

PEACE WITH JUSTICE: THE ROLE OF PROSECUTION IN PEACEMAKING AND RECONCILIATION

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Summary: I. INTRODUCTION. II. TOWARDS RECONCILIATION: DIFFERENT APPROACHES AND THEIR PRACTICAL APPLICATION. III. FUNCTIONS OF JUSTICE AND THEIR ACHIEVEMENT BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY). IV. IS THE ICTY AN EFFECTIVE TOOL FOR RECONCILIATION? V. CONCLUSIONS. BIBLIOGRAPHY

“Ending the climate of impunity is vital to restoring public confidence and building international support to implement peace agreements.

At the same time, we should remember that the process of achieving justice for victims may take many years, and it must not come at the expense of the more immediate need to establish the rule of law on the ground.

Transitional justice mechanisms need to concentrate not only on individual responsibility for serious crimes, but also on the need to achieve national reconciliation. We need to tailor criminal justice mechanisms to meet the needs of victims and victim societies. If necessary, we should supplement courts with mechanisms such as truth and reconciliation commissions.

At times, the goals of justice and reconciliation compete with each other. Each society needs to form a view about how to strike the right balance between them”.

(Text of remarks by Secretary-General Kofi Annan to the ministerial meeting of the United Nations Security Council (UNSC) on ‘Justice and the Rule of Law: the United Nations Role’, Press Release SG/SM/8892, SC/7881, 09/24/2003).

I. INTRODUCTION

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In the late twentieth and early twenty-first century, issues of peace and justice have been receiving increasing attention, especially from international Organisations.¹ Quite often, cases of gross violations of human rights are reported, one of the most recent, though unfortunately not the only one, being the genocide in Darfur (Sudan) because of the civil war that has been ravishing the country for over twenty years.² Within the context of peace processes or peace agreements, as a response to atrocities committed over decades in ethnic conflicts, domestic and international mechanisms of various types are being implemented with the aim of achieving national reconciliation and dispensing justice. This study will examine the relationship between peace and justice and the impact of prosecution on peacemaking, in the short term, and reconciliation, in the long term, as part of the responsibility to provide protection after a conflict.³

The importance of prosecuting crimes after a repressive regime or a conflict, and the impact prosecution has on peacemaking and reconciliation, cannot be discussed without making reference to other approaches aimed at reconciliation. In effect, in the last century, the international community went from accepting amnesty laws as the standard way of securing peace, to considering that punishment before national or international courts was a preferred solution for achieving justice and reconciliation. Meanwhile, a third alternative is emerging with characteristics of both – the truth commission, or truth and reconciliation commission.⁴

Among scholars, there is strong debate on the most effective ways of achieving peace and reconciliation, suggesting a dichotomy between judicial approaches (what some authors call *retributive justice*) and non-judicial approaches (what some authors call *reconciliatory justice*). Some even advocate the possibility of combining the two mechanisms by reconstructing the truth, reconciling the parties and prosecuting in criminal courts those responsible for committing massive breaches of human rights.⁵

¹ Specially during the last decade by the United Nations (UN). See Text of Remark by UN Secretary-General Kofi Annan to the ministerial meeting to the UNSC on ‘Justice and the Rule of Law: the United Nations Role’, Press Release SG/SM/8892, SC/7881, 24/09/2003, and the Statement by the President of the Security Council, 6 October 2004. S/PRST/2004/34.

² GAMARRA, Y. and VICENTE, A., “Securing Protection to Civilian Population: The Doubtful United Nations Response in Sudan”, *The Global Community Yearbook of International Law and Jurisprudence*, 2004 (1), pp. 195 *et seq.*

³ BELL, Ch., *Peace Agreements and Human Rights*, Oxford, Oxford University Press, 2003.

⁴ For a general point of view, see ROTBERG, R.I. and THOMPSON, D. (eds.), *Truth v. Justice. The morality of Truth Commissions*, Princeton/Oxford, Princeton University Press, 2002. Truth Commissions have been described by P. van ZYL as the ‘third way’, see van ZYL, P., “Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission”, *Journal of International Affairs*, 1999, vol. 52, pp. 647 – 667.

⁵ See, for example, DUGARD, J., “Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?”, *Leiden Journal of International Law*, 1999, p. 1005. Also, BIGGAR, N., “Making Peace or Doing Justice: Must We Choose?”, in BIGGAR, N. (ed.), *Burying the Past. Making Peace and doing Justice*

The international community consider ways in which reparation for victims can be partly founded by the international community, in the context of the ongoing effort at the United Nations (UN) to develop the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law.⁶ The Basic Principles explicitly adopt a ‘victim-oriented point of departure’ and include both retributive⁷ and reconciliatory⁸ approaches to justice.

The issue of punishment also raises interesting questions about the relationship between ethical, political, and legal theory.⁹ From the ethical point of view, negotiation of an armed conflict creates tension between two essential values for the whole of society: peace and justice. There is a constant temptation to sacrifice the former in order to attain the latter. There are situations in which peace is given precedence in the future over justice. This *a priori* pragmatic thought ignores what reality has taught regarding the negative consequences of sacrificing a society’s essential values. Peace without justice is a false peace whose frailty will become apparent sooner or later. Justice is a very valuable tool to be used in the transformation of a society in conflict. Politically, a peace negotiation should aim to seek national reconciliation and untroubled coexistence in society. Its objective should be the definitive halting of gross systematic mass violations of human rights and humanitarian law. For this reason, respect for human rights must be preserved in negotiation processes. From a legal perspective, any peace negotiation that claims legitimacy must respect domestic as well as international legality.

In the decades immediately following World War II, advocates for human rights launched three important innovations: the International Military Tribunal trials in Nuremberg and Tokyo, the UN, and intergovernmental and non-governmental organisations. Nuremberg and Tokyo were a reaction to the holocaust and other atrocities committed during World War II. Although their relevance from a historical point of view has been remarkable, this approach is widely seen today as victor’s justice and therefore not conducive to reconciliation. In contrast, the role of international

after Civil Conflict, Washington, Georgetown University Press, 2001, pp. 12 and 13, and ESTRADA-HOLLENBECK, M., “The Attainment of Justice through Restoration, Not Litigation: The Subjective Road to Reconciliation”, in ABU NIMER, M. (ed.), *Reconciliation, Justice and Coexistence*, Oxford, Lexington Books, 2001, pp. 66 *et seq.* and 74 *et seq.*

⁶ See Commission on Human Rights, UN Doc. E/CN.4/2000/62 and UN Doc. E/CN.4/2003/63.

⁷ “Violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations ...” UN Doc.E/CN.4/2000/62, para. 4.

⁸ See Redress, OMCT, Amnesty International et al, “The Draft Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law”, at <http://www.alrc.net>

⁹ See, GREIFF, P. de, “Deliberative Democracy and Punishment”, *Buff. Crim. L. Rev.*, 2001/2002, pp. 373 *et seq.* For a critical point of view see, KOSKENNIEMI, M., “‘The Lady Doth Protest Too Much’. Kosovo, and the Turn to Ethics in International Law”, *The Modern Law Review*, 2002, pp. 159 *et seq.*

Organisations, particularly the UN, in the setting up of inter-governmental and international mechanisms, was essential in the definition, promotion and protection of human rights,¹⁰ as was the role of non-governmental organisations. More recently, mechanisms for the promotion and protection of human rights have also included *ad hoc* international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR), *hybrid* tribunals (Sierra Leone, Kosovo, Timor Leste), truth commissions, and the permanent International Criminal Court (ICC). Each of these mechanisms has been applied in very different situations and conflicts with different characteristics, but all of them aim to deal with the past and to prevent the recurrence of conflict and serious crimes.

This study adopts an inductive approach to this debate in the context of contemporary international Law with the aim of examining the culture of human rights, justice and rule of law, especially to what extent the work of the ICTY has been effective in the peace and national reconciliation processes of the new republics evolving from the dissolution of the former Yugoslavia. Without any doubt, the prosecution of those responsible for committing international crimes is one of the factors to be taken into account in peace and national reconciliation processes. Various judicial mechanisms have been set up on the international scene, and results have varied depending on the situation and the actions that have been taken. Obviously, some judicial mechanisms may be more effective than others, yet their mere existence represents a step forward in international Law, inasmuch as they have succeeded in prosecuting individuals who have committed atrocities, and eliminated impunity as well as future breaches of human rights. But, the weakness of the ICTY mandate limited their effectiveness.

With a view to including the functions of justice in peace and national reconciliation processes,¹¹ this study has been divided into three parts. The first part presents an overview of the different judicial and non-judicial approaches for dealing with past conflicts, as well as an analysis of their effective contribution to peace and reconciliation through several experiences. In the second part, the ICTY as one of the main judicial approaches currently functioning, and its role in achieving peace and reconciliation in the Balkans, is examined. This section studies the various functions of justice in achieving reconciliation, and analyses whether the Tribunal accomplishes those functions and contributes to lasting peace in the former Yugoslavia. In the third part, the interaction of both approaches to prevent atrocities and impunity and its consequences for international Law will be discussed. Cases are selected whose features best illustrate each part.

¹⁰ See PASTOR RIDRUEJO, J.A., “Una estrategia integrada para la protección de los derechos humanos”, in *Héctor Gross Espiell Amirocum Liber*, vol. 2, Brussels, Bruylant, 1997, p. 1015.

¹¹ See BENNOUNA, M., “Truth, Justice and Amnesty”, in VOHRAH, L. Ch., et al. (eds.), *Man’s Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese*, The Hague/London/New York, Kluwer Law International, 2003, p. 136.

II. TOWARDS RECONCILIATION: DIFFERENT APPROACHES AND THEIR PRACTICAL APPLICATION

1. Non-judicial approaches: Amnesty Laws and Truth Commissions

A) Amnesty laws: a key element of transition to peace

The traditional approach to the intersection of peace and justice was the amnesty law, by which outgoing authorities granted themselves, or negotiated the granting of, amnesty. Not surprisingly, this mechanism has been abused many times in the past by repressive military or other regimes seeking impunity for their crimes before relinquishing power to successor governments. However, it may be argued that, at certain points in history, amnesty was the only approach for smoothly reaching a democratic transition after a repressive regime, and thus may have represented the best available option to victims as well as perpetrators.

Spain opted to give priority to the transition to democracy via a general amnesty Act,¹² with the agreement of all parties, rather than judge those responsible for atrocities committed during the Civil War and Franco's dictatorship, and to reconstruct the past and the truth. Proposals for the reconciliation of the Spanish people and integration of everyone into political life without any type of discrimination were embodied in a series of political measures, both actual and symbolic, that meant the rehabilitation, albeit partial, of the vanquished. This rehabilitation was not complete, not only because of the time that had passed since the Civil War (nearly forty years), but also because of the willingness to forget that existed at the time. Firstly, actual political measures were passed, such as the pardon decreed by the King,¹³ or the recognition of pension rights for the vanquished and equality with the victors. It is significant that in the preamble of the pardon granted by the King, there was a relatively clear statement of intent in which the idea of the Monarchy was linked to the reconciliation of the Spanish people. Secondly, a series of symbolic measures of reconciliation with the past was adopted, such as recognition of the bombing of Guernica, the transformation of the Victory Parade into the Day of the Armed Forces, the erection of a monument to all of the fallen, and the recognition of the Civil War as being the 'war of the madmen', the period of 'collective madness' *par excellence* in the history of Spain.¹⁴

¹² Executive Order 10/76 of 30/7/1976, published in the Official State Gazette 3rd and 4th August 1976.

¹³ 'Pardon for imprisonment, fines and driving bans imposed, or that may be imposed, for crimes and misdemeanours committed under the Criminal Code, Military Justice Code and special criminal laws, committed prior to 22nd November 1975', Executive Order of 25th November 1975, N° 2940/75, OSG 25th and 26th November 1975.

¹⁴ See AGUILAR FERNÁNDEZ, P., *Memoria y olvido de la Guerra Civil española*, Madrid, Alianza Editorial, 1996, pp. 261-286.

Currently under discussion is a bill for the recovery of historical memory following a resolution passed by Parliament on 8th June 2004. Coinciding with the 75th Anniversary of the Second Republic, it also passed Act 24/2006 of 7th July, concerning the declaration of 2006 as the Year of Historical Memory.¹⁵ At the same time, there has been a proposal to set up a Historical Memory Archive with the aim of bringing together the scattered resources of Spanish exiles from the 1936 Civil War. This type of measure arouses, at least, feelings encountered in civil society and tension in the political milieu.¹⁶ Categorical condemnation of the breaches and violations of human rights committed during Franco's dictatorship are also to be found in resolutions by international political bodies such as the European Parliament¹⁷ and the Parliamentary Assembly of the Council of Europe.¹⁸

In fact, the contemporary trend in international Law has been to reject amnesty laws.¹⁹ For example, the UN Commission on Human Rights²⁰ and its Sub-Commission for the Prevention of Discrimination and Protection of Minorities have concluded that amnesty is a major reason for continuing human rights violations throughout the world.²¹ In addition, the Inter-American Court and Commission of Human Rights have held that amnesties granted by several Latin-American countries are incompatible with the American Convention of Human Rights. Nonetheless, a compromise between the international demand for prosecution of international crimes and the national appeal for a political compromise involving amnesty can in some cases be achieved by recognising a distinction between permissible and non-permissible amnesties, and giving international acceptance to the former only.²² With the internationalisation of human

¹⁵ *Official State Gazette*, 8th July 2006.

¹⁶ *Diario de Sesiones del Congreso de los Diputados*, VIII Legislatura, 14th December 2006, n° 222, pp. 11255 *et seq.*

¹⁷ Declaration by the President of the European Parliament and the chairmen of the political groups in the Parliament on the 70th anniversary of General Franco's coup in Spain which gave rise to the beginning of the Spanish Civil War, 4th July 2006.

¹⁸ Recommendation 1736 (2006), adopted by the Parliamentary Assembly of the Council of Europe on 17th March 2006.

¹⁹ See on this issue the approach studied by ROBINSON, D., "Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court", *EJIL*, 2003/3, vol. 14, pp. 481 – 205.

²⁰ UN Human Rights Commission, "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law", Final report of the Special Rapporteur, Cherif Bassiouni, submitted pursuant to Resolution 1999/33, E/CN.4/2000/62, para. 25.

²¹ See United Nations Commission on Human Rights: Report on the Consequences of Impunity, UN Doc. E/CN.4/1990/13.

²² See the comparison between the experiences of Chile and South Africa noted by DUGARD, J., "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?", *op. cit.*, pp. 1001 *et seq.*

rights and humanitarian Law and the emerging democratic principle in international Law, the international community has shown its repulsion against human rights abuses, and its preference for prosecuting the perpetrators of crimes over granting them amnesty.²³ This preference for prosecution is reflected in certain legal instruments, such as the Genocide Convention of 1948,²⁴ the Geneva Conventions of 1949,²⁵ the International Convention on the Suppression and Punishment of Crime of Apartheid of 1973,²⁶ or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984,²⁷ as well as in international institutions, such as the Inter-American Court,²⁸ and Commission of Human Rights, European Court of Human Rights,²⁹ or the UN Human Rights Committee.³⁰ Even the firm stance of the ICTY on the issue follows this point of view.³¹

B) Truth and Reconciliation Commissions: a non-judicial mechanisms

In the last few decades, in view of atrocities such as those committed in Chile, South Africa, Uganda, Cambodia, Peru, Guatemala, Sierra Leone, Liberia, Democratic

²³ See PENROSE, M. M., “It’s Good to Be the King!: Prosecuting Heads of State and Former Heads of State under International Law”, *Columbia Journal of Transnational Law*, 2000, pp. 193 *et seq.* Professor Penrose advocates the enactment of prosecutorial rules and urges the international community and states in particular to take the necessary steps to try the perpetrators.

²⁴ Article 4 of the Genocide Convention of 1948 states that “(p)ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”.

²⁵ Article 146, par. 1 of the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War goes further when the contracting parties are committed to “enact(ing) any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention” and para. 2 states the obligation that “shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case”.

²⁶ Article V states “Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction”.

²⁷ Article 5 paras. 1 and 2, and Article 7 deal with similar engagements.

²⁸ Barrios Altos Case, *Chumbipuma Aguirre y otros v. Perú*, Judgement, Inter-American Court of Human Rights, 14 March, 2001, para. 41.

²⁹ *Streletz, Kessler and Krenz v. Germany Case*, European Court of Human Rights, Judgment, 22 March 2001, para. 103.

³⁰ General Commentary No. 20 of the International Committee for Human Rights.

³¹ *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1, Judgement, 10 December 1998, para. 155.

Republic of Congo (DRC), Timor Leste, Sri Lanka and Sudan, among others, the enforcement of human rights has required the development of creative alternatives. Among the most noteworthy is the development of truth commissions intended to inquire into and document torture, murders, and other human rights violations that otherwise would be denied and covered up by repressive regimes. This approach constitutes a new form of dealing with the past that might be situated between amnesty laws and international or national tribunals, and is sometimes applied together with one of these two mechanisms. As shown in this section, truth commissions have come to constitute an effective way of dealing with the past and achieving reconciliation in several cases, the best known and perhaps most successful being South Africa.³² Nevertheless, there are other cases worthy of attention, such as Chile or Guatemala.³³

Firstly, Chile may be considered an example of non-permissible amnesty, although its story is more complicated than such a simple characterization might suggest. The way that Chileans have dealt with the atrocities committed during the regime of Augusto Pinochet (1973-1990) can be divided into two phases - a 'political phase' and a 'judicial phase'.

The former, during the first successor civilian government under President Aylwin, was a 'political phase' dominated by the executive. This phase determined how the new democracy was going to deal with the past and what limits the government wanted to (or was forced to) impose in prosecuting the perpetrators of crimes committed by the Pinochet regime.

The second phase was the so-called "judicial phase" and took place during the government of President Eduardo Frei, elected in 1993. During this stage, the atrocities committed in Chile acquired tremendous international attention thanks to human rights organizations, political party activists and victims' organizations. In 1997, the Supreme Court applied the Geneva Conventions for the first time since 1973, giving priority to international Law over the amnesty law and breaking the sanctity of the amnesty mechanisms for impunity. In January 2000, Pinochet's arrest in London renewed civil-military tensions in Chile and highlighted one of the most important considerations in the Chilean case - the tension between peace and justice. On more than one occasion, the Chilean courts stripped the former general of immunity in order to try him for corruption, torture and kidnapping. Time and again Pinochet was arraigned, but there was no judge capable of trying and condemning him. The Chilean courts showed their inability to try and condemn him, and they probably enabled the former general to achieve his real goal: to die without having been condemned.

³² JEFFREY, A., *The Truth About the Truth Commission, Johannesburg*, Institute of Race Relations, 1999; JENKINS, C., "Amnesty for Gross Violations of Human Rights in South Africa: A Better Way of Dealing with the Past?", in EDGE, I. (ed.), *Comparative Law in Global Perspective*, Transitional Publishers, 2000, pp. 345 et al., and "After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa", *South African Journal of Human Rights*, 2000, pp. 417 et al.

³³ More information: <http://www.ictj.org>

Unlike the Chilean case, the shift from an authoritarian regime to an elected civilian government was not a true indicator of democratic transition in Guatemala.³⁴ The elections of 1985 were controlled by the military and followed by a period of gross human rights violations, consolidation of military power, and elimination of any opposition movements. Ten years passed before Guatemala took specific steps toward peace and the possibility of reconciliation. It should be pointed out that in the Guatemalan case, the peacemaking process had a great impact on future mechanisms of reconciliation. The circumstances of the peace negotiations did not favor a strong mandate for the official investigation commissions and, although the civilians had more power during the peace agreements than before, the military remained the most organized and powerful of the two sides. As a consequence, the agreement concluded in December 1996 was very weak on the issues of demilitarization and reform of the institutions. However, due to the efforts of the Catholic Church and human rights groups, an agreement for a UN-sponsored Historical Clarification Commission had been signed in June 1994.³⁵ Despite having a weak mandate, its recommendations included programs for compensation of victims, including psychological and economic assistance, investigations and exhumations of clandestine graves, and a commission for the search of missing children among others.

It is important to note that the process of dealing with past atrocities in Guatemala has been led mainly by civil society organizations independent of the revolutionary left and supported by mainly international NGOs and the UN mission in the country. These groups have frequently challenged military power and impunity while uncovering the truth and securing justice for victims. However, in order to reach genuine democracy, these activities must be accompanied by a submission of the elite to the rule of law and the abandoning of their historic privileges. Although the process for reconciliation started out with the truth commission and compensation mechanisms, there has been a lack of judicial sanctions, creating impunity for the military and civilian elites that still remain in the country, and obstructing any real democratic transition.

In the third case, one of the most significant examples of permissible amnesties is South Africa's Truth and Reconciliation Commission (TRC) created in 1995 by the first democratically elected parliament as a consequence of the peaceful transition from apartheid. It is important to point out that the TRC was a compromise (to launch a

³⁴ See SIEDER, R., "War, Peace, and the Politics of Memory in Guatemala", in BIGGAR, N., *Burying the Past. Making Peace and doing Justice after Civil Conflict*, op. cit., pp. 184 et seq., and SIMON, J.-M., *La Comisión para el esclarecimiento histórico, verdad y justicia en Guatemala*, Ponencia presentada al Coloquio internacional, 'Estado de Derecho y delincuencia de Estado en América Latina. Procesos de transformación comparados', 22nd-24th February 2002, Sao Paulo, Brazil.

³⁵ In addition, an extensive report on human rights violations during the armed conflict was published by the Human Rights Office of the Catholic Church in 1998. This document included names of individuals responsible for violations. That transparency was probably the reason why one of its co-authors was killed a few days after the report was published.

process for granting amnesty to participants in past conflicts) included during the peace negotiations. In this case therefore, there was a clear political will from all sides of the conflict to include a mechanism for national reconciliation in the peacemaking stage. As Villa-Vicencio notes, “(i)ronically, it was the forced compromise between the forces of liberation and the forces of apartheid that provided an alternative way to dealing with the atrocities of the past”.³⁶

The TRC was a transitional mechanism designed, in the words of the Interim Constitution, to “provide a historic bridge between the past of a deeply divided society characterized by strife conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex”.³⁷ The TRC consisted of an amnesty, victim testimony, and reparation and rehabilitation committees. For the granting of amnesty, remorse was not a requirement; only political motivation for the crime and full disclosure of the facts in a public hearing under cross-examination were required. Those who failed to obtain amnesty from the committee, or who failed to apply for it, were exposed to prosecution. This serves to demonstrate that amnesty in South Africa was dependent on certain requirements and did not favor impunity.

Although the TRC did not aim at retributive justice, it had a positive effect on the victims and succeeded in large part in reaching a consensus among South Africans, aimed at achieving a pluralistic society. Joseph Montville points out that storytelling usually had a cathartic effect on the victim telling the story, which became part of the official public record of the state. He argues that storytelling³⁸ also penetrated the defenses of the other side that had resisted broadside accusations.

As for the limits of this mechanism, the Commission failed in a number of ways to meet the needs of victims, and the government failed to respond to the recommendations made by the Commission concerning reparations. Moreover, the TRC did not adjudge legal culpability for those who supported or tolerated the previous oppressive government. However, even today the TRC in South Africa is seen as a successful transitional mechanism to deal with the past, and it has been taken into consideration in many debates, including the Yugoslavia Tribunal in some cases,³⁹ when dealing with reconciliation.

³⁶ VILLA-VICENCIO, Ch., “Restorative Justice in Social Context: The South African Truth and Reconciliation Commission”, in BIGGAR, N., *Burying the Past. Making Peace ...*, *op. cit.*, p. 209.

³⁷ Preamble to the Interim Constitution (Act No. 200 of 1993), after Section 251.

³⁸ See MONTVILLE, J., “Justice and Burdens of History”, in ABU-NIMER, M., *Reconciliation, Justice and Coexistence*, *op. cit.*, p. 138.

³⁹ For instance, note below that Alex Borain, former co-president of the TRC, appeared as a witness before the ICTY, during the proceedings to consider the guilty plea of the defendant Biljana Plavsic.

2. Judicial approaches for dealing with the past

A) The role played by Domestic Courts

Judicial approaches for dealing with the past are applied in different legal scenarios and with different features, but most of them are characterized by being retributive and, in most of the cases, although not necessarily, adversarial. First of all, we have National Courts prosecuting the perpetrators in their own jurisdictions and under their own judicial system, such as in Chile or Rwanda.⁴⁰

Second, there are National Courts applying the principle of universal jurisdiction, such as Belgium with its case against Sharon or Spain with its case against Pinochet.⁴¹ In the latter case, the aim was to establish a criminal jurisdiction with regard to the principle of universal prosecution, although the Republic of Chile had emphasized the practically exclusive nature of its jurisdiction, invoking the principle of territoriality arising from State sovereignty.⁴² In the doctrine there are some who claim that general international Law has reached a level of development that would enable one to say that States can proclaim their jurisdiction over certain international crimes, wherever they were committed and regardless of the origin and situation of the perpetrators and victims, if they might imperil international order.⁴³ Thus Professor P-M. Dupuy stated that, as well as any conventional rules that may exist, we are moving towards the existence of a customary rule that would not recognize immunity for Heads of State or Government when crimes have been committed against humanity.⁴⁴ But these statements do not mean that immunity is considered to have disappeared, because

⁴⁰ In the Rwanda case, discussed below, national prosecution is complemented by the Rwandan International Criminal Tribunal.

⁴¹ See on the Scilingo case or Guatemalan case before Spanish courts, CAPELLÀ I ROIG, M., “Los crímenes contra la humanidad en el caso Scilingo”, *Revista Electrónica de Estudios Internacionales (REEI)*, 10/2005 and SANTOS VARA, J., “La jurisdicción de los tribunales españoles para enjuiciar los crímenes cometidos en Guatemala”, *REEI*, 11/2006, available at <http://www.reei.org>

⁴² See the studies on this matter published by Professor REMIRO BROTONS, A., “El proceso a Pinochet”, *Política Exterior*, 1999, nº 67, pp. 43 *et seq.*, and *El caso Pinochet. Los límites de la impunidad*, Madrid, Política Exterior/Biblioteca Nueva, 1999, pp. 45 *et seq.*, and GARCÍA ARÁN, M. and LÓPEZ GARRIDO, D. (coord.), *Crimen internacional y jurisdicción internacional. El caso Pinochet*, Valencia, Tirant lo Blanch, 2000.

⁴³ With regard to the exercise of universal jurisdiction, see KOLB, R., “Universal Criminal Jurisdiction in Matters of International Terrorism: Some Reflections on Status and Trends in Contemporary International Law”, *RHD*, 1997, pp. 43 *et seq.*, and ACEVES, W.J., “Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation”, *Harv. ILJ*, 2000, pp. 129 *et seq.*

⁴⁴ See, in this respect, DUPUY, P-M., “Crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes”, *RGDIP*, 1999, p. 292.

as M. Cosnard states, “refuser l’immunité comporte un risque d’ingérence insupportable si la personne poursuivie est un chef d’État en exercice”.⁴⁵

The precedent of the Pinochet case leads us to a restrictive interpretation of the concept of extradition for actions against humanity, limited to the Torture Convention. This is why any expectations for a system of universal jurisdiction are not very optimistic. The former President of the International Court of Justice (ICJ), G. Guillaume, noted that “la compétence juridictionnelle universelle n’est qu’un substitut de l’extradition et s’accompagne, non de l’application de la loi étrangère, mais celle de la loi du for (...) Le choix offert n’est plus aujourd’hui entre extraditer et punir, (...) mais entre extraditer et poursuivre, *aut dedere, aut persequi*”.⁴⁶

At any event, it would be necessary to promote cooperation among all States, all the more so if they are democratic, and avoid any breach of international peace and stability through situations of torture, genocide or terrorism. For national tribunals not to apply the principle of universal jurisdiction in the cases of the most serious crimes is tantamount to defending the double standards that happen to be criticised in the doctrine and more and more fiercely by world public opinion.

B) *Hybrid Courts: Sierra Leone Special Court*

Special Courts have been created by agreement, such as in Sierra Leone, representing a mixture of national and international Law. In response to atrocities committed in the country as a consequence of a civil war in the 1990s, the UNSC, through Resolution 1315 (2000) of 14th August, requested the Secretary General of the UN to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bore the greatest responsibility for the committing of crimes against humanity, war crimes and other serious violations of international humanitarian Law committed within the territory of Sierra Leone.⁴⁷ It is important to note that, unlike the Yugoslav Tribunal, which was created under Chapter VII of the UN Charter, the Special Court was the result of an agreement signed between the UN and the Sierra Leone Government on 16th January 2002. Consequently, the Special Court has concurrent jurisdiction with primacy only over Sierra Leone courts.

The subject matter jurisdiction of the Court includes crimes under international Law (crimes against humanity, war crimes and other serious violations of international humanitarian Law not including the crime of genocide), and crimes under Sierra Leone

⁴⁵ COSNARD, M., “Quelques observations sur les décisions de la chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l’affaire Pinochet”, *RGDIP*, 1999, p. 321.

⁴⁶ GUILLAUME, G., “La compétence universelle. Formes anciennes et nouvelles”, in *Mélanges offerts à Georges Levasseur. Droit pénal, droit européen*, Paris, Librairie de la Cour de Cassation/Litec, 1992, p. 36.

⁴⁷ See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4th October 2000 (S/2000/915).

law. One notable innovation of the Court is its personal jurisdiction over juvenile offenders who, at the time of the alleged commission of the crime, were between 15 and 18 years of age.⁴⁸

The Special Court of Sierra Leone is innovative in several respects, compared with the Rwanda and Yugoslavia Tribunals. In addition to the incorporation of national law, several judges and staff members are from the country or appointed by its Government, and the seat of the Tribunal is in the country's capital, Freetown. This Court is also complemented with the Sierra Leone and the Truth and Reconciliation Commission.⁴⁹

C) *Ad Hoc* Tribunals: Demanding Justice by the UNSC

Following massive violations of human rights, including genocide, which were considered threats to international peace and security, the UNSC, acting under Chapter VII of the UN Charter, created the two *ad hoc* Tribunals as a measure contributing to the restoration and maintenance of peace in those areas. The ICTY was established by the UNSC in Resolution 808 (1993) and gave it its own statute in Resolution 827 (1993). The former resolution stated the decision to set up an international tribunal with the aim of prosecuting those accused of serious breaches of international humanitarian Law committed in the territory of the former Yugoslavia between January 1st 1991 and a date to be determined by the UNSC once peace was restored.⁵⁰ With a mandate to prosecute and punish those responsible for committing mass killings, torture and massive breaches of human rights, as well as the unacceptable practice of *ethnic cleansing*, the UNSC decided to set up, for the first time, a subsidiary body dealing with criminal law at an international level, with the purpose of putting an end to these practices and removing impunity in the territory of the former Yugoslavia.

The state of open conflict in the territory of the former Yugoslavia prompted the setting up of an independent specialist body to hear the crimes committed in the Balkans. The decision to set up this criminal court was aimed at putting an end to the atrocities committed and taking effective measures to bring those responsible to

⁴⁸ See article 7 of the Statute of the Special Court, regarding "Jurisdiction over persons of 15 years of age". This point was highly controversial at the time of the negotiations and, due to the pressure from different human rights organizations, measures of rehabilitation and other judicial guarantees were contemplated.

⁴⁹ See the studies of SCHABAS, W., "La relation entre les Commissions Vérité et les poursuites pénales: le cas de la Sierra Leone", in ASCENSIO, H., LAMBERT-ABDELGAWAD, E., and SOREL, J-M. (eds.), *Les juridictions pénales internationalisées*, Paris, Société de Législation Comparée, 2006, pp. 209-240, and 'Reparation Practices in Sierra Leone and the Truth and Reconciliation Commission', in DE FEYTER, K., PARMENTIER, S., BOSSUYT, M. & LEMMENS, P. (eds.), *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp and Oxford: Intersentia, 2006, pp. 289-308.

⁵⁰ Paragraph 2 of the UNSC Resolution 827 (1993).

justice.⁵¹ In view of the paucity of legal guarantees at that time in the territory of the former Yugoslavia, the UNSC decided to intervene unilaterally in order to help restore and maintain peace.

Bearing in mind the other ways of dealing with conflicts and as an argument in favour of international prosecution, P. R. Williams and M. P. Scharf argue that: “(...), the particular circumstance of the crimes committed in the former Yugoslavia required the formation of an *ad hoc* criminal tribunal for both moral and practical reasons. First, the genocide, rape, and torture that occurred was of a nature and scale so horrific that nothing short of full accountability for those responsible would provide justice. Second, the domestic legal systems in some of the republics of the former Yugoslavia had been so thoroughly corrupted that they were not competent to conduct a fair trial of the war’s perpetrators, many of whom are still in power”.⁵²

There was consensus within the UNSC, despite the reservations expressed by Russia and China.⁵³ The required unanimous decision was reached within the UNSC to determine that the widespread breaches of international Law in the territory of the former Yugoslavia, including mass killings and the practice of *ethnic cleansing* were a threat to international peace and security. This new tribunal represented a decisive step in international criminal Law towards the creation of the new ICC, despite being imposed, giving rise to several negative effects, as may be inferred from the trial of Slobodan Milosevic. Furthermore, the setting up of this tribunal demonstrated the UN’s weakness in stopping the atrocities of the Serbs, in that the imposition of a series of prior measures, including air, economic and diplomatic embargoes, and even the use of force, all failed.⁵⁴

Critical voices were raised with this *ad hoc* tribunal, not so much regarding the need or otherwise of establishing this court, but rather as to the UNSC’s authority to set it up and the procedure used in so doing. Criticisms regarding the validity of this resolution were very quickly voiced. Article 39 stipulates as a requirement for action under Chapter VII of the UN Charter the determination of the existence of ‘any threat to the peace, breach of the peace or act of aggression’. This does not stipulate under what circumstances such determination would be necessary, nor what formal requirements would be needed by this determination. This grey area has given rise to quite a few

⁵¹ Doubts arising from efforts to prosecute perpetrators are studied by OSIEL, M. J., “Why Prosecute? Critics of Punishment for Mass Atrocity”, *Human Rights Quarterly*, 2000, pp. 118 and *seq.*

⁵² WILLIAMS P. R. and SCHARF, M. P., *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia*, New York/ Oxford, Rowman and Littlefield Publishers, 2002, p. 22.

⁵³ See Official Document of the UNSC, S/PV 3175.

⁵⁴ In 1993, in an unprecedented step made possible by the end of the Cold War and the resulting spirit of pragmatic cooperation at the UNSC, FREEMAN, M. and WIERDA, M., “The ICTY and the Pursuit of Justice in the Balkans”, in STAMKOSKI, G. (ed.), *With No Peace to Keep: UN Peacekeeping and the Ward in the Former Yugoslavia*, London, Volatile Media Ltd., 2002.

interpretations and criticisms as to when the UNSC might qualify a 'situation' as being 'a threat to the peace'.⁵⁵ Recent studies on the practice of the UNSC have mentioned that the determination of a situation would not be necessary when the action approved under Chapter VII did not involve coercive measures in terms of articles 41 and 42 of the UN Charter.⁵⁶ Thus, the resolutions setting up international criminal courts for Rwanda and the former Yugoslavia had their legal base in the implicit powers possessed by the UNSC under Article 41 of the UN Charter. These wide powers were confirmed by the Appeals Division of the Tribunal for the former Yugoslavia in its decision on jurisdiction in the well-known Tadic case (1995).⁵⁷ The highest international authority responsible for safeguarding international peace and security offered an expansive and unusual interpretation of the concept of 'threat to the peace', inasmuch as it involved setting up subsidiary bodies to judge the perpetrators of atrocities committed in the territory of the former Yugoslavia, since leaving them unpunished would mean a threat to international peace and security.

On the other hand, the Rwandan conflict represents one of the worst atrocities ever committed, both for its intensity and for its efficiency and calculated organization. Bearing in mind this disaster, two different approaches to dealing with the Rwandan conflict have arisen: an *ad hoc* tribunal created by the international community and a reformed national judicial system.

Firstly, due to the reaction of the international community to the atrocities committed in Rwanda between April and June 1994, the International Criminal Tribunal for Rwanda

⁵⁵ For the legal limits of the UNSC and recent practice, see SCHWEIGMAN, D., *The Authority of the Security Council under Chapter VII of the UN Charter*, Leiden/Boston, Martinus Nijhoff Publishers, 2001.

⁵⁶ KIRGIS, F.L. Jr., "The Security Council's First Fifty Years", *AJIL*, 1995, pp. 98 *et seq.*; ÖSTERDAHL, I., *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter*, Uppsala, Justus Förlag, 1998, and FRANCK, Th., *Recourse to Force. State Action Against Threats and Armed Attacks*, Cambridge University Press, 2002.

⁵⁷ The Appeals Division of the International Criminal Court for the former Yugoslavia stated: "le choix du Conseil de Sécurité est-il limité aux mesures prévues aux articles 41 et 42 de la Charte (comme le suggère le texte de l'article 39), ou est-il doté d'une plus grande discrétion sous forme des pouvoirs généraux pour maintenir et rétablir la paix et la sécurité au titre de l'ensemble du chapitre VII? Dans ce dernier cas, il n'est pas nécessaire de trouver chaque mesure prise par le Conseil de Sécurité au titre du chapitre VII dans les limites des articles 41 et 42 ou, peut-être, de l'article 40. En tout état de cause, selon ces deux interprétations, le Conseil de sécurité est doté d'un large pouvoir discrétionnaire pour décider des mesures à prendre et évaluer leur caractère adéquat. Le texte de l'article 39 est parfaitement clair pour ce qui est de canaliser les pouvoirs très larges et exceptionnels du Conseil de sécurité au titre du chapitre VII par la voie des articles 41 et 42. Ces deux articles confèrent un choix si large au Conseil de sécurité qu'il est inutile de chercher, pour des motifs fonctionnels ou autres, des pouvoirs plus étendus et plus généraux que ceux prévus expressément par la Charte. Ces pouvoirs sont d'un caractère coercitif vis-à-vis de l'État ou de l'organe coupable. Mais ils sont également contraignants vis-à-vis des autres États Membres, qui sont tenus de coopérer avec l'Organisation (art.2, par.5; art.25 et 48) et les uns avec les autres (art. 49) dans l'exécution de l'action ou des mesures décidées par le Conseil de Sécurité", *Prosecutor v. Dusko Tadic, Alias 'Dule' Arrêt relatif a l'appel de la défense concernant l'exception préjudicielle d'incompétence, Tribunal Pénal International pour l'ex-Yougoslavie, Decision of 2 October 1995*, par. 31.

was created by UNSC Resolution 955 of 8th November 1994.⁵⁸ The Tribunal's Statute recognizes that the role of the Tribunal is to "contribute to the process of national reconciliation and to the restoration and maintenance of peace".⁵⁹

However, despite the high expectations of the Rwandan population, the Rwanda Tribunal has been criticized for various reasons. For example, mention should be made of the slowness of its procedures, its temporal constraint (as the Tribunal's mandate only covers crimes committed in 1994), lack of investigation into the crimes committed by the victors (Tutsis), and lack of involvement of victims in the process.

Secondly, the response of the national judicial system was the consequence of the new government's will to prosecute the perpetrators of mass human rights violations as a precondition for reconciliation in the country.⁶⁰ With this in mind, two objectives were essential and consecutive: the re-establishment of the justice system, and the prosecution of genocide crimes within that system.

D) 'Back to the Future in The Hague': judging violations of human rights

The ICJ and the ICC in The Hague, although different in nature and in procedures, are both international *fora* to which countries can present their grievances regarding human rights violations. In particular, the recently created ICC represents the future of prosecution for human rights violations.⁶¹

The ICC represents a decisive step forward in the fight against impunity, and a bid to promote the values of justice, a fair trial and observance of the rule of law. It is the first international jurisdiction of a permanent nature to try individuals for what are called 'crimes of international significance' that constitute serious violations of essential values of the international community.⁶² These new international moral and social values are specified in articles 6, 7 and 8 of the ICC Statute which name the most abominable and contemptible crimes committed by the individual. These clauses typify crimes of serious violations of human rights which also involve an attack against

⁵⁸ See HERIK, L. van den, *The Contribution of the Rwanda Tribunal to the Development of International Law*, The Hague, Martinus Nijhoff Publishers, 2005.

⁵⁹ In this respect, it is important to mention *Prosecutor v. Serusago, Sentence*, Case No. ICTR-98-39-S, T.Ch I, 5 February 1999, para. 19; *Prosecutor v. Kambanda, Judgement and Sentence*, Case No. ICTR-97-23-S, T Ch. I, 4 September 1998, paras. 26-28 (see also para. 59); *Prosecutor v. Rutaganda, Judgement and Sentence*, Case No. ICTR-96-3-T, T. Ch. I, 6 December 1999, paras. 455-456.

⁶⁰ The question arises here of recognising the existence of international justice for merely the criminals most responsible, not for all of them, as implied by article 7 of the ICTY Statute and article 6 of the Criminal Tribunal for Rwanda Statute.

⁶¹ See <http://www.iccnw.org/documents/>

⁶² Article 5 of the 1998 Statute of Rome includes the category 'the most serious crimes of concern to the international community as a whole'.

international peace and security, without forgetting that the trial of those responsible for committing genocide, inhumane acts and war crimes (in the context of both international and internal armed conflicts) is essential in national reconciliation processes.

Among the cases investigated by the ICC prosecutors - Darfur (Sudan), Central African Republic, Uganda and DRC– the latter warrants attention for its uniqueness and duration of the affair. Since 1998, the DRC has experienced horrific armed conflict in which impunity for war crimes and crimes against humanity has been, and continues to be, the norm. Attacks against the civilian population, killings, and use of sexual violence continue to be committed in the East of the country. These crimes will not stop as long as those who commit them are not held responsible for their acts. Accountability for those responsible for serious crimes is essential if the DRC and the region are to make a transition to a durable peace. One possible tool for helping resolve these conflicts and rebuild these societies is the ICC. In this respect, on 19th April 2004 the Office of the Prosecutor of the ICC announced receipt of the referral of the situation in the DRC. The referral, transmitted to the office of ICC Prosecutor, L. Moreno Ocampo in a letter signed by the DRC President, requested the Prosecutor to investigate allegations of crimes falling within ICC jurisdiction if committed anywhere in the territory of the DRC since July 1st 2002, the date of entry into force of the Rome Statute of the ICC. After receiving several communications from individuals and non-governmental organisations, the Prosecutor had announced in July 2003 that he would closely follow the situation in the DRC. One year later, at the end of June, 2004, the Prosecutor of the ICC announced that he was initiating the Court's first formal investigation into ongoing atrocities in the DRC.⁶³ If done correctly, the prosecution of those most responsible for atrocities at the ICC could help deter ongoing crimes while fostering the rule of law and social reconciliation.

But although the ICC may be an answer to crimes committed in the DRC, what will happen to crimes committed from 1998 to July 2002, a period that is beyond the scope of the ICC? While the DRC's ratification of the Rome Statute allows the ICC to try crimes committed after July 1 2002, there is no mechanism to thoroughly investigate and prosecute the gravest crimes committed during the five-year war and put an end to impunity. The national justice system is unable, due to its current state of disarray, even with massive help, to address past crimes perpetrated in the DRC since 1998. The ICC is also not competent because of lack of jurisdiction to deal with these crimes. Hence the necessity for possible justice mechanisms to investigate and prosecute crimes against humanity and war crimes committed prior to the entry into force of the ICC Statute.

In any case, the current transitional period in the DRC is particularly marked by the creation of several institutions *purported* to support *democracy* among which is the

⁶³ More information in <http://www.icc-cpi.int/index.php>

Truth and Reconciliation Commission (TRC).⁶⁴ This TRC would consider political, economic, and social crimes committed from 1960 until 2003 in order ‘to establish truth and help bring individuals and communities to reconciliation’. Is the establishment of the TRC meant to end impunity or to cover up gross violations of human rights committed in the DRC? The response seems to be known in advance, since one individual suspected of involvement in human rights abuses was appointed to the executive committee of this TRC. The ghost of impunity continues to haunt the DRC and the important thing now is to look at the challenges in addressing impunity for the atrocities committed in the DRC since 1998. If not, the impunity for these atrocities will send the message that such crimes may be tolerated in the future. At this time, the question arises as to how possible it is to establish an International Criminal Tribunal beyond the borders of the DRC, to include the Great Lakes Region for crimes that occurred in the DRC after 1998?

III. FUNCTIONS OF JUSTICE AND THEIR ACHIEVEMENT BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)

1. Essence of Justice: truth, impartiality, fairness and retribution

Judicial approaches for dealing with the past are applied in different legal scenarios and with different features, but most of them are characterised by being retributive and, in most cases, although not necessarily, adversarial. Establishing the ICTY was an alternative measure to confront crime and criminals. Truth, reparation and the declaration of responsibility are essential principles of justice compatible with peace.

It has been said that justice is related to truth, fairness, rectitude and retribution.⁶⁵ In order to apply justice, it is important to know the truth, to record and find the causes of the conflict, and to determine who is responsible for what. In the context of peace-building, truth relates to an accurate understanding and recording of the causes of a conflict, as well as of which parties are responsible for which actions, and which parties, including individuals, may be characterised as the victims or the aggressors. This exercise is better undertaken by a third party that is able to show fairness and impartiality. Impartiality in this context means that once the facts are known by the third party, they are not misrepresented in order to maintain artificial impartiality, but are incorporated into the decision-making process. One example of this in the Yugoslav case is the War Crimes Commission created by the UN in 1993 to assess the nature of the conflict and the extent of responsibility that each party to the

⁶⁴ See the International Center Transitional Justice Activity in DRC at <http://www.ictj.org/africa/drc.asp>

⁶⁵ More information on the retributive justice approach in PINTO, M.C.W., “Truth and Consequences of Truth and Reconciliation? Some Thoughts on the Potential of Official Truth Commissions”, in VOHRAH, L.C. et al. (eds.), *Man’s Inhumanity to Man, op. cit.*, pp. 698 – 703.

conflict had with respect to the crimes committed. Although the findings showed atrocities committed by each party, the Commission concluded that the Serbian forces were acting as aggressors and they were responsible for the vast majority of crimes.⁶⁶

Fairness also means that negotiators do not seek to find an agreement at the expense of the victims, forcing them to accept concessions against their will or judgement. Although concessions by one party may be effective for achieving a peace agreement and avoiding human suffering in the short term, they may not help to reach lasting peace in the area.⁶⁷ For example, some authors argue that during the Dayton talks in 1995 the United States of America (U.S.) negotiators put too much pressure on the Bosnians to force them to accept certain concessions that the Bosnian delegation saw as unacceptable for lasting peace in the area.⁶⁸

Additionally, as part of the peacemaking stage, retribution may be essential in terms of compensating the victims, punishing the perpetrators and imposing the rule of law. The most visible of the judicial mechanisms operating is the ICTY. Although, as P. R. Williams and M.P. Scharf note, the norm of justice must be applied together with other relevant approaches, such as accommodating the interests of the parties in the conflict, economic inducements, and the use of force, during the peace-building process. As the first Prosecutor of the ICTY, R. Goldstone, stated: “one must not expect too much from justice, for justice is merely one aspect of a many-faceted approach needed to secure enduring peace in transitional society”.⁶⁹

Certainly, justice should be complemented by other measures in transitional societies.⁷⁰ Justice is only one of the dimensions to be taken into account in this obligation to provide protection following a conflict, and imparting justice ensures legal certainty and credibility at a national and international level. Justice is no more than a

⁶⁶ WILLIAMS, P.R. and SCHARF, M-P., *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia*, *op. cit.*, pp. 12 and 13.

⁶⁷ Estrada-Hollenbeck argues that “(t)o resolve, of course, is to do more than stop the violence. To resolve is to leave the conflicted parties with institutions and attitudes that favour peaceful interactions”, ESTRADA-HOLLENBECK, “The Attainment of Justice through Restoration, not Litigation”, in ABU-NIMER, M., *Reconciliation, Justice and Coexistence*, *op. cit.*, p. 69.

⁶⁸ Williams and Scharf differentiate between the Rambouillet/Paris and Dayton negotiations to see the extent of this theory. See also above, ESTRADA-HOLLENBECK, p. 80. For his part, Lewis Rasmussen points out that “countries such as Angola, Bosnia, Cambodia, Rwanda, Sierra Leone ... have at one point reached negotiated agreements to end their civil wars, and yet all continue to struggle toward a sustainable peace”, RASMUSSEN, L., “Negotiating a Revolution. Toward Integrating Relationship Building and Reconciliation into Official Peace Negotiations”, in ABU-NIMER, M., *Reconciliation, Justice and Coexistence*, *op. cit.*, p. 103.

⁶⁹ GOLDSTONE, R., “Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals”, *NYU Journal of International Law and Policy*, 1996, vol. 28, pp. 485 and 486.

⁷⁰ See KORHONEN, O., “International Governance in Post-Conflict Situations”, *Leiden Journal of International Law*, 2001, vol. 12, pp. 495 et seq.

tool in the transformation of a society but it can be an essential tool. What is the legacy of the ICTY? Can justice be considered an instrument for reconciliation in the States of the former Yugoslavia? What positive and what negative elements can be drawn from the proceedings of the Tribunal?

2. Functions and achievements of the ICTY

A) Establishing individual responsibility

One of the functions expected from prosecution is the determination of individual responsibility and not assigning that responsibility to the entire group - the Serbs in this case. In fact, individual responsibility is one of the specific elements of contentious procedure, as against the institutional and collective responsibility of truth and national reconciliation commissions. This mechanism is used for establishing individual responsibility of leaders as against suggesting the collective guilt of the masses.

In the Yugoslav conflict, the Serbian and Bosnian Serb leaders used provocation, incitement, propaganda, official sanction, coercion, and opportunities for personal gain to transform ordinary citizens into mass murderers. For this reason, one of the most important functions of the Yugoslav Tribunal was to disclose the way the Yugoslav people were manipulated by their leaders into committing acts of savagery on a mass scale. While this would not completely absolve the underlings of their acts, it would make it easier for victims to eventually forgive, or at least, reconcile with former neighbours who had been caught up in the institutionalized violence. To achieve this function, the Office of the Prosecutor should have quickly issued indictments for the responsible leaders, charging them with genocide.

However, the arrest of indictees has been a highly complicated problem since the early days of the ICTY. During the Dayton talks, the then Prosecutor of the Yugoslavia Tribunal, R. Goldstone, formally asked the U.S. to make the surrender of indicted suspects a condition for any peace accord. The U.S. peace negotiators did not support this initiative, fearing that it would endanger the whole peace process.⁷¹ Moreover, the role of former Serbian president S. Milosevic was seen by the negotiators as essential for reaching any peace agreement. As a consequence, the fact that prosecuting the perpetrators was not included in the provisions of the Dayton agreement is important in order to understand the subsequent difficulties of the Tribunal in arresting major indicted war criminals, such as R. Karadzic and R. Mladic, who still remain at large today. In addition, the ambiguous mandate given by the negotiators⁷² to IFOR (the

⁷¹ See above WILLIAMS, P.R. and SCHARF, M-P., *Peace with Justice?...*, *op. cit.*, p. 151 *et seq.*

⁷² As an indication that the negotiators considered it more important to achieve an agreement than addressing justice issues dealing with the Tribunal, it may be interesting to quote Ambassador Holbrooke's words: "The Administration remain divided over the most important question if faced: if we got an agreement in Dayton, what would the NATO-led Implementation Force, IFOR do? Of course, if

NATO-led Implementation Force and later renamed SFOR) in order to arrest indictees and transfer them to the Tribunal, whether intentional or not, contributed to the above-mentioned situation. The non-prosecution of some high-level perpetrators and their treatment as legitimate negotiators, as seen by the victims and other observers, is likely to undermine the reconciliatory function of the Tribunal. Although dealing with issues regarding the perpetrators was not on the agenda during the Dayton talks, on 22nd November 1995 the UNSC enacted Resolution 1022 encouraging the FRY to co-operate with the Tribunal and noting that compliance with orders from The Hague “constitutes an essential aspect of implementing the Peace Agreement”.⁷³ Obviously, one of the negotiating parties was represented by precisely those who had committed these atrocities, and it would have been difficult to include the prosecution of those responsible for committing acts of genocide, war crimes or crimes against humanity in the peace agreement.

Moreover, the Tribunal was established as an enforcement measure of the UNSC under Chapter VII of the UN Charter, and therefore it was a subsidiary organ with delegated enforcement powers. The Tribunal’s Statute also granted the Tribunal, through Article 29, the authority to issue international arrest warrants, which were to be complied with “without undue delay”.⁷⁴ In addition to Article 29, Rule 61 of the Rules of Procedure and Evidence contemplates a procedure in case of failure to enforce an arrest warrant, with the possibility for the President of the Tribunal to notify the failure of that state to the UNSC. With these mechanisms, the Tribunal in theory should not have any difficulties in arresting perpetrators. However, reality shows that co-operation from Belgrade is still sporadic and often conditioned to foreign economic assistance, and physically bringing perpetrators to The Hague has proven to be a major obstacle to the Tribunal’s success. Indeed, in Resolution 1534 of 2004, the UNSC reaffirmed the need to intensify the co-operation of all States, especially Serbia, Montenegro, Croatia and Bosnia and Herzegovina, and the Republika Srpska within Bosnia and Herzegovina, with the ICTY,⁷⁵ to bring before it R. Karadzic and R. Mladic, as well as all other indictees.

B) Creating a credible Historical Record

Another important function of justice is to create a detailed historical record of the events and atrocities committed in order to have knowledge of what happened, who

Dayton failed to produce a peace agreement, our deliberations would be meaningless”, HOLBROOKE, R., “To End a War”, *Random House 1998*, p. 215.

⁷³ Preamble of the UNSC Resolution 1022 (1995).

⁷⁴ The Trial Chamber has noted in this respect that the Tribunal is empowered to issue binding orders to States pursuant to Article 29 of the Statute, which derives its binding force from Chapter VII and Article 25 of the UN Charter and UNSC resolutions adopted pursuant thereto. By affording judicial assistance to the Tribunal, States do not thereby subject themselves to the primary jurisdiction of the Tribunal, which is limited to natural persons.

⁷⁵ UNSC Resolution 1534 (2004), para. 1.

was responsible, why it should be condemned, and to prevent it from happening in the future.⁷⁶ For families who do not know what happened to their loved ones, truth is an essential part of meaningful accountability. The families of victims of torture and genocide in Cambodia and other cases today seek a full and truthful acknowledgement of the Khmer Rouge atrocities. Thus, making public the truth about what happened will help to discredit the policy applied and the regime that applied it.

Creating a detailed historical record was an important function of the Tokyo and Nuremberg Tribunals. The Chief Prosecutor at Nuremberg, R. Jackson, noted that the most important legacy of the trials was the documentation of Nazi atrocities “with such authenticity and in such detail that there can be no responsible denial of these crimes in the future”.⁷⁷ To accomplish the objective of establishing the truth and creating an accurate and comprehensive historical record, it is incumbent upon institutions of justice to ensure that they investigate and make public at the appropriate time all relevant information concerning the nature of the conflict and the atrocities or war crimes committed during the conflict. The international justice body should also disseminate the documents, not only in the conflict area but also internationally.

The ICTY is contributing to that end in a noteworthy manner by collecting witness testimonies and other evidence, as well as analytical studies, investigations and other information regarding the conflict. However, it is not all good news. Due to the confidentiality of most of these documents, it is still not clear whether they will be released to the public once the Tribunal’s mandate ends. Moreover, the Tribunal’s jurisdiction and prosecution practices fail to cover many smaller (but nevertheless important from the victims’ point of view) incidents during the conflict. In addition, procedural or legal technicalities may lead to information being withheld from the public, in order to protect witnesses or for other reasons.⁷⁸ At any event, establishing a truthful record of atrocities and their perpetrators and causes can be an essential part of building a better future by communicating a consensus that certain conduct occurred and should not be repeated.

C) Silencing more than hearing the Victims

⁷⁶ Note Santayana’s famous phrase: “Progress, far from consisting of change, depends on retentiveness... Those who cannot remember the past are condemned to repeat it”. George Santayana, “Life of Reason or the Phases of Human Progress”, 5 vols., Charles Scribner’s Sons, 1936.

⁷⁷ See, *Report of Robert Jackson*, U.S. Representative to the International Conference on Military Trials 432 (Dep. Of State, Pub. 3080, 1949).

⁷⁸ By way of example, the Judges normally dismiss the case if the defendant dies before judgement is issued, with the result that the court’s findings of fact and law are never publicly pronounced. This was the case of Slavko Dokmanovic, who died while in detention awaiting judgement. See the ICTY Press Release, *Completion of the Internal Inquiry into the Death of Slavko Dokmanovic*, UN Doc. CC/PIU/334-3, 23 July 1998.

Acknowledging the victims and their stories and grievances is also one of the main functions of justice and is essential for achieving a peaceful coexistence, the first step in reconciliation.⁷⁹ Reparations to victims of atrocities can take many forms, including public memorials and compensation, and even symbolic forms of compensation can be important to victims or their families struggling to reclaim their lives after atrocities. In effect, not only is it important to acknowledge the dignity of the victims, but also to provide them with material and psychological support to repair the damage as far as possible. Yet reparations could in principle be faster than justice, and do something to ease immediate tensions: it is easier and quicker to identify a victim than the guilt of a perpetrator by due process of law.

In the ICTY Statute, there is no mechanism to defend the rights of the victims before the Tribunal, as the only role they get to play is that of witnesses. The reference to victims is found in Article 22 of the Statute, which deals with the protection of victims and witnesses. There is also a set of rules of procedure and evidence that refers to victims and witnesses, but only in terms of their protection. Victims, according to ICTY rule 106 of procedure and evidence, have the right to compensation, but from the national authorities. Unlike the recently created ICC, which envisages a Victims' Compensation Fund,⁸⁰ this mechanism does not exist in the Statute of the ICTY. While the Statute of the Tribunal does not provide the Tribunal with the authority to award victim compensation, it does provide it with the power to order the return of stolen property or the proceeds resulting from the sale of such property.⁸¹ Once the ICTY has issued a judgement, the victim(s) may bring an action against the accused to claim compensation. In addition, the victims can form civil groups linked to the ICTY as a group, through NGOs and other bodies, but this is an institutional relationship, not for making submissions in the hearing.

Moreover, the complexity of the procedure inherent to any judicial body means that many perpetrators are still at large, living in the communities where the crimes took place, and this naturally prevents the catharsis process from even getting off the ground. Also, given the paucity of indictments, the Office of the Prosecutor failed to interview a substantial number of the victims and thus denied them an opportunity to 'tell their story', an essential part of certain healing processes.⁸² In 2000, the International Crisis Group reported around seventy-five individuals indictable for major war crimes who held important positions of power and influence in municipalities and political party institutions across the Republika Srpska and in the Republika Srpska Central

⁷⁹ DOUGLAS, L., *The Memory of Judgement: Making Law and History in the Trials of the Holocaust*, 2001.

⁸⁰ Article 79 and Article 17 of the ICC's Statute.

⁸¹ Article 24 (3) of the ICC's Statute.

⁸² WILLIAMS, P. R. and SCHARF, M-P., *Peace with Justice?...*, *op. cit.*, p. 125.

government.⁸³ This makes the relief of the victims very difficult, if not impossible, and encourages personal revenge.⁸⁴

The role of the victims in criminal trials is limited as well as difficult, as it is impossible to prove events that occurred in conflicts. For example, how can dreams about those who tortured your loved ones be proved? In the Krstic case, the ICTY suggests⁸⁵ that war crimes trials effectively silence, rather than hear victims. In this particular trial, victim-witnesses predictably governed neither the agenda nor the pace of the hearings. More problematically, argue M-B. Dembour and E. Haslam, incongruously optimistic judicial remarks unnecessarily denied their suffering.⁸⁶ Thus, victims' testimonies were only vaguely connected to the person of the accused. It is clear that it is necessary to foster a variety of collective memories outside the judicial platform.

D) Deterring and preventing atrocities

For present and future conflicts all around the world, justice is intended to produce deterrence and prevention. A strategy of prevention generally includes efforts to deter individuals from committing such offences. This function is directly connected with the above-mentioned individualisation of responsibility, and the Tribunal needs to show firm willingness to impute crimes and arrest the perpetrators. By prosecuting individual perpetrators and holding them criminally responsible for their actions, the aim is to deter them and others from committing such crimes again in the future by demonstrating that the prospect of punishment is effective and efficacious. Moreover, efforts to achieve individual or specific deterrence in a particular conflict can be part of a larger effort to convey a deterrent message more generally to other would-be offenders in other parts of the world.

Deterrence, however, is frequently elusive and not always effective. For example, after its establishment in 1993, the ITCY failed to prevent the subsequent atrocities committed by the same perpetrators in Kosovo in 1999. Notably, it was only after that year that the Office of the Prosecutor indicted S. Milosevic and other high-

⁸³ See International Crises Group, "War Criminals in Bosnia's Republika Srpska", 2, 68, 69, 78.

⁸⁴ The fact that the victims have very few opportunities to tell their stories and relieve suffering through a judicial process may be an argument to have considered any form of truth commission complementary to the action of the Tribunal for this aim. In this respect, see also WILLIAMS, P. R. and SCHARF, M-P., *Peace with Justice?...*, *op. cit.*, pp. 125 and 126.

⁸⁵ *Prosecutor v. Radislav Krstic* Case N° IT-98-33-T, 2 August 2001.

⁸⁶ DEMBOUR, M-B. & HASLAM, E., "Silencing Hearings? Victim-Witnesses at War Crimes Trials", *EJIL*, 2004/1, vol. 15, pp. 151 – 178.

level criminals from Serbia.⁸⁷ However, it is too early to examine the role of the Tribunal in the long term stability of the Balkans and other international conflicts (and, in particular, its effectiveness as a deterrent and prevention). Since 2001, indictees from each part of the conflict, not only Serbs, have been arrested or surrendered to the Tribunal.⁸⁸ Moreover, there is abundant jurisprudence in the Tribunal's case law to illustrate that one of its aims is to prevent future violations of human rights and that deterrence is the unique mandate of the ICTY.⁸⁹

Prevention requires more than just taking steps to deter individuals from committing crimes by prosecuting offenders. Effective prevention over time also requires more far-reaching initiatives by governments and civil society. These include, among others, overcoming a legacy of impunity by strengthening the rule of law, including the institutions and cultural attitudes that help reinforce new norms of behaviour and new patterns of accountability, and addressing grievances and inequalities that may underlie long-standing conflicts. Obviously, individual accountability for genocide, war crimes, crimes against humanity and other serious abuses, while very important, is only one piece of such larger efforts at prevention.

E) Reconciling and maintaining Peace: the self- incriminating responsibility

Reconciliation is often cited as a goal of accountability, but it is a complex issue that requires analysis on different levels. For individuals who have suffered atrocities and survived to face the pain, the idea of reconciliation on a personal level may be unthinkable for some, but important for others. Following the words of the former president of the ICTY, A. Cassese, "far from being a vehicle for revenge the Yugoslav tribunal is an instrument for reconciliation".⁹⁰

There is extensive case law to suggest that the ICTY has been fully aware of this function of justice and it is reconciliation that has been one of the main objectives to be achieved in the former Yugoslavia.⁹¹ In effect, it was the basis of the Dayton Peace

⁸⁷ S. Milosevic's initial indictment was issued on 24th May 1999, together with Sainovic, Ojdanic, Stojilkovic, and former Serbian president Milutinovic. Krajisnic's initial indictment is from 21st March 2000.

⁸⁸ In February 2003, three members of the KLA (Kosovo Liberation Army) were brought to the Tribunal. See *Prosecutor v. Limaj et al.*, Case No. IT-03-66.

⁸⁹ See *Prosecutor v. Biljana Plavsic*, Case N° IT-00-39&40/1-S, para. 24, and also, *Prosecutor v. Stevan Todorovic*, Case N° IT-95-9/1-S

⁹⁰ CASSESE, A., *International Tribunal for the Former Yugoslavia, First Annual Report*, UN Doc. IT/68, 28, July 1994, para. 16.

⁹¹ On the other hand, M. Minow argues that the goal of war tribunals does not include reconciling perpetrators and victims. See MINOW, M., "Innovating Responses to the Past: Human Rights Institutions", in BIGGAR, N. (ed.), *Burying the Past. Making Peace and doing Justice after Civil Conflict*, *op. cit.*, pp. 74 – 84.

Agreement by which all the parties to the conflict in Bosnia and Herzegovina have agreed to live together. A consideration of retribution as the only factor in sentencing is likely to be counterproductive and disrupt the entire purpose of the UNSC, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice. Reconciliation at a broader society level is also a goal of the accountability processes.

The Office of the Prosecutor also appears to consider reconciliation important for the purpose and success of the ICTY. For example, in a recent closing argument, the prosecution noted that in 1993 the UNSC passed Resolution 827 and expressed its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian Law, systematic detention, mass killings, rape of women, and the continued practice of ethnic cleansing. According to the Prosecution, it was recognised that there was a need to deter such conduct in order to have peace, and the UNSC was said to have been determined to put an end to such crimes and to bring to justice the persons ultimately responsible. The Prosecution declared that the ICTY was created with the aim of contributing to the restoration and maintenance of peace.⁹²

In the case law of the ICTY, guilty pleas (self-incrimination) by some defendants have been maybe the most valuable element for reconciliation. There have been some eighteen cases out of more than one hundred where the accused have entered guilty pleas.⁹³ However, the case of Biljana Plavsic, former president of the Republic

⁹² *Prosecutor v. Biljana Plavsic*, Case N° IT-0039&40/1-S, paras. 60 *et seq.*

⁹³ The accused that have entered a guilty plea so far are: 1) Milan Babić, guilty of persecution as a crime against humanity; 2) Predrag Banović, guilty of persecution as a crime against humanity; 3) Ranko Češić, guilty to all counts (12 in total) of the Third Amended Indictment: six counts of crimes against humanity (5 counts on murder and 1 count on rape), and six counts of violations of the laws or customs of war (5 counts on murder and 1 count on humiliating and degrading treatment); 4) Miroslav Deronjić, guilty of persecution as a crime against humanity; 5) Dražen Erdemović, guilty of murder as a crime against humanity; 6) Goran Jelisić, guilty to 31 counts: fifteen counts of crimes against humanity (12 counts of murder and three counts of inhumane acts), and sixteen counts of violations of the law or customs of war (12 counts of murder, 3 counts of cruel treatments and 1 count of plunder); 7) Miodrag Jokic, guilty to all six counts of violations of the laws or customs of war of the Second Amended Indictment: murder as a violation of the laws or customs of war, cruel treatment as a violation of the laws or customs of war, attacks on civilians as a violation of the laws or customs of war, devastation not justified by military necessity as a violation of the laws or customs of war, unlawful attacks on civilian objects, as a violation of the laws or customs of war, and destruction or wilful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science as a violation of the laws or customs of war; 8) Darko Mrđa, guilty of murder as a violation of the laws or customs of war and one count of inhumane acts as a crime against humanity; 9) Dragan Nikolić, guilty to all (four) counts of the Third Amended Indictment: persecution, murder, aiding and abetting rape, and torture; 10) Momir Nikolić, guilty of persecution as a crime against humanity; 11) Dragan Obrenovic, guilty of persecutions as crimes against the humanity; 12) Biljana Plavsic, guilty of persecution as a crime against humanity; 13) Ivica Rajić, guilty to four counts of the Amended Indictment: wilful killing, inhuman treatment, appropriation of property, and extensive destruction not justified by military necessity and carried out unlawfully and wantonly; 14) Duško Sikirica, guilty to persecution as a crime against humanity; 15) Damir Došen, guilty to persecution as a crime against humanity; 16) Dragan Kolundžija,

Srpska, brought together the efforts of Defence and Prosecution to show to the Judges that the confession and remorse of Plavsic could be a significant and essential contribution to the process of reconciliation in Bosnia-Herzegovina and the former Yugoslavia. Several internationally renowned witnesses, such as A. Borain (former co-president of the South African Truth Commission), M. Albright (former U.S. Secretary of State) and E. Weisel (winner of the Nobel prize for peace) testified before the court to present Plavsic's act as a contribution to reconciliation.

In a statement, Plavsic herself noted that to achieve any reconciliation or lasting peace in Bosnia-Herzegovina, serious violations of humanitarian Law during the war must be acknowledged by those who bore responsibility, regardless of their ethnic group, and that acknowledgement was an essential first step.⁹⁴

Furthermore, the Trial Chamber accepted that: "acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation. In this respect, the Trial Chamber concludes that the guilty plea of Plavsic and her acknowledgement of responsibility, particularly in the light of her former position as President of the Republic Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole".⁹⁵

Interestingly, the effect achieved through a guilty plea contains most of the characteristics examined in this study for achieving reconciliation. Although occurring in a very different procedural context, a guilty plea is in many ways very similar to some non-judicial approaches for dealing with human rights atrocities, such as the truth commissions.

In cases where individuals within particular groups (ethnic, social or political) have perpetrated severe atrocities against other groups, prospects for reconciliation with society, which may take generations, may require sustained efforts to overcome patterns of hostility, vengeance, and blame. Holding major offenders individually accountable through criminal proceedings may be essential to this process, lest entire groups be blamed for the atrocities committed by just certain members. Reconciliation may also require long-term efforts to *rehabilitate* offenders, victims, and indeed a traumatised society more generally by demonstrating a genuine commitment to building a culture of accountability in which the rule of law will be central and impunity for atrocities will not be tolerated.

guilty to persecution as a crime against humanity; 17) Milan Simi, guilty to two counts of torture as crimes against humanity; and 18) Stevan Todorović, guilty to persecution as a crime against humanity.

⁹⁴ *Prosecutor v. Biljana Plavsic*, Case IT-0039&40/1-S, para. 67.

⁹⁵ *Ibid*, para. 80.

IV. IS THE ICTY AN EFFECTIVE TOOL FOR RECONCILIATION?

Bearing in mind the ICTY experience, where justice and prosecution of perpetrators were imposed by the UNSC under Chapter VII, rather than agreed upon by the parties to the conflict, there are several lessons which can be learnt in order to understand this and other conflicts all around the world. One very important lesson was the fact that in Dayton the negotiators were dealing with war criminals and that the role of justice in the undermined peacemaking stage was essential for understanding the atrocities that followed in Kosovo in 1999. Obviously, the role of justice in the peacemaking stage was not as relevant as may have been desirable, as the Office of the Prosecutor did not issue an indictment against S. Milosevic until a later stage in the conflict and he was seen to be a legitimate negotiator in the Dayton and Rambouillet/Paris talks.⁹⁶ Justice and reconciliation are key concepts that require the attention and study of peacemakers and peace-builders before agreements are signed or negotiated political compromises reached.

The approaches to achieving reconciliation must be agreed upon by the parties, even if monitored by an impartial third party, so that they include every group or ethnicity in the negotiations and they do not force one party to accept concessions that will not contribute to lasting peace. It is important that any approach to dealing with past crimes be included in the peacemaking stage, so that there is an explicit compromise by the parties to create and enhance the foundations of an inclusive social infrastructure. Effectively changing political systems after an intense conflict requires recognition and tolerance of diversity, as well as access to participation in the process that determines the conditions of security and identity. States and other parties involved in the negotiating process will influence the peace-building strategy following their own interest. Therefore, negotiators should acknowledge the political circumstances of the conflict, take into consideration the nature of the problems and ways of dealing with them, and identify the approach chosen with democratic States.

The tension between making peace and providing justice has been evident in cases such as the former Yugoslavia, where the negotiators had to sacrifice the full application of the rule of law in favour of a peace agreement to end the conflict or achieve stability in the country. In order to end an international or internal conflict, negotiations are very often conducted with the leaders who are themselves responsible for gross human rights abuses. In these situations, insisting on criminal prosecution may prolong the conflict and intensify human suffering, thus having a harmful effect in peacemaking. However, it is important to keep in mind that although the achievement of an agreement may avoid more human suffering in the short term, reconciliation is

⁹⁶ In general terms, states (individually, and together in the UN and other international organisations) have had different reactions and approaches to dealing with human rights violations in or outside their boundaries, and those reactions have been greatly determined by the circumstances of each case. Although some experiences have been more successful than others, in none of the conflicts has reconciliation been fully achieved. One reason for this, as most experts note, is that reconciliation among the parties is a process that starts at the peacemaking stage, by reaching an agreement on how to deal with the past, but it takes time for such an agreement to be implemented and incorporated by the new society.

necessary to prevent recurring cycles of revenge among the parties. Indeed, as in the South Africa and Sierra Leone cases, sometimes judicial and non-judicial approaches for dealing with the past complement each other.

It is important to meet the ICTY's aims in order to complete the prosecution of all the perpetrators within the ICTY's jurisdiction. While this task may be difficult to achieve due to time and economic constraints, it is essential for the relief of the victims and coexistence in the area in which war criminals will be prosecuted. In judicial processes, the time factor and financial support are essential for determining their effectiveness. At the moment, the ICTY is reaping success in its endeavours in reconciliation procedures in Bosnia-Herzegovina, Serbia or Montenegro, since a good number of judicial resolutions are beginning to be issued.

V. CONCLUSIONS

The ICTY deserves praise as well as criticism. The proceedings have lengthened and the costs have risen, disillusion has set in. The long campaign against the ICC has not helped.⁹⁷ In August 2003, the UN imposed a 'completion strategy' on both the Yugoslav and Rwandan tribunals, requiring them to end all trials by 2008 and appeals by 2010.⁹⁸ This could hinder the Tribunal's effectiveness in achieving the fervently desired national reconciliation, as a result of a set of linked factors.

International tribunals do not have police powers: they cannot send in sheriffs to make an arrest. They rely only on the co-operation of foreign governments, which is not always forthcoming. Among measures to be taken to avoid this situation is the need to increase the international community's pressure on the governments in Belgrade or Zagreb to show greater co-operation with the ICTY to hand over those identified as being responsible for committing acts of genocide, war crimes and human rights crimes. Currently, there are still about twenty criminals to be handed over, including R. Karadzic, the former Serbian-Bosnian leader, and R. Mladic, the general who ordered the massacre of seven thousand five hundred Bosnians of Moslem origin in Srebrenica in 1995.

In addition, the ICTY has had to harmonise different legal traditions, cope with multiple languages (of judges, lawyers, perpetrators and victims) and translate mountains of documents. Most of the cases before it are hugely complex, involving dozens of charges, and those condemned have a right of appeal against both conviction and sentence, which they always seem to exercise. Indeed, this judicial mechanism has become extremely costly for the UN and its member States, which explains why

⁹⁷ See on this particular policy GAMARRA, Y., "La política hostil de Estados Unidos de Norteamérica contra la Corte Penal Internacional: los acuerdos del artículo 98 (2) o la búsqueda de la impunidad", *REDI*, 2005/1, pp. 145 *et seq.*

⁹⁸ This strategy of conclusion was included in UNSC resolution 1503 (2003), par. 7.

subsequently hybrid courts were created, such as those in Timor Leste or Sierra Leone, each with its own characteristics, successes and failures. These hybrid tribunals are more affordable than purely international tribunals; for instance, the Special Court for Sierra Leone is budgeted to cost a mere fifth of ICTY on an annual basis. Hybrid models also carry the advantages of being based in-country, being staffed in large part by nationals, and being directly supportive of the national legal system.

As the ICTY operates only under international Law, and with no judges from the former Yugoslavia, it has been criticised for its distance from the scene of the crimes, for making victims feel irrelevant and for leading the Serbs, who make up the great majority of defendants, to talk of ‘victors’ justice’. Some even blame the court for the nationalists’ revival in Serbia – both S. Milosevic and V. Sesejl played a part in the elections in December 2003 – and the political manoeuvring since then. This impartiality, so necessary in the judicial process, has had its pros but also its cons, as it has been interpreted as interference in the internal affairs of Serbia and has been dubbed as being remote and manipulated by the international community. Nevertheless, in spite of its imperfections, the situation in the former Yugoslavia has made it advisable to follow this route because of its legal safeguard and the responsibility for protection after the conflict.

Although the ICTY serves as a *forum* for some of the victims to tell their stories and redress their grievances before the court and the international community, it has failed to contemplate any kind of compensation system or to serve as a comprehensive mechanism in which a larger number of victims could expose the atrocities they suffered to the rest of the world. Their testimonies would serve not only for their own relief but also for the international community to have full knowledge of what happened in the former Yugoslavia and prevent this from happening in the future.

Thus, despite the tremendous contributions of the ICTY, there is substantial room for improvement in these and other areas.⁹⁹ As R. Goldstone notes, the main success of these trials is that, once they began, we saw an end to negotiations regarding the fact that genocides had been committed. In this sense, it can be seen how in certain ICTY cases, the parties concur on ‘agreed facts’; in other words, the parties acknowledge, by mutual agreement, facts that took place, for example, the state of conflict of the country or the existence of refugees. The judgements include the facts, as proved by the Prosecution, so that the Court is somehow recognising that they did take place.

Judicial trials are slow and costly, and since the international community decided to put an end to impunity and set up these *ad hoc* criminal trial mechanisms, mixed courts and also the ICC, it would be a mistake to sink into pessimism and hinder the work of the ICTY. At this juncture, it needs the support of the international

⁹⁹ In this respect, Barry Hart points out the remaining obstacles to reconciliation. See HART, B., “Refugee Return in Bosnia and Herzegovina. Coexistence before Reconciliation”, in ABU NIMER, M., *Reconciliation, Justice and Coexistence...*, *op. cit.*, pp. 296 *et seq.*

community to complete its mandate: to try those accused of serious breaches of international humanitarian law. Nevertheless, there are growing doubts as to whether the ICTY is a useful instrument for achieving reconciliation in the new Republics of the former Yugoslavia.

In fact, justice is a necessary condition for reconciliation, although it is not a sufficient condition. There is a dilemma between looking at the past to correct grievances while creating a viable present and future for every group after a conflict. Therefore, reconciliation needs complementary approaches to achieving justice – not just the typical retributive, adversarial process. A major challenge for negotiators will be to find a process capable of achieving the functions of justice without creating resentment in one of the groups. Reconciliation only succeeds if it is linked with structural and institutional changes. Any approach that does not address a reform in corrupt institutions, as well as promoting reconstruction, disarmament, dealing with returnees, redistribution of resources and other economic needs among others will very often fail and not contribute to lasting peace.¹⁰⁰

Reconciliation must include elements of forgiveness, which does not mean forgetting and burying the past, not even in the Yugoslav case. For the parties to reach reconciliation, they have to acknowledge the past and remember their historical injuries. Unfortunately, there is no ideal model to follow in the world to achieve reconciliation. Neither *ad hoc* tribunals nor truth commissions by themselves are capable of handling the complexity of a post-conflict situation. For instance, judicial approaches may be politically biased, provide selective prosecution, unduly limit the admissibility of evidence, or be seen as victor's justice. Truth commissions, on the other hand, may be insufficiently punitive or ineffectual. Perhaps for this reason, some authors state that the key to achieving lasting peace is broadening and incorporating various approaches, in order to add restitution, acknowledgement, apology, forgiveness and equality to the retributive character of justice.¹⁰¹ In the end, despite certain limitations, all of these developments in international justice give renewed hope of the possibility of an emerging international order based on an international rule of law, and founded on the highest ideals of justice for the worst crimes known to humanity.

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¹⁰¹ For example, GOLDSTONE, R., "Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals", *op. cit.* See footnote 70, or EVENSON, E.M., "Truth and Justice in Sierra Leone: coordination between Commission and Court", *Columbia Law Review*, 2004, pp. 730 *et seq.*

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