respect to individual criminal responsibility¹⁶⁰⁰, including under joint criminal enterprise. What the judges did when they interpreted “committing” under Article 7(1) of the ICTY Statute, finding that it encompasses participation in a joint criminal enterprise, is different from what the interpretation of a Statute should normally be. In *Celebici*, the Trial Chamber was of the opinion that:

the trial chamber is aware that the meaning of the word ‘interpretation’ in the context of statutes, [...] may be explained both in broad and in a narrow sense. In its broad sense, it involves the creative activities of the judges in extending, restricting or modifying a rule of law contained in its statutory form. In its narrow sense, it could be taken to denote the role of a judge in explaining the meaning of words or phrases used in a statute.¹⁶⁰¹

The interpretation of “committing” to mean “participation” in joint criminal enterprise falls afoul in terms of what is required of a judge. This may bring one to support Jipping’s argument that “judges thus threaten, and even reject, their own independence when they legislate from the bench, crossing the line of legitimate judicial power and exercising power belonging to other branches.”¹⁶⁰²

To wrap up with joint criminal enterprise, it is fair to argue that a generation of judges has taken the international criminal law far away from its boundaries, on a much unsecured and sliding side. More time and research will be needed to get things back on track. It has been shown that

¹⁵⁹⁷ *Mpambara*, paras 16 to 27 but particularly para. 17

¹⁵⁹⁸ *Mpambara*, TC, para. 37

¹⁵⁹⁹ See for instance *Ntakirutimana and Ntakirutimana*, TC; *Niyitegeka*, TC; *Nahimana et al.*, TC; *Gacumbitsi*, TC;

¹⁶⁰⁰ See *Jean de Dieu Kamuhanda v. The Prosecutor*, Judgment, Case No. ICTR-99-54A-A, 19 September 2005, paras 56 to 77

¹⁶⁰¹ *Mucic et al.*, para 158

¹⁶⁰² Jipping L. Thomas, “Legislating from the Bench:...”, op. cit., p. 158

all the scholarship referred to indicates that the *rationales* for including joint criminal enterprise are linked to the difficulties encountered in proving each one's participation in complex criminal situations. The contours of command responsibility, though in existence for quite a long time before joint criminal enterprise, are still debatable. An attempt in this regard follows.

7.3. Command or superior responsibility doctrine

Command responsibility “is central to the campaign to bring high-ranking civilian and military leaders charged with war crimes and crimes against humanity before the bars of justice.”¹⁶⁰³ The *ad hoc* tribunals apply a doctrine that evolved selectively and unevenly to impute responsibility to fallen enemy superiors, be they military or civilians, without a similar test to such superiors in victorious nations. This is particularly where the imbalances and inconsistencies in the application of the doctrine could be traced.

The history of the *Second World War* is replete with cases where Germans and Japanese were found guilty for the crimes committed by troops under their command. Most of the cases were adjudicated by the Americans applying their own laws. Other trials were held by American Allies in protracted international military tribunal fora. Americans and their Allies also committed crimes imputable to their commanders. They captured many prisoners of war; whom they abused. They killed and mistreated civilians. Yet, there is no record of command responsibility in these instances. A huge gap was normatively created and continues to evolve. Such a gap brings about a narrow view of the doctrine at the domestic level, while unnecessarily extending international prosecutions.

7.3.1. The early initiatives of holding superiors responsible for crimes committed by subordinates at domestic and international levels

Holding superiors responsible for the crimes committed by their subordinates goes back to 500 B.C. “Sun Tzu wrote in *Ping Fa* - “the Art of War” – about the duty of commanders to ensure

¹⁶⁰³ Lippman Matthew, “Humanitarian Law:...”, op. cit., p. 4 [footnotes omitted]

that subordinates conduct themselves with a certain level of civility in armed conflict.”¹⁶⁰⁴ In 1439 King Charles VII of France made a clear statement regarding the doctrine in “the Ordinance of Orleans.”¹⁶⁰⁵ In substance, the kings ordered that:

each captain or lieutenant [to] be held responsible for the abuses, ills, and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he brings the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offense, as if he has committed it himself and shall be punished in the same way as the offender would have been.¹⁶⁰⁶

This ordinance comprises all the necessary requirements to hold any superior responsible for crimes committed by his subordinates. It binds military officers as well as civilian superiors. It can apply at domestic and international levels likewise.

At the end of *World War I*, a Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties was established “to report on the responsibility for *World War I* and the breaches of the laws and customs of war committed by the German Empire and its allies.”¹⁶⁰⁷ Though no remarkable prosecutions followed, the commission had “made the unprecedented proposal that individuals responsible for these atrocities should be subject to

¹⁶⁰⁴ Levine Eugenia, “Command Responsibility: The *Mens Rea* Requirement”, *Global Policy Form*, 2005, Vol. 31, pp.1 – 12. For a detailed historical evolution of the concept of command responsibility see also Burnett D. Weston (Lieutenant Commander), “Command Responsibility and a Case Study of the Criminal Responsibility of Israel Military Commanders for the pogrom at Shatila and Sabra”, *Military Law Review*, Vol. 107, pp. 71 – 189, 1985; Peters C. William, “Adjudication Deferred: Command Responsibility for War Crimes and US Military Justice from *MY Lai* to *Haditha* and Beyond”, *Nationalities papers*, Vol. 37, No.6, 2010, pp. 925 – 952; Green C. Leslie, “International Criminal Law: Command Responsibility in International Humanitarian Law”, *Transnational Law and Contemporary Problems*, Vol. 5, Iss.2, 1995, pp. 319 – 371; Green C. Leslie, “Fifteenth Waldemar A. Soft Lecture in International Law”, *Military Law Review*, Vol. 175, 2003, pp. 309 – 384; Smidt L. Michael (Major), “Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military operations”, *Military Law Review*, Vol. 164, 2000, pp. 155 – 234; Lippman Matthew, “Humanitarian Law; the Uncertain contours of command responsibility”, op.cit., pp. 1 – 93; Stryszak Michal, “Command responsibility: How much should a commander be expected to know?”, *United States Air Force Academy Journal of Legal Studies*, Vol. 11, 2002, pp. 27 – 69; Boelaert-Suominen Sonja, “Prosecuting Superiors for Crimes Committed by Subordinates: a discussion of the first significant case law since the Second World War”, *Virginia Journal of International Law Association*, Vol.41, 2001, pp. 747 – 785. A comprehensive and abbreviated history of the doctrine is also found in Bassiouni M. Cherif, *Crimes Against Humanity: Historical evolution and contemporary application*, Cambridge University Press, 2011, pp. 530 - 560

¹⁶⁰⁵ Levine Eugenia, “Command Responsibility: ...”, op. cit., p.2

¹⁶⁰⁶ Quoted in Green C. Leslie, “Superior Orders and Command Responsibility”, *Military Law Review*, Vol. 175, 2003, pp. 309 – 385, p. 310

¹⁶⁰⁷ Lippman Matthew, “Humanitarian Law: The uncertain contours of Command responsibility”, op. cit., p. 4

criminal prosecution, regardless of rank and status.”¹⁶⁰⁸ It was also its view that “the immunity typically accorded to high-ranking officials under domestic doctrine was an expression of political self-interests which had no proper place in international law.”¹⁶⁰⁹ This was a good point of departure for a balanced approach domestically and internationally. Unfortunately this early attempt of judicial enforcement of the concept was “met with mostly uneven results.”¹⁶¹⁰

The American representatives opposed “the commission’s initial formulation which posited that civilian and military authorities should be liable for a failure to act, regardless of their degree of knowledge or capacity to prevent the commission of the crimes.”¹⁶¹¹ They insisted that “an official must have been aware of the criminal acts and have possessed the authority and power to prevent or to repress them; the duty or obligation to act was essential.”¹⁶¹² Their objection revolved around the abrogation of sovereign immunity and the extension of liability to heads of states. In their view “the essence of sovereignty was that a head of state was neither subject nor subordinate to foreign control.”¹⁶¹³

The American resistance may eventually be explained by either national pride or the assumption that “punishing military commanders has always been seen as having adverse consequences on the morale and dignity of [...] officers.”¹⁶¹⁴ On one side, Americans have always avoided as much as possible to punish their officers. For example, Brigadier-General Jacob Smith who commanded the US military campaign in the Philippines during the early 1900s¹⁶¹⁵ “ordered the death of any person over the age of 10 and the destruction of every enemy object. The subsequent court-martial merely admonished and sent him into early retirement.”¹⁶¹⁶ His deeds

¹⁶⁰⁸ Ibidem, p. 5

¹⁶⁰⁹ Lippman Matthew, op. cit., p. 5

¹⁶¹⁰ Peters C. William, “Adjudication Deferred:...”, op. cit., p. 929

¹⁶¹¹ Lippman Matthew, op. cit., p. 6

¹⁶¹² Ibidem, p. 6; see also Burnett D. Weston (Lieutenant Commander), “Command Responsibility and a Case Study...”, op. cit., p. 82

¹⁶¹³ Lippman Matthew, op. cit., p. 6 [footnote omitted]

¹⁶¹⁴ Bantekas Ilias, *Principles of direct and superior responsibility in International Humanitarian Law*, op. cit., p. 68. For a detailed account on how the U.S persistently shield its nationals from international accountability for war crimes and other legal violations yet using the UNSC to advocate for international criminal justice, see David P. Forsythe, “The UN Security Council and Response to Atrocities: International Criminal Law and the P-5”, *Human Rights Quarterly*, Vol. 34, No. 3, 2012, pp. 840 - 863

¹⁶¹⁵ Ibidem, pp. 68 - 69

¹⁶¹⁶ Idem, p. 69 [footnote omitted]

could have attracted command responsibility as Americans championed in the prosecution of other nationals using the doctrine. This attitude can eventually be explained by the vindictiveness against captured enemies.

7.3.2. World War II prosecutions marred by vindictiveness

The vindictiveness characterised the prosecution of World War II crimes. The accused were exclusively fallen enemy commanders who were captured and judged by the victorious powers. The majority were judged without due consideration of law. Yet the jurisprudence born out of those trumpeted judgments imposed itself as precedent. Later when the concept was codified in international treaties, like the Genocide Convention of 1948, the Geneva Conventions of 1949, the Additional Protocol I of 1977; the idea of vindictiveness and “victors’ justice” did not completely disappear in the minds of negotiators. *World War II* cases are, to a large extent, contestable not only on points of law, but also on facts and procedures in addition to their political connotation. The case of Japanese General Yamashita illustrates the tendency of that time.

7.3.2.1. The prosecution of General Tomuyuki Yamashita

General Tomuyuki Yamashita was a commanding officer of the Imperial Japanese Fourteenth Army in the Philippines from 9 October 1944 to 3 September 1945 when he surrendered to American forces. He assumed his command on 7 October 1944.¹⁶¹⁷ He found an already disintegrating force which he attempted to re-organise without success. His forces were shortly defeated by American troops.¹⁶¹⁸ In the meantime, a part of his forces had committed atrocities against civilians while the General was busy with the war.¹⁶¹⁹ On 25 September 1945 Yamashita was charged with being a war criminal. Two weeks later he was arraigned and served with a bill

¹⁶¹⁷ Reel A. Frank, *The case of General Yamashita*, The University of Chicago Press, 1949, p. 17

¹⁶¹⁸ Burnett D. Weston (Lieutenant Commander), “Command Responsibility and a Case Study...”, op. cit., p. 87

¹⁶¹⁹ Burnett writes that:

With respect to the command-and-control issue, the evidence indicated that Yamashita never came into physical contact with many of his units. They merely passed under his tactical command as the battle proceeded. Former aides and subordinates of Yamashita testified that he was too busy with the details of combat, supply, and reorganization of Japanese forces to know what was going on outside his own headquarters.

Ibidem, p. 90

of sixty-four particulars. His trial was set for October 29.¹⁶²⁰ The prosecution and defence teams were appointed 1 October 1945, less than a month after his surrender.¹⁶²¹ The proceedings went ahead uninterrupted until 7 December 1945 when the Military Commission found Yamashita guilty as charged and sentenced him to death by hanging.¹⁶²²

The defence appealed to the United States Supreme Court. From December 29, 1945, the defence had “little more than a week in which to prepare a brief and argument for the Supreme Court.”¹⁶²³ The Court heard arguments from the parties on 7 January 1946¹⁶²⁴ and handed down its decision on 4 February 1946¹⁶²⁵ confirming the Military Commission’s judgment. The defence petitioned for clemency to the President of the United States of America. Clemency was denied. On 23 February 1946, at three o’clock in the morning, at *Los Banos*, General Yamashita was hanged.¹⁶²⁶

Yamashita was charged for failing to prevent, terminate, or punish those of his subordinates who were committing war crimes in a widespread manner.¹⁶²⁷ Those crimes have been committed in a sector assigned to one Lieutenant General Yokoyama during the time Yamashita had departed *Manila* to go north.¹⁶²⁸ About 25,000 civilians were murdered pursuant to orders issued by Colonel Fujishige, a subordinate of Yokoyama. Yokoyama’s main force was far removed from Colonel Fujishige Headquarters. Yokoyama therefore gave “mission-oriented guidance to his colonel, but left the details of execution to his discretion.”¹⁶²⁹ Allegedly, the Filipino resorted to guerrilla tactics to attack the Japanese forces. An angered Colonel Fujishige decided, on his own authority, to declare war on the civilian population which he believed, had turned into guerrillas. They were therefore killed indistinctively. There were other killings of about 8,000 civilians in *Manila* and *Luzon*.¹⁶³⁰

¹⁶²⁰ Reel A. Frank, *The case of General Yamashita*, Op. cit., p. 76

¹⁶²¹ *Ibidem*, p. 13

¹⁶²² *Idem*, pp. 168 – 175, 302

¹⁶²³ *Idem*, p. 210

¹⁶²⁴ *Idem*, p. 212

¹⁶²⁵ *Idem*, p. 215

¹⁶²⁶ *Ibidem*, p. 239

¹⁶²⁷ Levine Eugenia, “Command Responsibility:...”, p. 3

¹⁶²⁸ Landrum D. Bruce (Major), “The Yamashita war crimes trial:...”, op. cit., p. 294

¹⁶²⁹ Landrum D. Bruce (Major), “The Yamashita war crimes trial:...”, op. cit., p. 294

¹⁶³⁰ *Ibidem*, p. 294

The judgment contained no finding of any order to commit, no knowledge of the crimes committed, and no condonation on General Yamashita's part. Crimes had been committed by his troops, and he had failed to provide effective control.¹⁶³¹ His conviction could not be justifiable by any provision of law. He was convicted of crimes for which he did not have the requisite *mens rea* and in which he did not participate.

The military commission consisted of three major generals and two brigadier generals; none of whom was a lawyer or had legal experience.¹⁶³² The commission members were bureaucratic officers without any combat experience. Therefore no one could understand and be humanely sympathetic to General Yamashita's difficulties with men who might have faced similar problems.¹⁶³³ The media reported that "the military commission came into the courtroom the first day with the decision already in its collective pocket."¹⁶³⁴ Yamashita's lawyers:

were intent on fighting for whatever modicum of justice might be available for their man. They objected to evidence that they considered improper; they attempted to invoke the safeguards accorded to an accused by congressional statutes, by international treaties, and by Anglo-Saxon judicial tradition. The members of the military commission were confused and irked. The only safe thing for the generals to do appeared to be to resolve all doubts against the defence.¹⁶³⁵

On appeal in the Supreme Court of the United States, eight justices studied the commission's judgment and remarked that it had been too unfair. Six of the justices declined competence to inquire into the matter. Two dissented; yet they were in the minority. Nothing legal was left in the case. It is difficult to conceive of how any principle or doctrine of law could be born out of such a case. Nevertheless, some writers have attempted to give credit to the judgment.¹⁶³⁶ This is where the problem lies.

¹⁶³¹ *Ibidem*, p. 174

¹⁶³² *Idem*, p. 41

¹⁶³³ *Idem*, p. 40

¹⁶³⁴ *Idem*, p. 41

¹⁶³⁵ Reel A. Frank, *The case of General Yamashita*, op. cit., p. 87

¹⁶³⁶ See for instance Stryszak Michal, "Command responsibility: How much should a commander be expected to know?" op. cit., pp. 27 – 69. He acknowledges the critics made by Yamashita's lawyer Frank Reel, and American Nuremberg Prosecutor Telford Taylor; yet he posits that "whether the five generals trying Yamashita were biased is debatable." (p. 42). Conversely he points out that, commenting on the High Command case: "the Allies held them under international auspices in a more judicial atmosphere than Yamashita's case." (p. 44). He even questions some aspects of the dissenting judges at the U.S. Supreme Court, Justices Murphy and Rutledge. According to him, the Yamashita case is commendable.

7.3.2.2. Prosecutions under Control Council Law No 10

At the conclusion of the Nuremberg trials, twelve more trials were held under the authority of *Control Council Law No. 10*.¹⁶³⁷ About 185 Germans who lost the war were prosecuted in each of the four zones of occupied Germany.¹⁶³⁸ Two important cases relied on command responsibility: the *Hostage* and *High Command* cases.

The “*Hostage case*”, better known as *United States v. Wilhelm List and others*¹⁶³⁹ grouped twelve German military officers. Marshal List was the commander-in-chief of the German Twelfth Army during the invasion of Greece and Yugoslavia. He had executive powers in the occupied territories. The accused were charged with murdering civilians in Albania, Greece and Yugoslavia; committing acts of devastation in Norway and in other countries¹⁶⁴⁰; and ordering the killing of surrendered combatants while denying basic rights to prisoners of war.¹⁶⁴¹

The factual allegations were that in September 1941, Field Marshal Keitel issued an order for the suppression of insurgent activities in the German occupied territories. Field Marshal List distributed those orders to his subordinate commanders for execution.¹⁶⁴² The *Hostage* case clarified important aspects of command responsibility.

The court established that a “ General who was in command of an occupied territory was accountable for the conduct of all of the units within the scope of the territory in question regardless of the chain of command.”¹⁶⁴³ In addition to military assignments, the commander was also entrusted with administrative functions including the safety and security of the civilian population.

¹⁶³⁷ Shelton Dinah, *War Crimes Trials*, Microsoft Student 2007 (DVD), Redmond, WA: Microsoft Corporation, 2006.

¹⁶³⁸ *Idem*

¹⁶³⁹ This case involved twelve German officers charged with crimes committed mostly in the Balkans during the period of German Occupation of the area. It lasted from 8 July 1947 until 19 February 1948. Basically the case dealt with the law of reprisal and hostages, but less command responsibility, see in this regard Stryszak Michal, “Command responsibility:...”, *op. cit.*, p. 51

¹⁶⁴⁰ Hendin E Stuart, “Command Responsibility and Superior Orders in the Twentieth Century – A century of Evolution”, *Murdock University Electronic Journal of Law*, Vol. 10, 2003, para. 53

¹⁶⁴¹ *Ibidem*, para. 53

¹⁶⁴² *Idem*, para. 54

¹⁶⁴³ Hendin E Stuart, “Command Responsibility...”, *op. cit.*, para. 55

The court held further that “a corps commander must be held responsible for acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about.”¹⁶⁴⁴ The case “established a broader theory of command responsibility by adopting an almost pure ‘should have known standard.’”¹⁶⁴⁵ The commander in this instance may be held responsible for anything that happened in his area of command, whether he is absent or present. “Absence and the constraints of time and resources were not recognized as defences.”¹⁶⁴⁶ The court accepted only one exception based on decisions that require independent decision-making.¹⁶⁴⁷ The *High Command* marks some slight differences.

The *High Command Case* or the *United States v. Wilhelm von Leeb and others*¹⁶⁴⁸ joined fourteen German officers. They were charged with war crimes and crimes against humanity “in connection with the ‘Commissar Order’, the ‘Barbarossa Order’, the ‘Jurisdiction Order’, the ‘Night and Fog Degree’, the ‘Hostages Order’, and the ‘Reprisal Order.’”¹⁶⁴⁹ The facts were the murder, ill-treatment of prisoners of war and of civilians in the occupied territories; the use of civilian and prisoners of war as slave labourers; and the instituting of co-operation between the military and SS in connection with the persecution, plunder and execution of Jews and others.¹⁶⁵⁰

A United States Military Tribunal held that “in order for a commander to be criminally liable for the action of his subordinates ‘there must be a personal dereliction’ which can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part tantamount to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.”¹⁶⁵¹ The case also comprised aspects of

¹⁶⁴⁴ Sengheiser Jason, “Command responsibility for omission...”, op. cit., p. 705, citing *United States v. Wilhelm List in 11 Trials of War criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, pp. 462 and 512 (1950)

¹⁶⁴⁵ Stryszak Michal, “Command responsibility:...”, op. cit., p. 51

¹⁶⁴⁶ see Lippman Matthew, “Humanitarian Law...”, op. cit., p. 28

¹⁶⁴⁷ Stryszak Michal, “Command responsibility:...”, op. cit., p. 51

¹⁶⁴⁸ The case involved 14 Germany officers including Field Marshal Wilhelm von Leeb. It was part of the Nuremberg subsequent proceedings. It lasted from 30 December 1947 until 28 October 1948. See in this respect, Stryszak Michal, *Command responsibility:...”, op. cit., pp. 44 - 45*

¹⁶⁴⁹ Hendin E Stuart, “Command Responsibility and Superior Orders...”, op. cit., para. 71

¹⁶⁵⁰ *Ibidem*, para. 71

¹⁶⁵¹ Levine Eugenia, “Command Responsibility:...”, op. cit., p. 3

executive commanders as in the *Hostage case*. It combined matters of personal responsibility for ordering criminal activities subsequently carried out by subordinates.

This case espoused a “slightly more restrictive theory of command responsibility than *Yamashita*, where there was less direct evidence that *Yamashita* knew of the crimes.”¹⁶⁵² The tribunal declined “to find a presumption of knowledge on the part of the territorial commander based only on the criminal acts themselves.”¹⁶⁵³ This was a setback in terms of the position taken in the *Hostage case*. The tribunal applied the standard of actual knowledge rather than constructive knowledge.

7.3.2.3. The Far Eastern prosecutions

The prosecution of Japanese suspected of war crimes were conducted by two distinct institutions; namely the “International Prosecution Section” and the “War Crimes Branch of the United States General Headquarters of the Armed forces in the *Pacific*.” The first took place in *Tokyo* under an international court, composed of career judges. The second were conducted in *Manila* and *Yokohama* under the auspices of military commissions. There are major differences between the two bodies.

The “International Prosecution Section”, similar to the Nuremberg IMT, intended to bring to justice the major Japanese war criminals.¹⁶⁵⁴ It “consisted of a panel of independent judges from eleven Allied nations.”¹⁶⁵⁵ The Tokyo Tribunal¹⁶⁵⁶ lasted from 3 June 1946 until 12 November 1948 and involved 28 former military and civilian Japanese leaders.¹⁶⁵⁷ The international prosecution afforded every conceivable procedural safeguard¹⁶⁵⁸ to the defendants; be they political leaders or military commanders. The bench was composed of brilliant and independent

¹⁶⁵² Stryszak Michal, “Command responsibility: ...”, op. cit., p. 50

¹⁶⁵³ Hendin E. Stuart, “Command Responsibility and Superior Orders...”, op. cit., para. 74

¹⁶⁵⁴ *Ibidem*, insert at p. 130

¹⁶⁵⁵ *Idem*, insert at p. 130; Hendin E Stuart, “Command Responsibility and Superior Orders...” para. 107

¹⁶⁵⁶ Also known as the International Military Tribunal for the Far East (IMTFE) or Tokyo Tribunal

¹⁶⁵⁷ Stryszak Michal, “Command responsibility:...” p. 54

¹⁶⁵⁸ Taylor Lawrence, *A Trial of Generals: Homma, Yamashita, MacArthur*, Icarus Press, South Bend, Indiana, 1981, p. 130

minds that strictly adhered to the rules of procedure and evidence.¹⁶⁵⁹ The defendants were represented by four competent Japanese counsels¹⁶⁶⁰, assisted by an Australian barrister¹⁶⁶¹, who was conversant with Common Law. The tribunal inevitably suffered from political pressure though in lower intensity. Taylor notes that “aside from establishing the proceedings, MacArthur took little part. The charges were specified in detail, and ample time was given [to] the defence for preparation of its case. In fact, the trials did not begin until May 3, 1946, and continued on for two-and-half years.”¹⁶⁶² The proceedings were a result of discussions between professional judges, acting independently, so to say. Nevertheless, legitimate criticisms of the *Tokyo* trials are still flowing. Boas, for example, draws attention to the fact that:

the findings of guilt at Tokyo relating to the doctrine of command responsibility are highly unsatisfactory. In particular, the Charter provides no clear statutory basis to bring such charges, the Tokyo judgment cited no authority in support of the its findings under this count, and the Tribunal’s treatment of the element of the doctrine – particularly with respect to knowledge and effective control – are sparse and contradictory.¹⁶⁶³

The military commission was a legal disaster in terms of its precedential authority. The Commission prosecuted suspects not considered “major” enough for the inclusion in the Tokyo trials.¹⁶⁶⁴ The judicial body of the latter consisted of U.S Army officers appointed by MacArthur.¹⁶⁶⁵ The commission was entirely controlled by the United States even though the tribunal established was composed of Australia, Canada, China, France, Great Britain, Netherlands, New Zealand, Russia, United States, India and the Philippines.¹⁶⁶⁶ Its headquarters was in Washington, with a nominal advisory body sitting in Tokyo. The commission was “primarily a political body [with] little or no investigative authority.”¹⁶⁶⁷ Its entire work was dictated by General Douglas MacArthur as the Supreme Commander for the Allied Powers.¹⁶⁶⁸ Its task was to investigate war crimes, collect and analyze evidence and arrange for the

¹⁶⁵⁹ Taylor Lawrence, *A Trial of Generals: ...*, op. cit., insert at p. 130

¹⁶⁶⁰ Yuki Tanaka, McCormack Tim and Simpson Gerry (eds), *Beyond Victors’s Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff Publishers, Leiden Boston, 2011, Foreword

¹⁶⁶¹ Id.

¹⁶⁶² Taylor Lawrence, op. cit., p. 130

¹⁶⁶³ Boas Gideon, “Command Responsibility for the failure to stop atrocities: the legacy of the Tokyo trial” in Yuki Tanaka, McCormack Tim and Simpson Gerry (eds.), *Beyond Victors’s Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff Publishers, Leiden Boston, 2011, pp.163 – 174, p. 165

¹⁶⁶⁴ Taylor Lawrence, *A Trial of Generals: ...*, op. cit., insert at p. 130

¹⁶⁶⁵ Idem.

¹⁶⁶⁶ Hendin E Stuart, “Command Responsibility and Superior Orders...”, op. cit., para. 89

¹⁶⁶⁷ Ibidem, para. 90

¹⁶⁶⁸ Idem, para. 90

apprehension of suspects. It also had the residual authority to determine who would be tried and which tribunals would undertake such proceedings.¹⁶⁶⁹

7.3.2.4. The legacy of the prosecutions following World War II

The judgments following *World War II*, especially the military commissions' trials need to be viciously criticised, even their legacy abandoned.¹⁶⁷⁰ A court's decision must not necessarily be taken as authoritative without in-depth analysis of all the circumstances, particularly the factual basis. There is a danger of transmitting a deadly virus with such jurisprudence.

Academics and researchers should be strong enough to name and shame neutrally and objectively any malpractices, rather than owing "some debt of gratitude"¹⁶⁷¹ to contestable precedents, as Boas suggests. Truly speaking Yamashita and other Japanese were found guilty by forcefully applying the concept of command responsibility. The prosecutions in the *Far East* were, according to Peters, a result of a fashioned "workable legal solution to the problem of international crime on a colossal scale."¹⁶⁷² Enemies have been captured or they had capitulated. So the question was, as Taylor rightly puts it: "what was to be done about these men publicly regarded as murderous villains, and their terrorist organizations?"¹⁶⁷³ No war crimes and atrocities committed by the Allied were ever prosecuted, whereas those of the Germans and Japanese were heavily punished. Command responsibility was heavily applied to the accused with a view to de-legitimise them. Allies also underscored their superiority.¹⁶⁷⁴

As Sengheiser notes, "a victor naturally wants to assign liability to the broadest range of offenders possible. Thus, as represented in cases such as Yamashita, the doctrine of command responsibility has, at times, been stretched beyond what interests of justice allow."¹⁶⁷⁵ But:

¹⁶⁶⁹ Hendin E Stuart, "Command Responsibility and Superior Orders...", op. cit., para. 91

¹⁶⁷⁰ See for instance Major Bruce Landrum saying that 'even in the United States courts, Yamashita has lost favor. It ever stood a strict liability standard, that strict standard never has been enforced again.' Landrum D. Bruce (Major), "The Yamashita war crimes trial:...", op. cit., p. 300

¹⁶⁷¹ Boas Gideon, "Command Responsibility for failure...", op. cit., p. 173

¹⁶⁷² Peters C. William, "Adjudication Deferred:...", op. cit., p. 929

¹⁶⁷³ Telford Taylor, *The Anatomy of the Nuremberg Trials*, op. cit., p. 25

¹⁶⁷⁴ Sengheiser Jason, "Command responsibility for omission...", op. cit., p. 718

¹⁶⁷⁵ *Ibidem*, p. 718

when applied to one's own forces, it would be detrimental to these interests for senior military leaders to be criminally charged for allowing their subordinates to commit illegal acts in cases where the senior leaders' responsibilities is too attenuated. Such liability would de-legitimize the entire undertaking of military discipline. So when command responsibility is applied to one's own forces, there is an interest in limiting the scope of liability.¹⁶⁷⁶

This controversy proved detrimental to the proper evolution of the doctrine of command responsibility. Many crimes have gone unpunished. They include the atomic destruction by the USA of the cities of *Hiroshima* and *Nagasaki*, the mass firebombing of *Dresden* by Allied Forces, the firebomb attacks by Allied Forces on *Tokyo* and *Kobe*¹⁶⁷⁷, and the 1950 *No Gun Ri* tragedy in which US troops gunned down inhabitants of a village in the early days of the *Korean War*.¹⁶⁷⁸ Other examples of double standard are, according to Anderson and cie:¹⁶⁷⁹

The massacre at My Lai of unarmed Vietnamese civilians, mostly women and children, by US soldiers in 1968; the Bloody Sunday massacre of 1972, in which British soldiers shot down a group of Irish civil rights protesters; atrocities committed during the Indonesian occupation of East Timor from 1975 until 1999; and the massacres of hundred of Arab refugees at Sabra and Shatila, carried out in September 1982 by Lebanese militias, with the support of the Israel forces.¹⁶⁸⁰

The list becomes only too troubling with the Israel military killing of civilians at *Kafr Qassem* in 1956¹⁶⁸¹, and the ill-treatment of prisoners at *Abu Ghraib* in Iraq by American occupation forces, described as "hell on earth."¹⁶⁸² The American "record shows that senior US military commanders have repeatedly and systematically avoided courts-martial and formal adjudication of serious war crime allegations since *My Lai* and the reawakening of responsibility for these international crimes that catastrophe supposedly engendered."¹⁶⁸³

¹⁶⁷⁶ *Idem*, p. 719

¹⁶⁷⁷ For a repertoire of crimes and atrocities committed in history, and particularly during *World War II*, see Anderson Janice, Williams Anne & Head Vivian, *War Crimes and atrocities*, op. cit.

¹⁶⁷⁸ *Ibidem*, p. 21

¹⁶⁷⁹ *Idem*, p. 21

¹⁶⁸⁰ *Idem*, p. 27; see also Hendin E Stuart, "Command Responsibility and Superior Orders...", op. cit., paras 122 – 135 (*My Lai*); paras 142 – 166 (*Shabra and Shatilla*). For a detailed analysis of responsibility in the *Shatila* and *Sabra* massacre, see Burnett D. Weston (Lieutenant Commander), "Command Responsibility and a Case Study...", op. cit.

¹⁶⁸¹ Hendin E. Stuart, "Command Responsibility and Superior Orders...", op. cit., paras 116 - 121

¹⁶⁸² For a full account of the inhumane conditions of detainees at *Abu Ghraib* detention in Bagdad, see, Mestrovic G. Stjepan, *The Trials of Abu Ghraib: an Expert Witness Account of Shame and Honor*, Paradigm Publishers, Boulder and London, 2007

¹⁶⁸³ Peters C. William, "Adjudication Deferred:...", op. cit., p. 927

7.3.3. American forces' massacre at My Lai in South Vietnam on 16 March 1968

The massacre at *My Lai* in South Vietnam in 1968 is a telling example of the domestic resistance to a proper application of the doctrine of command responsibility. It furthermore explains the overstating of the doctrine by international criminal courts. Peters recalls the facts surrounding this massacre as follows:

On the morning of 16 March 1968, Task Force Barker of the US Army's American Division murdered approximately 500 unarmed and compliant non-combatant civilians in the village of Son My in the Republic of South Vietnam. Victims included numerous women, children, and elderly men. [...] along with unlawful executions that day, other wanton crimes included 'group acts of ...rape, sodomy, [and] killing of detainees. They further included the killing of livestock, destruction of crops, closing of wells, and the burning of dwellings within several sub-hamlets.¹⁶⁸⁴

The massacre gave rise to four separate criminal prosecutions. First Lieutenant William Calley, a platoon leader at *My Lai*, was charged with participating in the murder and was convicted by an American military court-martial.¹⁶⁸⁵ In fact, the lieutenant has been actively involved in the killings of many unarmed civilians. He was therefore not prosecuted under the doctrine of command responsibility.

Captain Ernest Medina was the commander of the company to which *Calley's* platoon belonged. A day before, he ordered his company to destroy the village by burning the hooches, killing the livestock, closing the wells and closing the food crop.¹⁶⁸⁶ Medina also instructed his troops to "remember all the buddies they had lost. It was time to settle the score with those responsible for the misery and death Charlie Company had suffered. For what was left of 'the best company in Hawaii', it was time for revenge."¹⁶⁸⁷ Calley testified that his commander told them "to make sure there was no one left alive in My Lai."¹⁶⁸⁸ Medina was charged with five criminal offenses; four of which arose out of his own activities and one arising from the activities of his

¹⁶⁸⁴ Peters C. William, "Adjudication Deferred:...", op. cit., p. 933; see also Burnett D. Weston (Lieutenant Commander), "Command Responsibility and a Case Study...", op. cit., pp. 71 – 189, 1985 writing that "on 16 March 1968, American troops, acting as a unit under orders, engaged in widespread and indiscriminate killing of unarmed, unresisting Vietnamese civilians consisting almost exclusively [of] old men, women, and children." p. 121

¹⁶⁸⁵ Burnett D. Weston (Lieutenant Commander), "Command Responsibility and a Case Study...", op. cit., p. 121

¹⁶⁸⁶ Belknap R. Michael, *The Vietnam War on Trial:...*, op. cit., p. 58 [quoting Medina's testimony of orders he gave his company a day before the massacre]

¹⁶⁸⁷ Belknap R. Michael, *The Vietnam War on Trial:...*, op. cit., p. 58

¹⁶⁸⁸ *Ibidem*, p. 58

company.¹⁶⁸⁹ According to Burnett, evidence was available to establish “the illegality of the deaths but failed to link Medina to the issuance of illegal orders prior to or during the assault on *My Lai*.”¹⁶⁹⁰ On command responsibility, the trial judge instructed that the jury should consider whether Medina has actual knowledge of the crimes allegedly committed or about to be committed by his troops, and whether he failed to act.¹⁶⁹¹ Strikingly, the trial judge advised that “mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow the inference of knowledge.”¹⁶⁹² Medina was subsequently acquitted of all charges.

In considering the acquittal decision, Green observes, however, that “it is difficult to conceive how an officer present at the scene when a breach is being committed could not be aware of that fact. It might even be felt that lack of “knowledge” in such circumstances amounts to a criminal indifference equivalent to a failure to exercise proper command.”¹⁶⁹³ The standard adopted in Medina has been severely criticized by many American scholars, among them Clark who concluded that “the ‘actual knowledge test’, in a context like *My Lai*, is an invitation to the commander to see and hear no evil. It is not consistent with a serious effort to make the commands structure responsive to the humanitarian goals involved.”¹⁶⁹⁴ Clark goes on to characterise the standard as “a ‘protective attitude’ adopted in view to exonerate Medina, coupled with the failure to prosecute the high-ranking officers responsible for planning, supervising and subsequently concealing the *My Lai* massacre.”¹⁶⁹⁵

Medina’s immediate superior, Colonel Oren Henderson, was also tried and found not guilty of all charges. This is troubling because, “during an aerial reconnaissance of the objective the day before the attack, the task force commander informed [Medina] that they had permission to destroy villages, burn hooches, kill livestock, close wells, and destroy food crops.”¹⁶⁹⁶ Major

¹⁶⁸⁹ Burnett D. Weston (Lieutenant Commander), “Command Responsibility and a Case Study...”, p. 121

¹⁶⁹⁰ *Ibidem*, p. 122

¹⁶⁹¹ *Idem*, p. 123

¹⁶⁹² *Idem*, p. 123

¹⁶⁹³ Green C. Leslie, War Crimes, Crimes against Humanity, and Command Responsibility, <http://www.nwc.navy.mil/press/Review/1997/spring/art2sp97.htm>, accessed on 05 April 2004

¹⁶⁹⁴ Lippman Matthew, “Humanitarian Law:...”, *op. cit.*, p. 39 [footnotes omitted]

¹⁶⁹⁵ *Ibidem*, p. 40

¹⁶⁹⁶ Belknap R. Michael, *The Vietnam War on Trial...*, *op. cit.*, p. 61

General Samuel Koster and Brigadier General George Young, and the unit's chief of staff, Colonel Nels Parson¹⁶⁹⁷ avoided prosecution that would have determined whether their actions were criminal. Major General Koster, the commanding general of the Infantry Division to which Medina's company was attached was informed of the death of about 128 civilians with only two US soldiers killed on the day of the killing or shortly thereafter.¹⁶⁹⁸ Among other information at his disposal, he also received a report that a helicopter pilot had observed what he considered to be indiscriminate firing by troops from Captain Medina's company.¹⁶⁹⁹ Yet he failed to order a proper follow up investigation. In fact when the general received the report, he instructed Colonel Henderson to initiate an investigation into the matter. "That inquiry", according to Burnett, "constituted a self-investigation by the commander of the unit involved, an individual whose professional career concerns might interfere with his objectivity."¹⁷⁰⁰ The results of such an investigation were made verbally concluding that "the allegations of untoward conduct by American troops were unfounded."¹⁷⁰¹ Later, after some complaint from the Vietnamese authorities, "a brief, undocumented report was submitted which concluded that the allegations in the leaflet were without substance."¹⁷⁰² General William Westmoreland, the American Military Commander in Vietnam was charged pursuant to the complaint of a line soldier involved in the massacre. The charges were also dismissed by the Secretary of the Army. The reason for dismissal was that Westmoreland did not know of the events at *My Lai* until a year after the massacre when he initiated an inquiry.¹⁷⁰³

My Lai massacre clearly shows the American biased approach to command responsibility when their own forces are involved. The problem since Vietnam is not, according to Peters, that "legal advisors in the armed services do not fully grasp the applicable law. Neither is there a lack of genuine concern among some in leadership positions about the importance of adhering to law of war principles."¹⁷⁰⁴ The breakdown is brought by the military institution itself whose legal

¹⁶⁹⁷ Peters C. William, op. cit., p. 934

¹⁶⁹⁸ Burnett D. Weston (Lieutenant Commander), "Command Responsibility and a Case Study...", op. cit., p. 125

¹⁶⁹⁹ *Ibidem*, p. 125

¹⁷⁰⁰ *Idem*, p. 125

¹⁷⁰¹ *Idem*, p. 126

¹⁷⁰² *Idem*, p. 126

¹⁷⁰³ *Idem*, p. 127

¹⁷⁰⁴ *Ibidem*, p. 927

experts are also officers in the forces. It is quite embarrassing if the situation is to remain as such. Senior officers will continue to manipulate the law for their own protection from prosecution. The solution to the problem must be a deep institutional reform of the whole system of military criminal justice. While military matters may be better addressed by military personnel, cases where senior commanders are implicated need to be dealt with by mixed military legal and civilian experts. In any case, the system should ensure that anyone involved does not play any role in military criminal investigations and prosecutions.

7.3.4. The application of the concept of command responsibility before the *ad hoc* tribunals

7.3.4.1. ICTY re-confirmation of the concept of command responsibility

*Celebici*¹⁷⁰⁵ is the first ICTY case which examined the concept of command responsibility. There were four defendants in this case: Esad Landzo, a guard at the *Celebici* prison-camp¹⁷⁰⁶; Hazim Delic and Zdravko Mucic who worked in the camp as its commanders¹⁷⁰⁷; Mucic who was the the commander; and Delic who was the deputy commander from May to November 1992, when he replaced Mucic as commander. The fourth defendant Zejnil Delalic allegedly “exercised authority over the *Celebici* prison-camp in his role, first as coordinator of the Bosnian Muslim and Bosnian Croat forces in the area, and later as Commander of the First Tactical Group of the Bosnian Army.”¹⁷⁰⁸ The indictment specifically charged Mucic and Delalic for crimes committed by their subordinates, including those alleged to have been committed by Landzo and Delic.¹⁷⁰⁹ The last two were charged with individual criminal responsibility pursuant to Article 7(1).¹⁷¹⁰ Other counts charge Delic as a superior with command responsibility. This case is quite important in re-visiting the concept of command responsibility and setting out new criteria for its appreciation.

¹⁷⁰⁵ *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Judgment, Case No. IT-96-21-T, 16 November 1998

¹⁷⁰⁶ *Mucic et al.*, para. 4

¹⁷⁰⁷ *Mucic et al.*, para. 4

¹⁷⁰⁸ *Mucic et al.*, para. 4

¹⁷⁰⁹ *Mucic et al.*, TC, para. 5

¹⁷¹⁰ *Mucic et al.*, TC, para. 5

Without going into the details of this lengthy case, it suffices to underscore one of the most acclaimed rulings of the Trial Chamber which sets the doctrine in motion again. The Chamber held that “where the superior either knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit [...] crimes”¹⁷¹¹; he may be held criminally liable. The Chamber reaffirmed the three elements of command responsibility, (1) the existence of a superior-subordinate relationship; (2) the superior knew or had reason to know that the criminal act was about to be¹⁷¹² or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.¹⁷¹³

Despite the controversial or insufficient approaches adopted by some Trial Chambers subsequently, especially before the ICTR, the principle is that military and the superiors’ authorities may incur command responsibility. The only question is therefore twofold: who exactly is that superior who is sought after for the purpose of ascribing criminal responsibility, and what degree of control must he wield in this respect.¹⁷¹⁴ Particularly with the latter concern, the ICTY has expressed in *Aleksovski* that “the level of control required to establish that the person against whom command authority is attributed has however been the subject of differing interpretations.”¹⁷¹⁵ An ICTR trial Chamber took another approach in the *Akayesu* case.

The Indictment against Jean-Paul Akayesu states that he was “bourgmestre of [the Taba] commune from April 1993 until June 1994.”¹⁷¹⁶ It further indicates that “as bourgmestre, [he] was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the

¹⁷¹¹ *Mucic et al.*, TC, para. 342

¹⁷¹² This formulation is from Williamson. See Williamson A. Jamie, “Command responsibility in the case law of the International Criminal Tribunal for Rwanda”, *op. cit.*, p. 366

¹⁷¹³ Ambos, *op. cit.*, p. 161, *The Prosecutor v. Radislav Krstic*, Judgment, Case No. IT-98-33-T, 02 August 2001 and generally in all cases in which this form of responsibility is raised.

¹⁷¹⁴ Williamson uses the terms “degree and nature of authority and control wielded by the individual.” See Williamson A. Jamie, “Command responsibility in the case law of the International Criminal Tribunal for Rwanda”, *op. cit.*, p. 367

¹⁷¹⁵ *The Prosecutor v. Zlatko Aleksovski*, Judgment, Case No. IT-95-14/1-T, 25 June 1999, para. 77

¹⁷¹⁶ Akayesu Indictment, para. 3 as reproduced in the judgment

communal police, as well as any gendarmes put at the disposal of the commune.”¹⁷¹⁷ At trial, it was held that:

in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in article 6(3), remains contentious. Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.¹⁷¹⁸

The Trial Chamber relied on a dissenting opinion of Judge Röling in the *Hirota* case. In this case, the dissenting judge argued that:

Generally speaking, a Tribunal should be very careful in holding civil government officials responsible for the behavior of the army in the field. Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for omissions. Considerations of both law and policy, of both justice and expediency, indicate that this responsibility should only be recognized in a very restricted sense.¹⁷¹⁹

All that can be said is that *Röling’s* dissent needs to be placed in the special circumstances of *Hirota*, who, as a Minister of Foreign Affairs of Japan had no direct link with the Army that misbehaved in the field. He only participated in cabinet meetings, and had even raised the issue of atrocities committed. The majority, in seeking to impute responsibility to him extrapolated deeper and held that “he was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.”¹⁷²⁰ While *Hirota’s* responsibility is based on omission, there is nothing available which suggests that those who committed atrocities were his subordinates *de jure* or *de facto*. This is the problem that has been raised throughout with respect to all the prosecutions following World War II where very little or insufficient evidence was enough to convict those apprehended.

The Chamber in *Akayesu* could have approached the issue looking at all available jurisprudence that existed at the time of the judgment delivered on 2 September 1998. It is not, as suggests Williamson, an “apparent reticence to extend the principle of superior responsibility beyond military commanders.”¹⁷²¹ In reality it is a great failure to thoroughly research and consistently

¹⁷¹⁷ Akayesu Indictment, para. 4 as reproduced in the judgment

¹⁷¹⁸ *Akayesu*, TC, para. 491

¹⁷¹⁹ Cited in *Akayesu*, TC, para. 490

¹⁷²⁰ Cited in *Akayesu*, TC, para. 490

¹⁷²¹ Williamson A. Jamie, “Command responsibility...”, *op. cit.*, p. 367

apply the doctrine as it stood when *Akayesu* was decided. Unfortunately, the same legal error re-appeared in *Musema*¹⁷²² case decided on 27 January 2000. It is worthy to note that the Trial Chamber that decided *Akayesu* was composed of the same judges who decided *Musema* on 27 January 2000.¹⁷²³ The Trial Chamber held that “the principle enunciating the responsibility of command derives from the principle of individual criminal responsibility as applied by the Nuremberg and Tokyo Tribunals. It was subsequently codified in Article 86 of the Additional protocol I of 8 June 1977 to the Geneva Conventions of 1949.”¹⁷²⁴ Without further ado, the Trial Chamber then went on to say that “it is significant to note that there are varying views regarding the *mens rea* required for command responsibility.”¹⁷²⁵

Out of a dissent of Judge Röling in the *Hirota* case, without any other authoritative precedent, the Trial Chamber crafted a rule of general application. The trial chamber position was wrong in theory because, according to Wu and Yong-Sung “there does not seem to be any compelling reason why promoting responsible behaviour by civilian leaders is a less important concern than with respect to military leaders.”¹⁷²⁶ Even though there is no much precedent and treaty codification of civilian command responsibility, it does not follow that what constitutes a fair duty in the civilian context is less obvious in contrast to the duties of commanders.¹⁷²⁷

The Trial Chamber could have explored more details regarding how the principle of command responsibility was actually applied at Nuremberg and Tokyo. The *ad hoc* tribunals had also some precedents already available that properly interpreted the doctrine, particularly *Kayishema and Ruzindana*¹⁷²⁸, *Mucic et al.*¹⁷²⁹, *Aleksovski.*¹⁷³⁰ All were decided before *Musema*.

¹⁷²² *Musema*, TC.

¹⁷²³ They were Judges *Laïty Kama*, of Senegal; Judge *Lennart Aspegren* of Sweden and Judge *Navanethem Pillay* of South Africa.

¹⁷²⁴ *Musema*, TC, para. 128

¹⁷²⁵ *Musema*, TC, para. 129; see same wording in *Akayesu*, TC, para. 488

¹⁷²⁶ Wu and Yong-Sung (Jonathan) Kang, “Criminal liability for the actions of subordinates – the doctrine of command responsibility and its analogues in United States Law”, *Harvard International Law Journal*, Vol. 38, Iss.1, 1997, pp. 272 – 297, p. 292

¹⁷²⁷ *Idem*, p. 292

¹⁷²⁸ *Kayishema and Ruzindana*, TC

¹⁷²⁹ *Mucic et al.*, TC.

¹⁷³⁰ *Aleksovski*, TC, para. 75

Firstly, in *Mucic et al.*, which was decided on 16 November 1998, the Chamber recognises, from the language of Article 7 (2) and 7(3) of the ICTY Statute¹⁷³¹, that the application of the doctrine “extends beyond the responsibility of military commanders to also encompass political leaders and other civilian superiors in position of authority.”¹⁷³² According to the Chamber, such an interpretation “of the scope of Article 7(3) is in accordance with the customary law doctrine of command responsibility.”¹⁷³³ The Chamber more specifically referred to the prosecution and conviction of civilian leaders by the Tokyo Tribunal under this doctrine, especially Koki Hirota, a former Japanese Foreign Minister¹⁷³⁴; Hideki Tojo, Prime Minister and Mamoru Shigemitsu, Foreign Affairs Minister.¹⁷³⁵ The Trial Chamber relied on other similar cases held in occupied Germany, like the *Roehling* case. But this latter case could have been properly addressed as one of aiding and abetting. A passage quoted in *Mucic et al.* allows such a conclusion. It reads:

Herman Roehling and the other accused members of the Directorate of the Voelklingen works are not accused of having ordered this horrible treatment, but of having permitted it; and indeed supported it, and in addition, of not having done their utmost to put an end to these abuse.¹⁷³⁶

Nothing here suggests whether or not all three elements of command responsibility were met in this case even though the defendants were found guilty for their failure to act, as in *Hirota*.

The Trial Chamber then concluded that “the applicability of the principle of superior responsibility in Article 7(3) extends not only to military commanders but also to individuals in non-military positions of superior authority.”¹⁷³⁷

It is possible to argue that the doctrine has been taken at the extreme, especially where the Trial Chamber relied on precedents in which many legal requirements were disregarded by the Allied powers in view to securing conviction of Japanese fallen enemies. Again, there is no suggestion that all the three main elements of command responsibility are met in this scenario. This is a misleading precedent.

¹⁷³¹ Same wording as Article 6(2) and 6(3) of the ICTR Statute.

¹⁷³² *Mucic et al.*, TC, para. 356

¹⁷³³ *Mucic et al.*, TC, para. 357

¹⁷³⁴ *Mucic et al.*, TC, para. 357

¹⁷³⁵ *Mucic et al.*, TC, para. 358

¹⁷³⁶ *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roehling and Others, Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany*, Vol. XIV, TWC, Appendix B, 1097, 1136, cited in *Mucic et al.*, TC, para. 361, footnote 386

¹⁷³⁷ *Mucic et al.*, TC, para. 363

Secondly, in *Kayishema* the Trial Chamber analysed the concept of command responsibility from the “construction of the Statute itself”¹⁷³⁸ which was a good starting point. Article 6(3) of the ICTR “makes no limited reference to the responsibility to be incurred by military commanders alone. Rather, the more generic term of ‘superior’ is used.”¹⁷³⁹ The Chamber moreover reverted to *Mucic et al.*¹⁷⁴⁰ In *Bagilishema*¹⁷⁴¹ likewise, an otherwise composed Trial Chamber clearly based its decision on the existing jurisprudence, but added that “the doctrine of command responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of the military commanders.”¹⁷⁴² Once again, this is a commendable step in comprehensively developing the principle. *Bagilishema* further clarifies how, in practical terms, the concept may be applied. The Chamber held that:

According to the Trial Chamber in *Celebici*, for a civilian superior’s degree of control to be ‘similar to’ that of a military commander, the control over subordinates must be ‘effective’, and the superior must, have the ‘material ability’ to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by ‘the trappings of the exercise of *de jure* authority.’ The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence.¹⁷⁴³

In summary, before the *ad hoc* tribunals, following the rulings in *Akayesu*, *Mucic et al.* and *Blaskic*, the “judicial developments suggest that the standard of a commander’s knowledge is now actual knowledge of the existence of war crimes, which may be proven ‘through either direct or circumstantial evidence, as well as an affirmative duty to investigate circumstances of subordinates conduct irrespective of specific reports of atrocities.’”¹⁷⁴⁴ Yet, the ICTR is far from adopting a consistent approach to the doctrine as the analysis of the *Karemera* and *Ngirumpatse*¹⁷⁴⁵ case shows.

¹⁷³⁸ *Kayishema and Ruzindana*, TC, para. 214

¹⁷³⁹ *Kayishema and Ruzindana*, TC, para. 214

¹⁷⁴⁰ *Kayishema and Ruzindana*, TC, para 215; see also *The Prosecutor versus Ignace Bagilishema*, Judgment, Case No. ICTR-95-1A-T, 7 June 2001, para. 40 (though decided after *Musema* and *Akayesu* respectively)

¹⁷⁴¹ *The Prosecutor versus Ignace Bagilishema*, Judgment, Case No. ICTR-95-1A-T, 7 June 2001

¹⁷⁴² *Bagilishema*, TC, para. 42, referring to *Mucic et al.*, TC, para. 378

¹⁷⁴³ *Bagilishema*, TC, para. 43 [all footnotes omitted]

¹⁷⁴⁴ Peters C. William, “Adjudication Deferred: Command Responsibility for War Crimes and US Military Justice from MY Lai to Haditha and Beyond”, op. cit., p. 932

¹⁷⁴⁵ *Karemera and Ngirumpatse*, TC.

7.3.4.2. The ICTR *Karemera and Ngirumpatse* case

Mathieu Ngirumpatse was the Chairman of the MRND (Ruling party) Executive Bureau in Rwanda from 1993¹⁷⁴⁶ until he eventually left the country towards July 1994. Edouard Karemera was the First Vice President of the party's Executive Bureau from April 1993. He also became Minister of the Interior and Communal Development for the Interim Government on 25 May 1994¹⁷⁴⁷, a post he occupied until he took exile. The indictment charges both Karemera and Ngirumpatse as superiors, in their capacity as First Vice-Chairman and Chairman of the party Executive Bureau for the crimes committed by *Interahamwe* whom the prosecutor alleges were their subordinates.¹⁷⁴⁸ Other alleged subordinates were “members of the Civil Defence programme”¹⁷⁴⁹, “local government officials in the territorial administration”¹⁷⁵⁰, “and administrative personnel in the ministries controlled by MRND.”¹⁷⁵¹

These charges are already unreasonably broad for any human being to defend himself against because no chain of command could be established between Karemera and so-called subordinates. Because charges are almost the same albeit for few specificities related to each accused, only *Karemera's* case will be examined here.¹⁷⁵² However, conclusions which will be drawn apply to both.

As a preliminary issue with respect to command responsibility, this case combines Article 6(1) and Article 6(3) of the ICTR Statute. The Trial Chamber maintains the provisions of Article 6(3) that “a superior can incur criminal responsibility for the acts of his subordinate if he knew or had reason to know that the subordinate was about to commit such acts, or had done so, and the

¹⁷⁴⁶ *Karemera and Ngirumpatse*, TC, para. 10

¹⁷⁴⁷ *Karemera and Ngirumpatse*, TC, para. 4

¹⁷⁴⁸ *Karemera and Ngirumpatse*, TC, para. 1504

¹⁷⁴⁹ *Id.*

¹⁷⁵⁰ *Id.*

¹⁷⁵¹ *Id.*

¹⁷⁵² The Trial Chamber noted however that “while Ngirumpatse enjoyed considerable de jure authority over the MRND party generally, it does not appear that he possessed de jure authority over the Interahamwe or members of the Civil Defence Programme.” But, it held that he “was the individual in Rwanda with the most de facto power, influence, and authority over the Interahamwe during the genocide.” *The prosecutor v. Edouard Karemera and Mathieu Ngirumpatse*, Judgment and Sentence, Case No. ICTR-98-44-T, 2 February 2012, para. 1545 & 1546

superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrator thereof.”¹⁷⁵³ It moreover adds that “superior responsibility encompasses criminal conduct by subordinates under all modes of participation pursuant to Article 6(1).”¹⁷⁵⁴ But this position is quite tricky as traditionally it is not necessary that a subordinate be prosecuted to impute responsibility to the superior. It may then prove impossible to impute a mode of criminal responsibility to someone who was not prosecuted in an attempt to impute the same conduct to his superior. The Chamber did not elucidate how then, a superior’s responsibility can be engaged under any mode of responsibility under Article 6(1) for a subordinate whose responsibility has not been engaged so far.

Karemera contended that *interahamwe* [in fact of the *Kigali* and *Gisenyi* Prefectures] could not be his subordinates as they have not been identified. Karemera claimed that he did not have the material ability to prevent members of MRND from committing crimes or to punish them for those crimes.¹⁷⁵⁵ The Trial Chamber dismissed Karemera’s claim arguing that “the prosecution must only identify categories of assailants [and that] it has done so by mentioning the *Interahamwe* and members of the Civil Defense Programme.”¹⁷⁵⁶ Yet these categories concerned the entire territory of Rwanda though the *Interahamwe* that are critical here were from the *Gisenyi* and *Kigali* Prefectures. Even for these *Interahamwe*, there is nothing suggesting any chain of command between them and Karemera. Nothing exists either between Karemera and so-called members of the Civil Defence. Nothing points to any kind of organisation of the Civil Defence apart from a document authored and signed by Karemera which was tendered into evidence.

To establish that Karemera was a superior of the *Interahamwe*, members of the Civil Defence Programme, local officials who were part of the territorial administration, the Chamber had first to be satisfied that he enjoyed *de jure* or *de facto* authority; whichever applies. The Chamber was then satisfied that Karemera had *de jure* authority over the alleged subordinates. Such a holding was predicated on the fact that Karemera occupied functions within the party as its First Vice-

¹⁷⁵³ *Karemera and Ngirumpatse*, TC, para. 1491

¹⁷⁵⁴ *Karemera and Ngirumpatse*, TC, para. 1492

¹⁷⁵⁵ *Karemera and Ngirumpatse*, TC, para. 1508

¹⁷⁵⁶ *Karemera and Ngirumpatse*, TC, para. 1509

Chairman and that he was a Minister of the Interior. In light of those functions “the chamber [was] satisfied that Karemera occupied an important position in the civilian chain of control and had substantial *de jure* authority during the genocide in Rwanda, generally.”¹⁷⁵⁷ The Chamber did not bother wondering whether those powers were effectively exercised during the events. Eventually the Chamber pointed out that Karemera participated in cabinets meetings and issued instructions to local authorities as *prefects*¹⁷⁵⁸, and the like.

The Chamber unreasonably ignored the situation that prevailed and the eventual impact it could have on the unfolding of events. It did not examine whether instructions issued were actually carried out and that feedback was uninterruptedly forthcoming. The Chamber reasoned as if Karemera had acted in normal situations: giving instructions, ensuring compliance and receiving feedback continuously.

The Chamber highlighted seven indicia that could indicate that Karemera also had *de facto* powers. Firstly, he was one of the four persons who composed the Executive Bureau of the MRND- the ultimate authority over the *Interahamwe* in *Kigali* and *Gisenyi*.¹⁷⁵⁹ Secondly, due to this position, he was a well-known figure in Rwanda.¹⁷⁶⁰ Thirdly, he allegedly agreed to provide training and distributed weapons to *Interahamwe*.¹⁷⁶¹ Fourthly, he intervened to secure Col. Théoneste Bagosora’s extension of term of office. The fifth indicium was that Karemera made public speeches in the presence of national authorities before and after he became Minister of the Interior. He also drafted and signed MRND *Communiqués* at public meetings and his party influenced decisions taken by the Interim Government.¹⁷⁶² The sixth indicium was that Karemera issued instruction to the Civil Defense one of which concerned the “mopping-up operation against *Tutsi* in *Bisesero*, which was carried out, resulting in the death of scores of *Tutsi*

¹⁷⁵⁷ *Karemera and Ngirumpatse*, TC, paras. 1510 - 1515

¹⁷⁵⁸ *Karemera and Ngirumpatse*, TC, paras. 1511 - 1512

¹⁷⁵⁹ *Karemera and Ngirumpatse*, TC, para. 1516

¹⁷⁶⁰ *Karemera and Ngirumpatse*, TC, para. 1517

¹⁷⁶¹ *Karemera and Ngirumpatse*, TC, para. 1518

¹⁷⁶² *Karemera and Ngirumpatse*, TC, para. 1519

civilians.”¹⁷⁶³ Lastly he selected people to be appointed in important posts within his ministry.¹⁷⁶⁴

To establish effective control, the Chamber held that Karemera was one of four members and Vice – Chairman of the Executive Bureau of the MRND. He could also have prevented offences committed by the Kigali and *Gisenyi Interahamwe* by speaking out and forbidding them.¹⁷⁶⁵ Without saying how in terms of material and personal means Karemera could have discharged that duty, the Chamber contented to mention that:

it stands to reason that one of the four most respected and powerful leaders of a civilian political organisation with a defined hierarchy is capable of wielding such powers to prevent offences by his subordinates. Such an individual has the capacity to issue orders from the very top of the organisation, which will be followed.”¹⁷⁶⁶

Nothing indicates the “defined hierarchy” the Chamber was talking about. The Chamber held that, considering Karemera’s *de jure* and *de facto* power, both as First Vice-Chairman of the Executive Bureau and as Minister of the Interior and Communal Development, “[he] could have punished offenders among the *Kigali* and *Gisenyi Interahamwe* on account of his status and authority over those organisations. Moreover, he could have sanctioned offenders politically, removed them from the ranks of the organisation, disabled their benefits and privileges, publicly humiliated them, or demoted them within the organisation, among other measures.¹⁷⁶⁷ The Chamber used the same reasoning with respect to halting and punishing crimes committed by civilians and local officials who participated in the Civil Defence programme¹⁷⁶⁸, as well as administrative personnel in the ministries controlled by MRND. Nothing indicates how these measures individually or collectively could have been effective to prevent the massacre or punish perpetrators thereof.

On the knowledge element of command responsibility, Karemera, as a national leader, knew about the crimes that were being committed in Rwanda during that period. Whether Karemera had specific knowledge of the occurrence of crimes apart from the general information about the

¹⁷⁶³ *Karemera and Ngirumpatse*, TC, para. 1520

¹⁷⁶⁴ *Karemera and Ngirumpatse*, TC, para. 1521

¹⁷⁶⁵ *Karemera and Ngirumpatse*, TC, para. 1523

¹⁷⁶⁶ *Karemera and Ngirumpatse*, TC, para. 1523

¹⁷⁶⁷ *Karemera and Ngirumpatse*, TC, para. 1524

¹⁷⁶⁸ *Karemera and Ngirumpatse*, TC, para. 1525

chaos in the country is another inquiry. No analysis of this element is therefore needed here. The question remains however to find out how realistically an individual civilian minister could be a superior in effective control of the four groups highlighted above; namely *Interahamwe* of Kigali and *Gisenyi*, members of the Civil Defence Programme, local officials who were part of the territorial administration and administrative personnel in the ministries controlled by the MRND. How could this kind of person be in effective control without any indication of a chain of command? A reasonable person cannot conclude that Karemera was in effective control of all the four groups highlighted.

Karemera raised this issue by submitting that “his material ability to prevent or to punish [was] particularly confusing when it comes to civilians because, in their case, the obligation for a subordinate to obey an order is not as clearly defined as in military structures.”¹⁷⁶⁹ Karemera also complained that neither him, nor Ngirumpatse did have military ability to enforce compliance. Rather than looking at the particular circumstances of these two civilian authorities, as a matter of factual evidence, the Chamber raised a point of law when it stated that:

The Aleksovski and Brdjanin Trial chambers of the ICTY have held that civilian superiors, who may lack the disciplinary or sanctioning powers of military commanders, may discharge their obligation to punish by reporting to the competent authorities whenever a crime has been committed if these reports are likely to trigger an investigation or initiate disciplinary or criminal proceedings. Moreover, this approach has been upheld by the Appeals Chamber in *Boskoski et al.* Furthermore, the Chamber notes that Article 60 of the MRND Statute clearly states that expulsion is one of the measures envisioned as punishment.¹⁷⁷⁰

The *Karemera* case needs to be distinguished from *Aleksovski*, *Brdjanin* and *Boskoski* cases. The Trial Chamber in *Aleksovski* considered that “on the basis of the evidence tendered at trial, it was established that the accused was the superior of prison guards within the meaning of Article 7(3) of the Statute for all matters relating to their duties in connection with the organisation and functioning of *Kaonik* prison.”¹⁷⁷¹ Reporting for him was normal business. In particular, the judgment indicates that “the guards acted pursuant to the accused’s orders”¹⁷⁷²; and that “he could initiate disciplinary or criminal proceedings against guards who committed abuses. This would take the form of [...] reporting to the military police commander and the president of the

¹⁷⁶⁹ *Karemera and Ngirumpatse*, TC, para. 1535

¹⁷⁷⁰ *Karemera and Ngirumpatse*, TC, para. 1536

¹⁷⁷¹ *Aleksovski*, TC, para. 106

¹⁷⁷² *Aleksovski*, TC, para. 104

Travnik military tribunal, who were competent to take the necessary measures.”¹⁷⁷³ No such finding exists in *Karemera* case.

Though in *Brdjanin* the Trial Chamber stated the applicable law, it however dismissed “superior responsibility under Article 7(3) [...] as a mode of liability.”¹⁷⁷⁴ *Brdjanin* is of no help either.

There are also many features that distinguish the *Karemera* case and *Ljube Boskoski*. Because of their importance to clearly elucidate the question, particularly pointing to the ICTR sustained tendency of relying on insufficient evidence in many respects, they will be looked at in more detail.

Ljube Boskoski was the Minister of Interior of the FRY from 2001 until November 2002.¹⁷⁷⁵ He headed a ministry which was “structured, disciplined and heavily regulated [in] a government that was functioning effectively and which had available the full and normal supportive structures of government, including judiciary, police and military agencies. There is no doubt he was in a position to effectively enforce his ministerial powers to the extent he chose.”¹⁷⁷⁶ Unlike the *Karemera* case that does not allude to the structural organisation either of the MRND party from the top down to the persons who committed crimes or the Ministry of Interior and Communal Development, the *Boskoski* judgment offers more details. They include the structural organisation of the Ministry of the Interior¹⁷⁷⁷, which may amount to a chain of command in the civilian hierarchy. The judgment relies on the *Rule Book* of the organisation and work of the Ministry of Internal Affairs which sets out its internal organisation.¹⁷⁷⁸ Every dependency of the Ministry at regional and local level is also well described.

Despite this detailed description, the Trial Chamber was candid and un-ambitious to acknowledge that Ljube Boskoski “had no function or capacity in respect of the army and its

¹⁷⁷³ *Aleksovski*, TC, para. 105

¹⁷⁷⁴ *The Prosecutor v. Radoslav Brdjanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 377

¹⁷⁷⁵ *The prosecutor v. Ljube Boskoski and Johan Tarcolovski*, Judgment, Case No. IT-04-82-T, 10 July 2008, para. 498.

¹⁷⁷⁶ *Boskoski and Tarcolovski*, TC, para. 514

¹⁷⁷⁷ *Boskoski and Tarcolovski*, TC, paras 468 - 478

¹⁷⁷⁸ *Boskoski and Tarcolovski*, TC, para. 470

personnel.”¹⁷⁷⁹ He did not have either “ministerial functions or capacity in respect of the judiciary, the public prosecutor or the judicial police.”¹⁷⁸⁰ In considering the necessary and reasonable measures Boskoski could have taken, the Trial Chamber dismissed disciplinary ones. It was the Chamber’s opinion that “to deal with criminal conduct of this nature as an internal disciplinary breach would be an entirely inadequate measure for the punishment of any police who might have perpetrated the alleged offences.”¹⁷⁸¹ The Chamber was very concerned as to whether or not the accused “took adequate measures to ensure that the alleged criminal conduct by police was brought to the attention of the appropriate authority so that it would be investigated with a view to criminal charges and appropriate punishment. That being so the matters raised concerning internal disciplinary procedures need not be further considered.”¹⁷⁸²

The competent authority refers to state institutions in charges of criminal or disciplinary proceedings *de jure*, namely the Ministry of Justice and the Public Prosecution office. Were all these institutions working in Rwanda according to the judgment against Karemera and Ngirumpatse? This question is very important because it is of no use if international prosecutions continue to overlook the reality of the facts or to ignore factors such as war, and its impact on the human capability to prevent or repress violations of international humanitarian law. This does in no way suggest that a person should not do all that they are capable of doing to prevent and punish violations of international humanitarian law even in times of war. Karemera could also have done something, but to a limited extent, not as wide as the Trial Chamber led people to believe in its ruling.

Without suggesting that the following facts were litigated in the *Karemera* case, it is necessary to note that most of them were of common knowledge when the case was decided. Elsewhere in this research, the death of the president of Rwanda and his counterparty of Burundi in a plane that was brought down over Kigali on April 6, 1994 was extensively referred to. The death of the President set off widespread violence, including the murder the following day of Rwanda’s Prime Minister and prominent opposition leaders - some of whom were ministers in the

¹⁷⁷⁹ *Boskoski and Tarcolovski*, TC, para. 517

¹⁷⁸⁰ *Boskoski and Tarcolovski*, TC, para. 517

¹⁷⁸¹ *Boskoski and Tarcolovski*, TC, para. 521

¹⁷⁸² *Boskoski and Tarcolovski*, TC, para. 522

government.¹⁷⁸³ In a letter the UN Secretary General wrote to the President of the Security Council on 8 April 1994 long before Karemera became Minister of the Interior, he recognised the tragic situation that prevailed in Rwanda.¹⁷⁸⁴ The situation continued to deteriorate drastically and had been becoming rapidly worse.¹⁷⁸⁵ The UN Secretary General Special report of 20 April 1994 describes better the prevailing situation in Rwanda at the time.¹⁷⁸⁶ A reasonable trial of fact could not even attempt to hold that a civilian Minister of the Interior was in effective control of subordinates and failed to take necessary and reasonable actions to prevent or punish the perpetrators of crimes.

The Trial Chamber in Karemera also shyly recognised that after the death of the President, the atmosphere between the parties deteriorated. The chamber acknowledged that in these circumstances, the conflicting parties could not have been expected to agree on the implementation of the Broad-Based Transitional Government before the situation stabilised.¹⁷⁸⁷ These incidents largely diminish the capability of a minister of interior to act; in any event, to have effective control over the four groups alluded to above.

¹⁷⁸³ Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, op. cit., p. 118

¹⁷⁸⁴ *Letter dated 8 April 1994 from the Secretary – General to the President of the Security Council concerning the role of UNAMIR in the crisis situation in Rwanda*, [not issued as a United Nations document], reproduced in Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, op. cit., p. 255

¹⁷⁸⁵ *Letter dated 13 April 1994 from the secretary – General to the President of the Security Council concerning development which may necessitate the withdrawal of UNAMIR*, [not issued as a United Nations document], reproduced in Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, op. cit., p. 259

¹⁷⁸⁶ *Special Report of the Secretary General on UNAMIR, containing a summary of the developing crisis in Rwanda and proposing three options for the role of the United Nations in Rwanda*, S/1994/470, 20 April 1994; [Document 48] reproduced in Department of Public Information (Publisher), *The United Nations and Rwanda 1993 – 1996*, op. cit., pp. 262 – 265, paragraphs 2 and 3 are very relevant:

This tragic [death of President Habyarimana of Rwanda] set off a torrent of widespread killings, mainly in Kigali but also in other parts of the country. The violence appears to have both political and ethnic dimensions. No reliable estimate of deaths has so far been available, but they could possibly number tens of thousands.

[...] Despite the best efforts of UNAMIR, the Rwandese Patriotic Front (RPF) security battalion quartered at the National Development Council complex broke out and started to engage Government troops, [...]. RPF units from the demilitarized zone also moved towards Kigali and joined the fighting. Authority collapsed, the provisional Government disintegrated and some of its members were killed in the violence. An interim Government was proclaimed on 8 April 1994, but could not establish authority, and on 12 April 1994, as fighting between the armed forces and the RPF intensified, left the capital.

¹⁷⁸⁷ *Karemera and Ngirumpatse*, TC, paras 666 – 667.

7.4. Summary

This chapter has demonstrated how joint criminal enterprise and command responsibility have become the prosecution darling modes of imputing criminal responsibility. These are however not the only modes of imputing criminal responsibility pursuant to article 7(1) and 7(3) of the ICTY Statute or article 6(1) and 6(3) of the ICTR Statute. Joint criminal enterprise was imagined as a mode of commission, which was implied to have been read under article 7(1) of the ICTY Statute and article 6(1) of the ICTR Statute. It fills the loopholes where evidence is non-existent or insufficient to impute responsibility to participants in group criminality. Scholarship tends to be divided between its staunch supporters and its vehement opponents. Its application and interpretation have varied and are far from being consistent before the ICTY and ICTR. This inconsistency has also largely contributed to the ineffectiveness of the *ad hoc* tribunals in developing this new concept.

There is no doubt that international criminal law must utilise all available tools to punish perpetrators of crimes of concern to humanity. Refining the existing modes of imputation of criminal responsibility and even inventing new ones that are most appropriate to deal with international crimes should be every legal mind's responsibility. Such an undertaking may however not come at any cost. It must be based on palpable evidence, rather than unsubstantiated assumptions, speculations or statements of intentions. Deep investigation, once again, must be able to pinpoint the extent of every contributor to crimes and eventually show the exact role each played rather than stop at the extreme difficulties encountered. If this fails, then the judges must discharge. Doing otherwise would be creating more uncertainty and unpredictability.

There have been varying interpretations of the doctrine of command responsibility; some extending the reach of its constitutive elements, others restricting it. It is undisputed that the doctrine has now acquired the status of customary international law. Whether it had attained that status before the prosecutions following *World War II* is not quite clear from the scholarship analysed so far. Thereafter, a long period of stagnation followed during which the doctrine did not feature a lot in international treaties and conventions. It was not forgotten however. At a domestic level it subsisted but its application was frustrated by attempts to protect own forces commanders while its elements were present. Most of them were similar to those relied on when

prosecuting *World War II* criminals. *My Lai* was a focal point of concern where visibly Captain Ernest Medina, Colonel Oren Henderson, Major general Samuel Koster and General William Westmoreland could have been held criminally liable as superiors, if one applies the Yamashita standard. Medina and Henderson in particular knew of the crimes committed by their troops. They could have prevented them. Yet, such a protective tendency subsists. Americans and their allies still shed their officers from command responsibility. This is however a particular issue that may be redressed by an act of parliament in concerned jurisdictions.

At an international level however, command responsibility is still unclearly and not consistently applied. According to the recorded *ad hoc* tribunals jurisprudence anyone can be a superior, a commander, and can have a broad range of subordinates if the circumstances so require, especially for the purposes of enforcing international humanitarian law provisions. Confusion is still deliberately entertained for a doctrine that otherwise seeks to protect humanity. Command responsibility as it is nowadays applied misses the balance between the interests of individual liberty and society's interest in enforcing the laws of war and protecting victims. The doctrine has shifted towards the interests of society to the detriment of the individual rights of the defendants.¹⁷⁸⁸ Redressing the imbalance should be a primary responsibility of the courts called to hear cases involving command responsibility.

From the arguments developed in the six chapters, time is now ripe to draw some conclusions about the effectiveness of the *ad hoc* tribunals. The general contention is that, faced with a mountain of allegations of violations of international humanitarian law, the UNSC established the *ad hoc* tribunals. This study has been successful to demonstrate how, gradually; under the pretence of establishing individual criminal responsibility the *ad hoc* tribunals have progressively diluted their mandate of its substance. As the French adage puts it, "*la montagne a accouché d'une souris*"; meaning the mountain has given birth to a rat. Are *ad hoc* tribunals still needed?

¹⁷⁸⁸ Sengheiser Jason, "Command responsibility for omission...", op. cit., p. 702

CHAPTER 8: DISCUSSIONS AND CONCLUSIONS

The effectiveness of the *ad hoc* tribunals cannot be assessed by only looking at the number of people who were judged and sentenced to heavy penalties, or those who were acquitted; neither can it be measured by considering suspects who have not been apprehended.¹⁷⁸⁹ Assessing the effectiveness of the tribunals is not a narrative report on the amount of money spent to run them or the mismanagement of offices within the tribunals. These matters, like many others, were not even raised in the research. Measuring effectiveness is rather a value, quality and impact-based exercise that looks into the work that has already been done, and how it has been performed in relation to the stated objectives and the means available for the few cases adjudicated. Measuring the effectiveness, for the purposes of this research, is a holistic approach that pinpoints some important aspects that could have contributed positively to the achievement of a good job, but which have been purposefully overlooked. Not everything affecting the effectiveness of the *ad hoc* tribunals can be covered in a single doctoral research project. There are many areas that still need attention.

The thesis posed questions on the legality and legitimacy of the *ad hoc* tribunals, their appropriateness for the situations that prevailed in the former FSRY and in Rwanda. It

¹⁷⁸⁹ The ICTR *Report on the completion strategy of the International Criminal Tribunal for Rwanda (as at 10 May 2013)* gives figures of purported achievement as follows: on 10 May 2013, the Tribunal has completed its work at the trial level with respect to all of the 93 accused, which includes 55 first-instance judgements involving 75 accused, 10 referrals to national jurisdictions (four apprehended accused and six fugitive cases), three top-priority fugitives whose cases have been transferred to the International Residual Mechanism for Criminal Tribunals, two withdrawn indictments and three indictees who died prior to or in the course of trial. The final substantive trial judgement was delivered in December 2012, and appellate proceedings have been concluded in respect of 46 persons. All but one of the remaining appeals will be completed in 2014. The final appeal (in the Butare case) is projected to be completed by July 2015; *Report on the completion strategy of the International Criminal Tribunal for Rwanda (as at 10 May 2013)*, S/2013/310, 23 May 2013, para. 3. The ICTY figures were also the following: 12 individuals on trial and 13 in appeal proceedings, no outstanding fugitives. The Tribunal has concluded proceedings against 136 of the 161 individuals indicted. The Tribunal anticipates concluding all trials during 2013, except for those of Radovan Karadžić, Ratko Mladić and Goran Hadžić, who were arrested later than the other accused; *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 16 November 2012 to 23 May 2013*, S/2013/308, 23 May 2013, para. 3

underscored the mandate assigned to the tribunals and the objectives set to be achieved. It examined the investigation and prosecution processes, questioned the practice of guilty plea and judicial notice. It also looked into the doctrines of joint criminal enterprise and command responsibility. The aim was to find out how the combination of these items could respond to the question of whether the *ad hoc* tribunals have been effective or not. This conclusion offers an answer to all these questions. The current research argued for the prosecution of international crimes by a legally and legitimately created judicial institution, not through *ad hoc* tribunals established by the UNSC. Even though they were established under questionable circumstances, *ad hoc* tribunals could have done much better had they been guided primarily by the search for justice. They were overburdened and did not acknowledge that fact. They navigated a tumultuous sea of problems which finally jeopardised their effectiveness.

The media, the humanitarian community, non-governmental organisations and many other human rights organisations and governmental agencies reported on the crimes committed in the former Yugoslavia and Rwanda. The UN mandated investigative commissions to inquire about the nature, extent, character and legal qualifications of those atrocities. The question was primarily about what could be done to effectively halt those crimes and redress the situation; restore peace and security in these countries and bring them back to normality. Rather than taking a resolute and timely military action, the UNSC, reluctantly opted for the prosecution of alleged perpetrators. The Council explained that it was performing its primary mandate of restoring and maintaining international peace and security, though the judicial route used was unprecedented. The *ad hoc* nature of the tribunals was a novel *sui generis* action in the history of the UNSC. This measure was already a problem on its own when consideration is given to the diverging views and opinions expressed during the discussions in the offices of the UNSC, and immediately after the tribunals were established. The much supported view was that the UNSC was not empowered to establish judicial institutions.

Resolution 827(1993) of 25 May 1993 was adopted pursuant to reports of massive atrocities that had been or were being committed in the former SFRY at the time of and subsequent to the resolution. It created the ICTY and adopted its statute that provided for an OTP and a college of trial and appeal's judges with a seat in The Hague, in The Netherlands. The Statute defined the

material, personal and temporal competence of the tribunal. It also set an array of objectives that were expected to be achieved through prosecution of alleged criminals. Allegations of war crimes, crimes against humanity, grave breaches of the Geneva Conventions and acts of genocide were reported in Croatia, Serbia, and Bosnia and Herzegovina. Despite the existence of the tribunal, atrocities continued unabated until 2001 and covered the territories of Kosovo and Montenegro. This already proved that prosecution was not an optimal way of halting the commission of the crimes and the armed conflict that was fueling them.

On 8 November 1994, the UNSC again passed Resolution 955(1994) that established the ICTR and adopted its statute providing the same organisational chart as the ICTY. The seat of the tribunal for trial purposes was situated in Arusha in the Republic of Tanzania. It shared the Appeals Chamber with the ICTY in The Hague. The material and personal competence of the tribunal was the prosecution of Rwandan nationals suspected of the commission of genocide, war crimes, crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II in the year 1994. Those crimes had been allegedly committed in Rwanda and in neighbouring states. War has ended when the resolution was adopted. Again, this constituted an inconsistent approach in the actions of the UNSC for the former Yugoslavia and Rwanda. The Council could not, with the same explanation, create a tribunal aimed at halting an armed conflict in the SFRY and eventually the crimes that accompanied that conflict, and establish another for the same purpose in Rwanda while the circumstances were not the same. The approach, moreover, constituted an abusive and arbitrary interpretation of the powers vested in the UNSC under Chapter VII of the UN Charter, if indeed the Council had power and authority to establish *ad hoc* tribunals as its subsidiary institutions. The Council should review its mandate and apply it in a consistent and coherent manner.

In addition to the ordinary goals of criminal prosecutions, the UNSC anticipated that the tribunals may also achieve many other objectives that include rendering justice, combating impunity through retributive justice and contributing to the process of national reconciliation. No criminal court can reasonably undertake to achieve these objectives, simply because they are beyond the work of a criminal tribunal. Overburdening the *ad hoc* tribunals might have been the first indication that they could not be effective. To discharge their tasks, the ICTY and ICTR

undertook investigations and prosecution of the crimes contained in the constitutive Statutes. Investigations in many respects proved insufficiently thorough with a clear lack of professionalism, at least in the most important cases. To fill the gaps, manage the insufficiency and complexity of the tasks, the tribunals chose or resorted to legal techniques that permitted or facilitated their work. They relied mostly on guilty pleas and judicial notice to dispose of some of the charges. It is quite illogical to use these techniques while dealing with the most serious crimes like genocide with a desire to uncover the truth behind the commission of those crimes and to send out a message of “never again”. Prosecutors and judges also preferred imputing criminal liability using the doctrines of joint criminal enterprise and command responsibility. These modes of ascribing responsibility were unnecessarily stretched to apply to those in the accused box, without necessarily meaning that they were commensurate to the real extent of their criminal responsibility.

Joint criminal enterprise, in its three categories does not clearly show the guilty mind of the perpetrator. Command responsibility developed unevenly applying mostly to politically fallen culprits, but not to everyone who should answer for the crimes committed by his/her subordinates. It is a consolidated analysis of the method of establishment, the legal foundation, the prosecution policies of investigation and prosecution, the legal techniques used and the preferred modes of ascribing criminal responsibility that brought about the questioning of the tribunals’ effectiveness.

Acknowledgment of the complexity of the matters at hand involving particularly aspects of law, politics and diplomacy must be made. The research attempted an application of the naturalistic and positivistic theories to find an agreeable approach for all these concerns. Moreover the naturalistic and positivistic theories assisted in providing an overall understanding of the interconnection and link between the areas that have been highlighted to measure the tribunals’ effectiveness. Both theories duelled for primacy over the years. It was argued that the establishment of the tribunals and their *modus operandi* were a reflection of positivism while the issue at hand should have been looked at naturalistically or through a balanced combination of both. For sure, naturalism cannot explain everything, but it helps to understand the process leading to truth. Naturalism constitutes the rights and values that were defended through the

process of prosecution. Positivism facilitated the creation of the tribunals, yet continued to guide their operations. It is at this juncture that the values to be defended were overlooked. The work emphasised the crucial importance that natural law still occupies in legal philosophy. Naturalism and positivism converged in the design and functionality of international criminal justice, positivism being more preeminent in the decisions taken by the UNSC and in the adjudication of international crimes. Considering the purposes for which *ad hoc* tribunals were established, namely the protection of human rights as universal values, the suggestion is that natural law, complimented with ethics and morality should be given particular attention in the design and functioning of international criminal tribunals. These considerations were largely absent in the conception and work of the *ad hoc* tribunals. International criminal law should be more a matter of values rather than a dictate imposed by powerful bodies including the UNSC. Morality and ethics are therefore critical to the upbringing and sustainability, predictability and certainty of international criminal justice. This is a very important conclusion to bear in mind.

The establishment of the *ad hoc* tribunals by the UNSC resolutions was a political exercise. The inquiry sought to explain whether or not the Council was the appropriate organ to take such a decision. The answer was that establishing an *ad hoc* tribunal permitted to avoid traditional means of negotiating a treaty because some states would allegedly, resist or refuse to ratify such a treaty, while the situation required an urgent action. States could drag their feet and frustrate the search for solutions.

Treaty-based criminal tribunals that respect the equal sovereignty of all UN member States; which are not imposed by binding resolutions, with as many resemblances to domestic criminal tribunals, is the solution in this respect. Establishing *ad hoc* criminal tribunals was also a weak alternative to a resolute action to engage a military operation to stop the wars in the former Yugoslavia and Rwanda. This was the most urgent action to take rather than going the judicial route. The serious violations of international humanitarian law were the consequences of war not its causes. War fuelled the violations and could have been dealt with as a matter of priority. Had war ceased, the violations of international humanitarian law could also stop. This casts doubt on the legitimacy and consistency of UNSC's action itself and that of the *ad hoc* tribunals to a certain extent. Establishing *ad hoc* tribunals was an ineffective measure to restore and maintain

international peace and security. Peace was not restored in the former Yugoslavia by the mere existence of the ICTY. War spread instead and more human casualties were registered. The war was stopped by the NATO bombing over Kosovo in 1999. In Rwanda, the war was already over when the Council decided to establish the ICTR. The existence of the ICTR did not bring peace to the region because the impunity granted to RPF gave it leeway to attack the DRC many times during the time frame of the tribunal. The UNSC's judicial action for the former Yugoslavia and Rwanda, proved untimely, inconsistent, contradictory and a complete rhetoric, entirely detached from the realities and facts.

The armed conflict situation that prevailed required that the UNSC take a speedy and timely military action. The Council would unquestionably be exercising its legitimate authority in the most appropriate circumstances. Establishing *ad hoc* tribunals failed to properly and legally fit in the competence of the UNSC under Chapter VII of the UN Charter. Some scholars, later on, attempted to legally explain and legitimise the decision, going as far as reading the competence of the Council in Article 41 of the Charter because the list of actions that may be taken is not exhaustive. From a review of the debates that took place and which were carefully recorded by Scharf and Morris, such a reading is non-existent. This is so because there were no legal provisions that empowered the UNSC to establish criminal tribunals. The tribunals themselves, through preliminary defence motions, affirmed that the UNSC was empowered to establish subsidiary organs, including *ad hoc* tribunals. They meant that they had been legally established and had competence to adjudicate according to their statutes.

The preliminary motions on jurisdiction filed by *Tadic*, *Kanyabashi*, *Nzirorera et al*, and *Milosevic* clearly show how contentious and debatable the matter was and still remains. The imposition of *ad hoc* tribunals without a clear legal foundation should be put to rest. It is not an optimal solution to resolve armed conflicts accompanied by serious violations of international humanitarian law. The UNSC should revisit its mandate and missions of maintaining international peace and security and adopt proper, effective and efficient mechanisms to respond to situations that require immediate action. Judicial institutions cannot respond to the urgency that war situations necessitate. The judicial route is ineffective, and becomes very weak if political calculations and narrow state interests interfere.

The overabundant inclusion of aims, goals and objectives in the mandate of the tribunals is another proof of the inappropriateness of the decision to establish *ad hoc* tribunals; robbing them of their focus – indeed, their effectiveness. It is hard to believe that a criminal tribunal can become a tool for the restoration and maintenance of international peace and security. A criminal tribunal cannot become an instrument contributing to the process of national reconciliation either. A criminal tribunal must stick to the function of determining individual criminal guilt upon allegations that a crime has been committed, that the perpetrator can be identified, investigated, arrested, prosecuted and sentenced. Whether at the domestic or the international level; criminal prosecutions serve the same purposes of deterrence, incapacitation, retribution, and fighting impunity. A criminal tribunal cannot do more than that. The mandate of any criminal tribunal must be clearly stated, focused, and not overambitious. Its objectives must be reasonably delimited to fit in the functions of a criminal tribunal. Objectives which are beyond the functions of a criminal tribunal should be abandoned and reserved to other mechanisms of accountability and truth-telling. This was not the case when the ICTY and ICTR were established.

The thesis stressed in great detail how the principal actors of international criminal prosecutions, particularly prosecutors and judges, should be guided by ethics and morality to better serve justice. International prosecutors and judges at the *ad hoc* tribunals had been found to harbour a conviction-minded tendency rather than being justice seekers. Judges and prosecutors proved to be too loyal to the UNSC rather than assuming their duties professionally, ethically and morally. In many instances, prosecutors were not independent or acted under pressure from interested states; judges looked on passively.

There is no professional body or other oversight mechanism in the *ad hoc* tribunals' Statutes or within the UN that hold prosecutors accountable when they abuse their powers or get involved in other prosecutorial misconducts. Furthermore, no body exists to deal with the judges' passivity. An independent mechanism outside of the organisational chart of the *ad hoc* tribunals solely entrusted with overseeing the way prosecutors discharge their function is really needed. The mechanism may also consider sanctioning judges when they become idle in front of the

prosecution's misconduct. The body should, however, not interfere with the legitimate exercise of independence and discretion by prosecutors and judges. It would instead intervene only where the judicial remedies ordinarily available at appeals' level have proved insufficient. With respect to the prosecutor, such mechanism will be set in motion if administrative control and supervision within the office of the prosecutor have collapsed to a degree that they can be qualified misconduct.

It was also argued that prosecuting high profiles cases should not be an institutionalised priority policy or strategy. The policy priority should be investigating and prosecuting anyone rightly and out of personal conviction and professionalism rather than out of external pressure or any desired outcome beyond doing justice. Policies should clarify what will be investigated, rather than who should be investigated. Assumptions that crimes have been sanctioned, condoned or authorised by those in high echelons should be supported by factual evidence related to the crimes committed. Investigation and prosecution should not be based on the legitimate exercise of power and authority as authorised by the constitutions and laws of the countries affected unless those constitutions and laws had been enacted for criminal purposes.

Shortcutting the system with legal tactics only frustrates, defeats and dilutes the aims for which international prosecution is undertaken. The prosecutor must proceed if he/she has a provable case supported by sufficient evidence which, in the conviction of the prosecution, can reasonably lead to a finding of guilty without excuses and tactics of delaying the process. Doctrines designed or interpreted to fill the gaps encountered in investigations or purely related to the nature, extent, severity and complexity of international crimes are not positively contributing to the building up of a credible international criminal justice system. Those gaps need to be filled by improved principles of justice, even those borrowed from domestic jurisdictions.

For some proponents of the international criminal justice, and to paraphrase Wippman, the study of international criminal prosecution bears with it the potential contributions to "the deterrence of atrocities, the de-legitimation of dictators, warlords, and notorious human rights violators, and

the promotion and maintenance of peace in war-torn countries.”¹⁷⁹⁰ It is perhaps the best and the only “hope of humanity in holding back the flood of atrocities that has persisted despite the hopes raised at Nuremberg.”¹⁷⁹¹ So, the expectation of justice through *ad hoc* tribunals was not unrealistic when they were established. It could have been meticulously followed.

Its opponents, but more specifically “conservative commentators and politicians, especially those in the United States, condemn recent developments as ineffective, arbitrary, poorly conceived, threatening to state sovereignty, and an impediment to the political resolution of complex conflicts.”¹⁷⁹² According to them, international criminal justice represents “a surrender of national authority to politicized foreign tribunals, to be opposed at all costs.”¹⁷⁹³ This position is simply the deliberate result of political calculations for all those states which do not wish to abide by the international criminal justice system, which are domestically self-centred, and lack a universal authority. This view fails to state that might is law. For those who are the most powerful, *ad hoc* tribunals work to their advantage. They influence and pressurise them to work in one direction or another. They should come out and show how an international criminal tribunal can be apolitical, how it should not endanger national sovereignty and contribute to finding solutions to conflicts. It is instead these same opponents who hinder and meddle with the international tribunals and prevent them from working effectively. The calculated indictment against Milosevic, the arrest of Radovan Karadzic and General Ratko Mladic illustrated this assertion; though prosecuting these individual was the right thing to do. They were responsible of crimes, but not to the extent of their opponents who wanted them out of the way.

This work attempted to dispassionately consider the strengths and weaknesses of the system on theoretical and practical grounds for possible improvements where warranted. In practice, it analysed instances where the international justice system evolves unevenly or without palpable grounds, eventually due to a lack of an agreeable theory. Considering the timing, the circumstances and the opportunistic approach adopted by the UNSC in 1993 and 1994

¹⁷⁹⁰ Wippman David, “ Review Article - Symbolic Justice: the past and future of war crimes prosecutions”, *The International Journal of Human Rights*, Vol. 5, No. 4, 2001, pp. 90 – 109, p. 92

¹⁷⁹¹ *Ibidem*, p. 92

¹⁷⁹² *Idem*, p. 92

¹⁷⁹³ *Idem*, p. 92

respectively when it established the ICTY and the ICTR, it is reasonable that much could not be realised in terms of aims, goals and objectives. The effectiveness of the tribunals was at stake. Apart from strongly worded statements of intention, these objectives were not even defined and delimited. The crimes and subject-matter of the *ad hoc* tribunals' mandate were atrocious, complex, horrendous and extensive. The Security Council wanted people to believe - in fact, one may so assume, what it did not itself believe - that by prosecuting a token of selected individuals, even for signalling that impunity will not be tolerated, these objectives could be attained altogether. One may doubt whether the objectives have been achieved as conceivably anticipated.

People have been prosecuted because towards the end of 2010, the ICTY had indicted and prosecuted about 161 persons while the ICTR at the same period had indicted and prosecuted about 91 people.¹⁷⁹⁴ Whether these token figures are reasonable for the lifespan of the tribunals is one matter. With this achievement, however, numerous substantial problems were registered. They relate to expectations translated in the forms of aims, goals and objectives of those particular prosecutions. The objectives were grouped in four categories.

Category one concerned the crucial question of justice as the cornerstone of all other aims and goals. Such a choice is in line with the traditional functions of any court of law, whether domestic or international, civil or criminal. The second category looked at the general concerns of any criminal justice system. Briefly, it is to answer the question about the role of a criminal prosecution. The third category analysed the leitmotiv that was advanced by the UN Security Council to establish *ad hoc* tribunals. It was a strategic aim of restoring and maintaining international peace and security. It was demonstrated that that objective was unreasonable and inappropriate. Finally, the mandate included the political objective of national reconciliation in countries of concern. It was a simple expression of intention which did not show how a criminal court could in practice contribute to national reconciliation. The *ad hoc* tribunals did not and could not give a voice to all stakeholders to address their ugly past, face their present challenge and together design their brighter future.

¹⁷⁹⁴ These figures are drawn from the websites of the tribunals without any specific reference.

If all these objectives were merged into one entity to fit them all, one might rightly agree with Scully who argues that: “international tribunals are often spoken of in lofty terms as if they are harbingers of salvation to post-conflict societies, and are expected to bring justice, peace, reconciliation, the rule of law, and a plethora of other social goods.”¹⁷⁹⁵ It is not possible. This is not a sentiment felt by only people unfamiliar with the *ad hoc* tribunals. It is even the view of the tribunals themselves which have:

purported to fulfil numerous objectives, including: to produce reliable historical records of crimes committed, to satisfy victims, to promote a sense of accountability for gross human rights violations, to make advances in international criminal law, and to stop ongoing conflicts – an objective that is far removed from the normal concern of national criminal justice systems.¹⁷⁹⁶

Though this has been a legitimate and commendable aspiration, the reality turned to be something else. The *ad hoc* tribunals “have necessarily been unable to make-good on all of their aspirations. [...] The most obvious problem is that the courts’ resulting agenda is overly demanding. Indeed, the problem seems self-evident: international tribunals cannot be everything to everyone.”¹⁷⁹⁷ The tribunals themselves must acknowledge this reality rather than attempting to explain anything and everything to show that they have performed, even where it was impossible to perform.

Views about what the tribunals were to effectively achieve were quite apart and diverging already at their inception. Some argued that the UNSC failed to use armed force to halt the killings in the former Yugoslavia republics and preferred resorting on *ad hoc* tribunals to redeem its credibility. There was no war in Rwanda when the ICTR was established. Despite the establishment of the ICTY in 1993, the war went ahead until 2001.

The analysis of the Appeals Chamber decision in *Tadic* challenge of jurisdiction, *Kanyabashi*, *Milosevic* and *Nzitorera* revealed that the UNSC was not the proper channel to establish criminal tribunals. The road taken by the Rome Treaty that established the ICC may not only be the most

¹⁷⁹⁵ Scully Seeta, “Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia”, *Asian-Pacific Law & Policy Journal*, Vol. 13, No. 1, 2011, pp. 300 – 353, p.303

¹⁷⁹⁶ *Ibidem*, p. 303

¹⁷⁹⁷ *Idem*, p. 303

appropriate in this regard, but a signal of the end of *ad hoc* tribunals.¹⁷⁹⁸ A summary of key objectives that the tribunals were to achieve shows what the tribunals attained and what they failed to do.

In terms of justice, the *ad hoc* tribunals could have done much better had they been designed based on universally acceptable principles of what an uneven justice requires. It is justice that is blindfolded, arrived at through objectivity, impartiality, without any external influence or pressure, preference or prejudice. Such principles, in the view of Dworkin are those that “are not aiming to promote a desirable social, economic or political goal, but rather seeking to meet a requirement of justice or fairness or to make a decision conform to ‘some other dimension of morality.’”¹⁷⁹⁹ The “justice” pursued by the *ad hoc* tribunals must be put in perspective to better formulate an objective conclusion in this respect. Firstly, the *ad hoc* tribunals were specifically designed to “prosecute”, not to render justice. Secondly, interested parties played a greater role in this enterprise of prosecution bringing about an uneven justice. Thirdly, objectives and goals beyond “rendering justice” assigned to the tribunals are alien to the role of a criminal court. In the latter case, the tribunals remained silent rather than making open pronouncements that these objectives were unrealistic, indeed unbecoming in their work.

Specific individuals’ subject-matter of investigation and prosecution were clearly targeted at the outset. Such targeting was as precise as pointing to the “most responsible”, “big fish”, or those “who bear the greatest responsibility.” In many instances, names were openly and repeatedly cited and circulated as perpetrators and responsible for crimes. The crimes for which individuals were accused of were described in their worst manifestation. The traditional neutrality of any court of law was deliberately eroded at the inception phase of the *ad hoc* tribunals. There is a dangerous confusion between those most responsible for crimes and most responsible in government, political and military administrative layers of society in the former Yugoslavia and

¹⁷⁹⁸ See Ambos Kai, “International Criminal Law at the crossroads: from ad hoc imposition to a treaty-based universal system”, in Stahn Carsten & Van den Herik Larissa (eds), *Future Perspectives on International Criminal Justice*, T.M.C. Asser Press, 2010, pp. 161 – 177. He argues that the era of the ad hoc tribunals is over and that the ICC was established to become a better universal court.

¹⁷⁹⁹ Dworkin R., *Taking Rights Seriously* (Duckworth 1977), p. 23, cited in Catler Antony & Nye David, *Justice and predictability*, The MacMillan Press Limited, 1983, p.57

Rwanda. There was clear evidence of prosecutors who manoeuvred the system of international criminal law with the only motive of securing convictions, scoring marks to impress their bosses and building up a career in the legal fraternity or elsewhere. These instances were illustrated by the cases of André Ntagerura, General Gratien Kabiligi, Milan Milutinovic, Slobodan Milosevic, Radovan Karadic and Jean Kambanda.

As Reel wrote pursuant to the judgment of General Yamashita, the fallacy with these kinds of prosecutions is that they “cover what is essentially a political act with a cloak of legalism.”¹⁸⁰⁰ Justice arrived at in this way, as Masayoshi suggests, “will be equated with a conviction; and, if the defendant(s) are acquitted, the tribunal will be seen to have failed in its purpose.”¹⁸⁰¹ International criminal tribunals need to be designed in a neutral way so as to avoid the impression that they target individuals rather than targeting what individuals have done wrong. Designing a tribunal with such a degree of specification with regard to whom to look for bears the danger of targeting a person for what he was rather than for what illegal deeds he did or failed to do. It does not give the unprofessional prosecutor or judge an opportunity to perform the dual functions of zealously fighting the crimes and being fair to the defendants. Indeed, it does not do justice.

The role that a prosecutor plays in designing the investigative and prosecutorial strategies has serious consequences on how a criminal case unfolds. Uviller argues that “no less than the power to charge, to dismiss the charges, and to immunize witnesses, the power to tailor a charge to the gravity of a particular offense and the deserts of a particular offender is the essence of the executive function in the prosecution of a crime.”¹⁸⁰² The bottom line is that international prosecutors must wield a high degree of professionalism, much higher than their domestic peers. Investigations of crimes of concern to humanity must be given the highest standard of professionalism. According to the Report on the NATO bombing of Kosovo, it is advisable that before deciding to open an investigation in any case, the prosecutor should have taken into

¹⁸⁰⁰ Reel A. Frank, *The case of General Yamashita*, op. cit., p. 243

¹⁸⁰¹ Masayoshi Mukai, “Ad hoc Tribunals: the failure to contribute to precedence-setting for a universal model of international justice”, op.cit, p. 50

¹⁸⁰² Uviller H. Richard, “The neutral prosecutor: the obligation of dispassion in a passionate pursuit”, *Fordham Law Review*, Vol. 68, Iss.5, 2000, pp. 1695 – 1718, p. 1695

account a number of other factors concerning the prospects for obtaining evidence sufficient to prove that the crime has been committed by an individual who merits prosecution in the international forum.¹⁸⁰³ This should be a consistent practice irrespective of the forum in which such investigations are carried out.

When those investigations are insufficient or when difficulties are encountered in gathering evidence, prosecution should only proceed when investigations are complete. If investigations prove completely insufficient to sustain a prosecution, then the case should be abandoned no matter what the public will say afterwards. Judges should also discharge when the prosecution cases collapse without going into unnecessary and costly proceedings.

Investigations of serious violations of international humanitarian law fail to meet the minimum acceptable standard required in domestic systems. The atrocious nature, scale and complexity of such crimes cannot always explain these investigative failures.

Guilty plea and judicial notice are legal doctrines that are used for convenience and accommodative purposes in cases of minor importance for petty crimes at domestic levels. Both these notions are not unfamiliar in legal fraternity. If they are resorted to properly, they are legitimate to some extent. This is not the point. The problem is the speed at which they invaded the international crimes prosecution as if no other proper techniques existed. They were overwhelmingly relied on in matters of such a seriousness and severity as international violations of humanitarian law. They can advance the conviction tendency, but they cannot be or become instruments of international criminal justice. Defendants may also use them to secure lenient treatments while they might have committed crimes that should be severely punished.

Guilty plea and judicial notice coupled with their surrounding manoeuvring and manipulations by ingenious prosecutors and unscrupulous defence lawyers who are mostly interested in winning the case rather than truth, do not assist in uncovering the truth around the serious crimes. Without the truth, no one can expect justice to be rendered either to the victims, the defendant or

¹⁸⁰³ *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, para. 5

to the society at large. They should be resorted to exceptionally and with the necessary caution. Otherwise they should be abandoned in international crimes prosecutions. Considering that only a few individuals are brought before international criminal tribunals, every effort should be made to present compelling evidence sufficient to convict rather than resorting to guilty pleas and judicial notice in an attempt to keep the tribunal functioning.

The doctrine of joint criminal enterprise was criticised as being a judicial creativity, forcibly introduced in international criminal law. It is a by-product of ingenious judges in the *Tadic* case who wrongly interpreted piecemeal jurisprudence following World War II prosecutions. It alleviates the prosecution's failure to thoroughly investigate serious crimes of international concern. Judges and scholars encouraged the reliance on the doctrine, and some like Cassese, Provost and Ambos using their academic credentials gave support to the doctrine. Other scholars are, however, not unanimous as to whether joint criminal enterprise is clearly and unambiguously read in Article 7(1) and 6(1) of the ICTY and ICTR Statutes as a mode of commission or whether it has root in customary international law. The doctrine seemed to have taken over from the crime of conspiracy or the modes of imputing criminal liability of aiding and abetting. Judges denied that this was not the case. Judges did not explain why the concept was given much importance and deference without giving the same to other modes of imputing criminal responsibility which are clearly provided for in the statutes.

The least one can say is that the doctrine contours are nebulous, so confusing, ambiguous, and unpredictable; and its consequences are uncertain. The doctrine needs to be refined and used in a very strict manner to better serve justice. It must be based on facts. Other modes of attributing criminal responsibility also need the same attention as had benefited "committing". This will also contribute to the development of international criminal law.

Command responsibility is another preferred mode of imputing responsibility to superiors. With strong military backgrounds, for obvious reasons command responsibility was for quite a long time used to hold military commanders responsible for criminal acts committed by their subordinates. Conceptually it was a doctrine of holding accountable irresponsible commanders and superiors. It however underwent an uneven development after the end of World War II.

Being unilaterally interpreted and applied by the victors to the vanquished to find them culpable, it evolved in a biased manner. Some states, particularly the USA, proved hostile to the application of the doctrine to their top civilian and military leaders. The doctrine was largely applied to fallen military commanders and other senior officials of the Axis after *World War II*. Americans in the majority, and their Allies to a certain extent, applied the doctrine to hold fallen German commanders and civilian authorities responsible of atrocities their forces allegedly committed.

While at *Nuremberg*, the top Nazi leadership was prosecuted as the perpetrator of crimes, in the *Hostage* and *High Command* cases, the doctrine applied to ensure that top enemy commanders could be found guilty. In the Far East, the case of General *Yamashita* and other trials of Japanese military and civilian leaders constituted landmark applications of command responsibility with the same mindset. These cases were, however, criticised as being a victor's justice. In this atmosphere, it is hard to believe that a consistent and uniform application of command responsibility could be reached or that it had ever been. This worry proved right when American martial courts demeaned the ambit and reach of the doctrine in the *Medina* case. No superior to Captain Medina was ever prosecuted while evidence pointed to their culpability. Until now, Americans and some of their Allies have not permitted such uniformity.

Considering the influence and role the U.S and their satellites played and continue to play in crafting the doctrine of command responsibility and its reluctance to apply it to its own forces, it cannot be securely proved that the *ad hoc* tribunals applied it disinterestedly. Americans apply a double standard of the doctrine. Forsythe is right when he suggests that Americans “often demand of others what they are unwilling to accept themselves.”¹⁸⁰⁴ It is still a matter of great concern the reach of which is not yet known or controllable. The doctrine should be re-imagined and be applied to anyone, yet on a case-by-case basis. Moreover, the doctrine must be depoliticised.

¹⁸⁰⁴ Forsythe P. David, “The UN Security Council and response to atrocities: International Law and the P-5”, *Human Rights Quarterly*, Vol. 34, No.3, 2012, pp. 840 – 863, p. 840 and 843

The other major failure of the *ad hoc* tribunals is the silent but decisive influence played by the “victors” and other stakeholders in the proceedings. In this respect, Masayoshi observes that “when the tribunal is created, or even influenced by the enemies of the defendants, the prospects for dispassionate judgment fade away. In such cases, trials threaten to become instruments of legitimized revenge, bearing the countenance of justice, at the expense of substantive fairness.”¹⁸⁰⁵ The Government of Rwanda meddled with the proceedings in Arusha in an attempt to get the failed enemies overcharged at the same time securing immunity for the RPA forces. The Serbian government likewise was not cooperative to secure indictment of its officials accused of serious crimes. Command responsibility is another example of this worrying political meddling.

Equality in prosecuting international crimes must be “founded on the principle that all victims of atrocity have a right to justice”¹⁸⁰⁶ even if it is done under the tokenism and selectivity approaches. No one can expect the tribunals to prosecute every offender. Ford reinforces this desire more clearly in recalling that the interest of justice, peace, the rule of law and respect for human rights requires that the rule of law apply to all uniformly, and that formal law be adequate to the task of satisfying demands for tangible justice.¹⁸⁰⁷

This is also a *sine qua non* condition to arrive at the truth of a situation. Chuter illustrates this well when he writes:

if the *ad hoc* tribunals are ever to disseminate their version of the truth, the task will be a long one. This situation will improve only if those who demand that courts be set up to establish the truth, are prepared to accept the truth when it appears, even if they dislike it. So far, there is little sign of this happening. The situation is much more difficult when politics is directly involved, since the issues that war crimes courts address are usually inflammatory.¹⁸⁰⁸

¹⁸⁰⁵ Masayoshi Mukai, *op. cit.*, p. 50

¹⁸⁰⁶ Peskin Victor, “Victor’s Justice Revisited: Rwandan patriotic front crimes and the Prosecutorial Endgame at the ICTR” in Straus Scott and Waldorf Lars, *Remaking Rwanda: State Building and Human Rights after Mass Violence*, The University of Wisconsin Press, 2011, p. 173

¹⁸⁰⁷ Ford Jolyon, *Bringing fairness to international justice: a handbook on the International Criminal Court for defence lawyers in Africa*, Institute for Security Studies, Tswane, 2009, p. 3

¹⁸⁰⁸ Chuter David, *War Crimes: Confronting atrocity in the modern world*, Lynne Rienner Publisher, Boulder, London, 2003, p. 230

There is a clear lack of principled commitment to an effective international criminal law more generally.¹⁸⁰⁹ As Smith complains, the trials “are constructed for the purpose of political consolidation rather than the dispensation of justice.”¹⁸¹⁰ This remark applies to the *ad hoc* tribunals as well. There is no acceptable moral justification that a tribunal established to prosecute individual suspects “from all sides of an armed conflict” tactically chooses to only prosecute one side but not the other. This practice makes it virtually impossible to uncover the truth.

Despite numerous explanations provided by the ICTR officials or their associates to partially deliver justice, it is a fact that the tribunal did not “indict a single Rwandan Patriotic Front (RPF) suspect implicated in the [...] massacres of Hutu civilians in 1994.”¹⁸¹¹ The ICTR failure to do so is only revolting and too embarrassing. Whereas the ICTR may well escape the charge of being a victor’s tribunal, it cannot survive the one of perpetuating a victor’s justice. The ICTR work was largely influenced by the Government of Rwanda to the point where it managed to get Chief Prosecutor Del Ponte expelled from her functions in an attempt to have RPF forces escape prosecutions. This is a great failure in terms of delivering justice, fighting impunity, deterrence, national reconciliation and international peace and security. This failure needs to be acknowledged as such without further disingenuous arguments. Future international criminal tribunals, including the ICC should design a proper strategy to deal with situations where there are strong interested parties in these kinds of proceedings.

The ICTY has prosecuted all sides that participated in the conflicts in the former Yugoslavia, whether Serbs, Croats or Moslems. It however failed to investigate and prosecute NATO air bombing of Serbia in 1999. Power was used to defeat any attempt at holding NATO responsible of civilian casualties including victims of the bombing. The ICTY feared losing NATO cooperation in investigations of Yugoslavs involved in crimes. Nevertheless, refusing to investigate NATO casts doubt on the tribunal’s ability, authority and power to investigate and prosecute crimes irrespective of who committed them. It is another example of the perpetuation

¹⁸⁰⁹ Forsythe P. David, *op. cit.*, p.846

¹⁸¹⁰ Smith A. Charles, *The rise and fall of war crimes trials: from Charles I to Bush II*, Cambridge University Press, 2012, p. 4

¹⁸¹¹ Peskin Victor, “victor’s Justice Revisited:...”, *op.cit.*, p. 173

of a victors' justice in addition to bias.¹⁸¹² No criminal tribunal should ever concede on principles even though it may encounter pressure from power-holders.

The *ad hoc* tribunals were designed and conformed to their Statutes as crafted by the UNSC under Chapter VII of the UN Charter. It has been demonstrated that such an approach was not the only one available, nor was it the most proper and effective at the time of establishing the tribunals. It was only one way out because the Security Council failed to timely and effectively intervene to stop the armed conflict in the former Yugoslavia and in Rwanda. It did not lack power and authority. It only lacked the political will not the means. Political will is necessary to support, but not to influence the nascent system of international criminal law.

The Security Council's binding resolutions were acted upon by the new institutions. Yet, Husserl suggests that "to act in conformity with law is not necessarily to act justly. [...] An act is considered to be just if it bears the stamp of equality. Equality will prove to be the criterion of justice."¹⁸¹³ Moreover, to quote Lyons, "if the claim is that one part of justice is equal treatment and, since fidelity to the law always meets this requirement formally, justice is partially realized when the law is applied impartially, one is simply confusing necessary and sufficient conditions."¹⁸¹⁴ Here, equality must be understood in its extended meaning as not only aimed at fairness in the treatment of the defendants apprehended, but also as fairness in the process of deciding whom to prosecute.¹⁸¹⁵ This requires an effort from criminal tribunals to only judge blindfoldedly.

According to Husserl, once again, "acts marked by formal equality spring from an attitude of consistency. An act of this type implies an antecedent act; between these two acts exists uniformity which is conditioned by a constancy of will on the part of the doer."¹⁸¹⁶ To echo this

¹⁸¹² Kerr Rachel, "Peace through Justice? The International Criminal Tribunal for the former Yugoslavia", *Southeast European and Black Studies*, Vol. 7, No. 3, 2007, pp. 373 – 385, p. 379

¹⁸¹³ Husserl Gerhart, "Justice", *International Journal of Ethics*, Vol. 47, No. 3, 1937, pp. 271 – 307, p.273 - 274

¹⁸¹⁴ Lyons David., "Derivability, Defensibility, and Judicial Decisions," in *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge: Cambridge University Press, 1993b), pp.82- 83, cited in Reeves R. Anthony, "Do judges have an obligation to enforce the law?: ...", *op. cit.*, p.183

¹⁸¹⁵ See Peskin Victor, "Beyond Victor's Justice? The challenge of prosecuting the winners at the International Criminal tribunals for the former Yugoslavia and Rwanda", *op. cit.*, p. 213

¹⁸¹⁶ Husserl Gerhart, "Justice", *op. cit.*, p. 279

argument, Pound rightly disagrees with the judicial justice which is mechanically tailored on the operation of rules to a less degree of principles and conceptions.¹⁸¹⁷ For the sake of certainty, predictability and uniformity, any system of criminal justice must be built on principles and clearly defined and non-ambitious objectives.

It is however regrettable that the *ad hoc* tribunals bowed to political and social forces which, according to Masayoshi “transformed [them] into a comprehensive humanitarian gesture by adopting obscure goals and responsibilities extraneous to [their] true purpose.”¹⁸¹⁸ One such obscure goal is the supposed contribution to national reconciliation. A definition of national reconciliation was successfully provided. Critical to the definition adopted, is the understanding that the process must involve at least two former antagonists or enemies who accept to settle their disputes of the past and agree to a common shared future. How a criminal trial may assist in this endeavour is a question the *ad hoc* tribunals did not and could not answer. How could they? The literature indicates that there is a palpable gap between the tribunals’ rhetorical promises aimed at reconciliation and their manifest reality.¹⁸¹⁹ Moreover, Barria and Roper suggest that:

Fundamentally, national reconciliation can only occur in an environment in which both sides feel that justice is being achieved. In order to promote national reconciliation there cannot be ‘victim’s justice’. This is part of the problem with the stratified concurrent jurisdiction of the ICTR and the national courts. Morris argues that as long as individuals perceive that international as well as domestic judicial institutions are systematically biased towards one group, reconciliation will never occur.¹⁸²⁰

This quote tells it all as far as the ICTR is concerned. The ICTR never attempted to reconcile both Hutu and Tutsi communities. As is generally well known, some members of these two communities were either perpetrators or victims of the crimes that swept through Rwanda irrespective of their severity. In the former Yugoslavia, things have not been brighter. According to Kerr:

while it is acknowledged that the ICTY has played a role in shedding light on the atrocities and raising awareness of the plight of victims at an international level, societies remain divided along ethnic lines, and in spite of some progress on the political level, reconciliation with the past and between victims and perpetrators still seems to be some way off.¹⁸²¹

¹⁸¹⁷ Pound Rosco, “Improving the administration of justice”, *American Bar Association Journal*, Vol. 29, Iss.9, 1943, pp. 494 – 502; 518 – 524, p. 494

¹⁸¹⁸ Masayoshi Mukai, *op. cit.*, p. 49

¹⁸¹⁹ Developments in the Law: International Criminal Law, *Harvard Law Review*, Vol. 114, Iss.7, 2000 – 2001, pp. 1943 – 2073, p. 1975

¹⁸²⁰ Barria A. Lilian & Roper D. Steven, “How effective are international criminal tribunals?...”, *op. cit.*, p. 363

¹⁸²¹ Kerr Rachel, “Peace through Justice?...”, *op. cit.*, p. 379

It is therefore possible to cautiously argue that criminal tribunals are not proper channels for reconciliation. Reconciliation may better fit in truth and reconciliation commissions or other transitional mechanisms. Eventually, reconciliation can be attained if justice is done to all parties. Yet both the ICTY and the ICTR failed to put this to a test. The tribunals could also have clearly stated that reconciliation could not be part of their work rather than being silent or offering apologies and explanations on something that was impossible to discharge.

The ICTR constitutive resolution specifically states that the tribunal will contribute to the “maintenance of peace”, that they will ensure “that such violations are halted and effectively redressed” and will lead to a “process of national reconciliation.”¹⁸²² Furthermore, as Barria and Roper note, “the goal of peace is an understandable mandate of the ICTY. This tribunal was created during the conflict as an element of the international community’s peace-building initiatives.”¹⁸²³ These authors observe, however, that:

In 1993, when the Security Council approved the creation of the tribunal, the conflict within Bosnia was still raging. If we are to define peace as the absence of war, we can initially conclude that the ICTY’s goal to maintain peace was not achieved. [...] the existence of the Tribunal and the possibility of being indicted did not seem to encourage an ending of hostilities and the examination of peaceful methods to solve the difference between the Bosnian Serbs, Croats and Muslims.¹⁸²⁴

Barria and Roper also write about the ICTR, and observe that:

although the ICTR was established in a post-conflict environment, the international community was concerned that revenge killings on the part of the Tutsis would undermine peace in the region. Since the establishment of the ICTR, estimates are that tens of thousands have perished in clashes between Hutu insurgents and Tutsi revenge killings.¹⁸²⁵

There is therefore a conceptual dichotomy between justice and peace. This dichotomy overemphasises the view that the *ad hoc* tribunals were not proper mechanisms to bring peace and security. This quite remote objective cannot reasonably be assigned to an *ad hoc* criminal tribunal. This does not negate the nexus that exists between peace and justice. In addition to this dichotomy, the alleged main suspects, like President Milosevic of the FRY, were not arrested in the first instance to signal that those who were allegedly fuelling violence were dealt with decisively as a matter of urgency. The ICTR’s first case concerned Jean-Paul Akayesu, a local

¹⁸²² Barria A. Lilian & Roper D. Steven, op. cit., p. 357

¹⁸²³ Ibidem, p. 358

¹⁸²⁴ Idem, p. 358

¹⁸²⁵ Idem, p. 358

mayor, whose judgment was rendered on 2 September 1998. He had been arrested on 10 October 1995.¹⁸²⁶ The initial appearance of the accused took place on 30 May 1996¹⁸²⁷, after 232 days of his arrest. The trial finally began on 9 January 1997.¹⁸²⁸ Akayesu was arraigned while colonel Bagosora, a so-called ring-leader was in the custody of the ICTR since 23 January 1997 having been arrested in Cameroon on 9 March 1996.¹⁸²⁹ Bagosora was detained in Cameroon pursuant to the Tribunal's authority from 17 May 1996.¹⁸³⁰ He was transferred to the Tribunal Detention Facility on 23 January 1997.¹⁸³¹ Considering the importance¹⁸³² the tribunal and the media in general was giving to the Bagosora and Milosevic cases, one would expect their adjudications to take precedence over any other judgment. Nothing of this nature happened.

It is imperative to end with Southwick's remarks where he emphasises that "the good intentions behind prosecuting crimes of mass violence should be subject to certain constraints."¹⁸³³ For example, it must be focused, like any other criminal justice in domestic systems. Role players, particularly political interveners should refrain from directing how international criminal justice runs its business. They should get their hands off the criminal process. Another constraint is that international criminal justice must calibrate its goals and objectives, avoiding by the same token being overambitious. Without advocating any model of criminal prosecution; it is true that some domestic systems of criminal justice work quite well in full independence, professionalism and accountability. They are effective. What is then missing for international criminal institutions to readjust their way of doing business and deliver much better results? This thesis has offered some useful insight and materials to start with.

¹⁸²⁶ *Akayesu*, TC, para. 9

¹⁸²⁷ *Akayesu*, TC, para. 12

¹⁸²⁸ *Akayesu*, TC, para. 17

¹⁸²⁹ See *Bagosora and Nsengiyumva*, A, para. 310

¹⁸³⁰ *Bagosora et al.* TC, para. 76

¹⁸³¹ *Bagosora et al.* TC, para. 76

¹⁸³² For instance, "on 6 March 1998 the Prosecutor submitted a joint indictment, for confirmation by a judge, in respect of Théoneste Bagosora and 28 other individuals." See *ICTR Third Annual Report*, A/53/429 - S/1998/857, 23 September 1998

¹⁸³³ Southwick G. Katherine, "Srebrenica as Genocide? The Kristic Decision and the Language of the Unspeakable", *Yale Human Rights and Development Law Journal*, Vol. 8, 2005, pp. 188 – 227, p.190

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