THE ICTY'S CONTRIBUTION TO THE DEVELOPMENT OF PUBLIC INTERNATIONAL LAW

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I. INTRODUCTION

The International Criminal Tribunal for the Former Yugoslavia (hereinafter mentioned as ICTY) was established pursuant to the United Nations Security Council Resolution 827 of May 25, 1993. The Security Council adopted this resolution under chapter VII of the UN Charter that empowered it to adopt measures for the maintenance of the international peace and security. The explicit objective behind ICTY's establishment was to ensure prosecution for the acts of serious violations of International Humanitarian Law committed in the territory of Former Yugoslavia since January 01,1991.[1]

Situated in the Hague, the Netherlands, ICTY remained functional for almost 24 years from 1993 till December 2017 when it was closed and all the outstanding appeals against conviction were transferred to the UN's Residual Mechanism for Criminal Tribunal (MICT) and the other war crimes cases were transferred to the respective national courts in the region. During these 24 years, ICTY contributed immensely to many fields of Public International Law and ushered a new era of end of impunity for international crimes. Though it was established in the midst of criticism and doubt related to its legality and capability to bring the desire result, ICTY evolved its functioning brick by brick in a way that impressively answered these cynicism.

As per the ICTY infographic, it indicted almost 161 persons in which 90 were sentenced and 19 were acquitted. It sat for more than 10000 trail days and used more than 2.5 million pages of transcript while adjudicating four categories of international crimes that were genocide, crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions.[2]

The ICTY was established in the background of violent nationalistic aspirations that were ruthlessly playing havoc to the minorities in the territories of former Socialist Federal Republic of Yugoslavia. The world community had failed miserably to prevent or stop the massacres and thus there was something concrete needed to be done. The establishment of ICTY was one of those concrete steps. The Tribunal was a legal institution having manifest political aspirations that its functioning must correspond to the maintenance of international peace and security. It was the explicit acceptance of the fact that prosecution of the international crimes committed in conflict zones is one of the important measures for the maintenance of international peace and security.[3]

There are seemed to be three probable justifications behind the establishment of the Tribunal. First, its establishment was preventive in the nature that it would desist the possible perpetrators from future violations and would thus help end the culture of impunity. Second,

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[1] UNSC Resolution 827 of 1993, Operative para. 2. UNSC Resolutions can be found at http://www.un.org/en/sc/documents/resolutions/ (last visited on November 20, 2018).

[2] See http://www.icty.org/en/content/infographic-icty-facts-figures (last visited on November 20, 2018).

[3] *Supra* note 1, UNSC resolution 827, preambular paragraph.

it individualized the offences thus separating offenders from the rest of their community members. In this way, it protected the communities from imposition of guilt against one another. Third, it helped in writing down the reliable historical records of atrocities and sufferings and thus protected the future generations from misinterpretation and myth.[4]

Since ICTY stopped functioning from December 2017, it is high time to discuss its contributions to the Public International Law. This tribunal was the first of its kind after the Nuremberg and Tokyo tribunals therefore the discussion about its legality is also of much importance. Part I of the paper discusses these issues in little detail and also highlights the contribution made by the Tribunal to the Public International law jurisprudence while deciding the legality of its own establishment. Part II of the paper discusses in brief the contribution of the tribunal in respect of International Humanitarian law and International Criminal Law. This part does not intend to be comprehensive and specific jurisprudential advances were selected as per their relative importance. Part III of the paper provides over all appraisal of the Tribunal and presents its conclusion.

II. LEGALITY AND LEGITIMACY OF THE ESTABLISHMENT

The ICTY was established by the UN Security Council in pursuance of the Council's powers to maintain international peace and security. Thus, Security Council openly recognized the relationship between establishment of the judicial tribunal to prosecute the serious violation of the IHL and the maintenance of international peace and security.[5] This was a concrete step that had further heralded the establishment of International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC) and many other hybrid courts and tribunals to prosecute the serious violations of laws of armed conflict so that peace and security could be maintained.

Though after the Nuremberg and Tokyo tribunals, the ICTY was probably the first attempt to ensure the prosecution of the serious violations of the International Humanitarian Law. But it was also in many ways different from these tribunals that were generally termed as its predecessors. The ICTY was international in the sense that it was established by a UN body in contrast to the multinational character of the Nuremberg and Tokyo tribunals that were the result of an agreement between the victorious powers of the Second World War. In contrast to the Nuremberg and Tokyo tribunals that lacked jurisdiction to prosecute the persons of Allied powers, the ICTY's jurisdiction was equally applicable to all sides of the conflict and thus primarily making it bereft of the criticism of victor's justice as imputed easily against its so called predecessors.

However, it is also true that no permanent members of the Security Council were party to the conflict at the time of its constitution. Subsequently in 1999 when NATO forces bombarded many places in Serbia and Kosovo, the natural question arose whether ICTY would also take similar interest in prosecuting the alleged IHL breaches committed by NATO forces. The Prosecutor of ICTY had received many requests to investigate serious allegations of breaches of IHL by NATO forces. In response to this Prosecutor had constituted a review committee to find out and advise her about the sufficiency of evidences to investigate allegations imputed against NATO forces. And the said Review Committee recommended

[4] Ivan Simonovic, "The Role of the ICTY in the Development of International Criminal Adjudication" 23(2) *Fordham International Law Journal* 440, 446 (1999).
[5] *Supra* note 3.

that no such investigation against NATO forces should be commenced for the reason of unclear laws and insufficient evidence.[6]

The Prosecutor of the ICTY, though having power to reject recommendations of the review committee, accepted its recommendation and made statements while addressing the Security Council that though NATO forces made some mistakes but they did not deliberately targeted the civilians.[7] This approach of the Prosecutor and reasoning and methodologies of the review committee have been criticized by some scholars.[8] Thus, though it can be said that the accusation of victor's justice with its classical meaning could not be imputed against ICTY but it is also not true to think of it as a body completely bereft of the intricacies of international relations.

As this tribunal was established by the Security Council that is the political organ of the United Nations and does not possess any criminal jurisdiction, many apprehensions as to its legality were raised. In contrast to the Nuremberg and Tokyo tribunals that were the result of the consent of the states having jurisdiction over crimes, Security Council could not claim of possessing of such criminal jurisdiction over the offenders or the crimes.

Most of these issue and concerns related to the legal status of the Tribunal were raised during the *Tadic* case. It was the first case tried by ICTY. The ICTY's decision against interlocutory appeal on jurisdiction clarified these concerns.[9] The defence raised three important questions relating to the jurisdiction of the tribunal. These were first, unlawful establishment of the ICTY; second, illegal primacy of the ICTY over competent domestic courts and third the lack of jurisdiction relating to subject matter. All these questions had important bearings on its existence and meaningful functioning. The Tribunal had responded them very well and while doing so also made important jurisprudential contributions to the Public International Law.

The ICTY unequivocally stated that the Security Council is the organ of the United Nations and thus its power howsoever broad must be bound by the constitutional limits of the organisation.[10] While referring Article 24 of the UN Charter that empowers the Council with the primary responsibility for the maintenance of international peace and security, the ICTY impressively asserted that the Charter talks about the specific powers of the Security Council and not of absolute fiat. It observed that Charter nowhere either in the text or spirit makes Security Council unbound by the law. The Security Council has full discretion to determine whether there is 'threat to the peace', 'breach of peace' or 'act of aggression' so as to invoke its exceptional powers under chapter VII. But this discretion is not completely unfettered and should at least correspond to the purposes and principles of the United Nations.[11]

The Tribunal further observed that once the Council had already determined about the existence of 'threat to the peace', 'breach of the peace' or 'the act of aggression', it enjoyed

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[6] Paolo Benvenuti, "The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia"12(3) *European Journal of International Law* 503, 504 (2001).
[7] *Id*. at 505.
[8] *Id*. at 509-526.
[9] *Prosecutor* v. *Dusko Tadic*, Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction on October 02, 1995. *Available at*: http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (last visited on November 20, 2018).
[10] *Id*., para. 28.
[11] *Id*., para. 29.

discretion to adopt appropriate measures as per Articles 40[12], 41[13] or 42[14] of the UN Charter. While denying the arguments that constitution of the judicial tribunal is not contemplated under Article 41, the Tribunal specifically asserted that the Council was within its powers to establish the judicial tribunal.[15] The measures mentioned in Article 41 are merely indicative and do not provide exhaustive list.

Furthermore, the Security Council could do directly by itself what it could got to be done by its Member States.[16] ICTY observes that the establishment of the judicial tribunal is within the mandate of the Security Council by virtue of Article 41 of the UN Charter. The Security Council is very much within its powers to establish its subsidiary organ having jurisdiction to prosecute specific offences committed during specific time period and within specific territories in order to maintain international peace and security. By doing this, the Security Council does not delegate its own functions and powers to the ICTY and neither usurp nor intervene in the judicial powers of any other organs of the United Nations.[17]

While deciding this, ICTY had relied on the previous instances of establishment of the United Nations Emergency Force in the Middle East in 1956 by the General Assembly and the decision of the International Court of Justice in the Effects of Award case where the competence of the General Assembly to create a tribunal to decide the disputes related to the staffs of the United Nations was upheld.[18] Though this logic was objected by some scholars.[19]

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[12] The Charter of the United Nations, 1945, art. 40. This Article empowers the Security Council to adopt provisional measures in case of its determination of 'threat of peace', 'breach of peace' or 'act of aggression'. It states that:
"In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures."

[13] The UN Charter, art. 41, empowers the Security Council to adopt non-military measures in case of its determination of 'threat of peace', 'breach of peace', or 'act of aggression'. It states that:
"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

[14] The UN Charter, art. 42, empowers the Security Council to take necessary measures through air, sea and land forces in case of its determination that measures under Article 41 would be inadequate or have proved to be inadequate. It states that:
"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

[15] *Supra* note 4 at 445.

[16] *Supra* note 9, paras. 35, 36.

[17] *Id*., para. 38.

[18] *Ibid*.

[19] Christopher Greenwood, "The Development of the International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia" 2 *Max Planck Yearbook of United Nations Law* 97, 103 (1998). The author observes that "[t]he two cases are not, however, on a par. The Assembly, in the *Effect of Awards* case, had dealt with a matter internal to the United Nations and in respect of which no national court would normally have possessed jurisdiction. By contrast, the Council created the Tribunal as an alternative to the exercise of jurisdiction by national courts and conferred primacy upon it." The author however, finds no reason to deny the authority of the Security Council to constitute judicial organ for the maintenance of international peace and security.

The Security Council established the Tribunal only to fulfil its primary functions of maintenance of international peace and security.[20] Furthermore, the legality and validity of the measures adopted by the Security Council would not be determined by the success or failure such measures might have incurred in achieving their goals. The legal validity of the measures must not be determined *ex post facto* by the ultimate results of those measures.[21] The choice of means under Article 39 of the UN Charter and evaluation as to their efficacy lies completely with the Security Council.

The Tribunal in this decision also refuted the contention that the ICTY was not established by law and hence did not correspond to the well-established international human rights standards that a criminal tribunal must always be established by law.[22] The Tribunal observed that this requirement was there for national courts and tribunals and could not as such be applicable under international legal system that did not have standard legislative wing. There is no established doctrine of separation of power in the international law. The Tribunal further observed that since the ICTY's functioning was based on rule of law and it guaranteed to the accused most of the protections available under international human rights instruments, thus it complied with the said requirement of establishment by law.

The Tribunal, for obvious reasons, desisted itself from declaring the resolutions of the Security Council as law. Since the public international law has its own established sources of law making, any recognition to the Security Council resolution as law making authority would have definitely disturbed the edifice of public international law. The observation made by Christopher Greenwood that "a more convincing justification is that the tribunal was established by a decision of the Council lawfully taken under a legally binding instrument, the Charter, and that it was therefore established by law"[23] is even not convincing because Security Council does not have legislative power and the resolutions of the Security Council can never be termed as law. The Council can take measures to maintain international peace and security and its resolutions only correspond to such actions and measures.

The binding character of the Security Council resolution adopted under chapter VII even does not change this characteristics and does not give legislative competence to the Council to make 'law' under international legal structure. The Security Council resolutions under chapter VII though the source of binding obligation but they do not in any sense a source of international law. Thus, the legality or illegality of the obligations imposed by the Security Council is open for discussion under the framework of international law. These obligations must emerge from the existing Public International Law that has its well-recognized sources.

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[20] *Supra* note 17.
[21] *Id*., para. 39.
[22] This requirement has been provided for in most of the International Human Rights instruments. For example, Article 14(1) of the International Covenant on Civil and Political Rights, 1966 states "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."
Similarly, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 states that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]."
Similarly,Article 8(1) of the American Convention on Human Rights, 1969 states "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law."
[23] *Supra* note 19 at 104.

This was also explicit from the fact that the statute of the tribunal did not create any new offences. The definitions of the offences were taken from their then existing understanding under customary international law. It did not make anything unlawful that was previously lawful under international law nor did it create any kind of individual criminal responsibility that did not exist in the international law at that time. The offences against which the tribunal had jurisdiction had already been defined under international humanitarian law and also had their existence in customary international law.

Against the ground of unjustified supremacy of the international tribunal over domestic courts, the Tribunal emphatically relied on first, the grave nature of the offences for which the Tribunal was established, and second, the higher status of the Security Council resolutions adopted under chapter VII of the UN Charter. The tribunal observed that:

> [T]he crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State … the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world.[24]

Against the accused's plea of his right to be tried by his own national court (*Jus de non evocando*), the Tribunal rejected this plea and observed:

> *jus de non evocando* ... if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter.[25]

Against the appellant's claim of the subject matter jurisdiction of the Tribunal, ICTY observed that:

> [C]onflicts in the former Yugoslavia have both internal and international aspects … the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.[26]

The Tribunal had provided a new framework for the determination of the existence of the armed conflict both in spatial and temporal expansions and rejected the appellant's plea that the Tribunal did not possess the adequate subject matter jurisdiction over the crimes

[24] *Supra* note 9, para. 59. This is actually the quotation of the trial judgment as mentioned in this 1995 decision.
[25] *Id.*, para. 63.
[26] *Id.*, para. 77.

mentioned in its statute due to the existence of a non-international armed conflict or non-existence of any armed conflict.[27]

It is important to note that by the end of the twentieth century, Security Council through its chapter VII resolutions established overarching administrative missions in Kosovo and East Timor. Considering their transformative character, these administrative missions were first of their kinds in the history of the United Nations. Most of the scholarly writings discussed the legality of their establishment on the similar line as done in the 1995 Tadic decision. The said decision heralded a new way and understanding of utilising the Security Council to claim the powers of so called nation building missions.

III. SPECIFIC CONTRIBUTIONS IN INTERNATIONAL HUMANITARIAN AND CRIMINAL LAW

Under this heading the paper mainly discusses the contribution of the ICTY in developing and shaping the international legal jurisprudence aimed to defining the nature and extent of the armed conflict, doctrine of joint criminal enterprise and the procedural innovations particularly directed towards the victims and witnesses protection in trial proceeding. This part is not extensive and these three subjects are chosen considering their relative importance respectively in defining conflict, fixing modes of criminal liability and providing fair, just and impartial trial procedure as developed by ICTY. Nevertheless to say that this part touches these issues in very brief manner just to highlight their relevance.

A. Contribution in Defining the Nature and Extent of Armed Conflict

While deciding its first case, ICTY has made significant jurisprudential contribution to the determination regarding nature and extent of armed conflicts. The determination of the nature and extent of the conflict is an important factor that further provides for the applicability of specific set of IHL rules. It is also a key point for any conviction under specific offences. The offences over which ICTY had jurisdiction demanded it to make specific determinations about the existence of the armed conflict as well as its specific kinds whether international or non-international. Except genocide, the prosecution under other three offences namely, grave breaches of the Geneva Conventions, violations of the laws or customs of war and crime against humanity could not be possible without establishing the existence of the armed conflict and without determining its specific nature i.e. whether international or non-international armed conflict.[28]

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[27] This issue will be discussed in more detail in the next heading.

[28] The ICTY Statute, *available at*: http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (last visited on November 20, 2018). The ICTY had jurisdiction over four offences. These were first, Grave Breaches of the Geneva Conventions of 1949 (art. 2); second, Violations of the Laws or Customs of War (art. 3); third, Genocide (art. 4); and fourth, Crimes against Humanity. Except the offence of genocide, the definition of all the other offences had close bearing on the determination about the existence and nature of the armed conflict.

For example:

The ICTY Statute, art. 2, states that- "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949……."

The ICTY Statute, art. 3, states that- "The international Tribunal shall have the power to prosecute persons violating the laws and customs ……."

The ICTY Statute, art. 5, states that- "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character ….."

Even the UNSC resolution 827 was of no help in this respect. The date of January 01, 1991 was chosen in neutral way without keeping in mind any specific battle or incident. The offences over which Tribunal had jurisdiction even did not positively affirm the existence of specific kind of armed conflict. The Security Council had not determined the nature of the conflict in the territories of Former Yugoslavia as it had determined the same while constituting the International Criminal Tribunal for Rwanda (ICTR). In the case of later, the Security Council provided jurisdiction to the ICTR over violations of the common Article 3 of the Geneva Conventions and the Additional Protocol II, thus specifically determining the nature of the conflict as non-international. No such indication in respect of ICTY was given by the Security Council. Thus the issue before the Tribunal was how to determine the existence of the conflict in this whole context. In this respect, ICTY Appeals Chamber in its decision of October 02, 1995 stated that:

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[29]

By this the Tribunal categorically denied the argument that existence of armed conflict is limited to the areas of actual fighting. Though the applicability of specific IHL rules beyond the places of actual fighting were already established by the time but the Tribunal's determination about the temporal and spatial expansion of the armed conflicts both internal as well as international was a significant contribution. Before this, the term 'armed conflict' was not in much vogue for academic reflections and IHL deliberations had been mostly thought of in the terminologies of war or military operations.[30] Thus, the tribunal's contribution was significant and forward looking. However, the Tribunal accepted that to constitute crime under its statute there must be a relationship between the crime committed and the armed conflict.

The Tadic judgment has carved out two determinative criteria, namely organization of the parties and the intensity of the hostilities, for any protracted armed violence that distinguish it from mere banditry, unorganized insurrections and the terrorist activities.This approach as propounded by the Tribunal in Tadic case was applied by the ICTY itself and by other tribunals.[31] ICTY in the case of *Prosecutor* v. *Limaz et.al*.[32] further illustrated some

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[29]*Supra* note 9, para. 70.

[30]*Supra* note 19 at 114. Also see, Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* 119(Cambridge University Press, Cambridge, 2010). The author quoted the statement of Sonja Boelart-Suominen, a legal adviser at the Office of the Prosecutor whereby he mentioned the following important contributions made by the 1995 decision. He stated: "First, it covers a variety of hypotheses and caters explicitly for conflicts between non-state entities. Second, whilst it sets a low threshold for the application of humanitarian law in general, it is particularly important for its consequences in relation to internal armed conflicts. The definition of armed conflict suggested by the Appeals Chamber covers not only the classic example of: (a) an armed conflict between two or more states and, (b) a civil war between a state at one hand and a non-state entity on the other. It clearly encompasses the third situation, (c) an armed conflict in which no government party is involved, because two or more non-state entities are fighting each other".

[31] Anthony Cullen (2010), *Id*. at 132-136.

important points that could be helpful in determining the 'organization of the parties' that distinguish non international armed conflict from other unorganized forms of violence. Some of these determinative points were appointment of zonal commanders, supply of weapons, ability to recruit, train and equip new members, issuance of political statements and communiqué, authorization of military actions to units, assignment of tasks to individuals within organization, involvement of general Staff in the negotiation with the representatives of neutral and adversary parties.

To satisfy the requirement of the intensity factor, the situation must be above the internal disturbances and tensions but there is no need to reach it to the extent of sustained and continuous military operations. The entire period of the hostilities must be considered to determine their 'protracted' character. As per one scholar "the protracted requirement is met when the hostilities are extended over time and space and includes events attributable to the conflict" and it should be assessed with reference to "the entire period from the initiation of hostilities to the cessation of hostilities".[33] The indicative condition in this respect may be seriousness of the armed clashes, troops mobilization, types of weaponry used, scale of destruction of property and displacement of population and existence of causalities etc. This formulation of the ICTY was also used extensively in the jurisprudence of ICTR. Many independent experts have also used this criterion to characterize specific situation existing in different parts of the world such as Palestine, Sierra Leone, Lebanon, Somalia and East Timor.[34]

As already mentioned, the Tadic judgment is also important in the sense that it had extended the geographical and temporal horizon of the armed conflict beyond the place and time of the actual hostilities with a condition that the specific acts in question must have nexus with the ongoing armed conflict. This position is consistently been followed in the ICTY Jurisprudence in subsequent cases.[35] The small interruptions in fighting do not break the existence of the armed conflict. It does not suspend the obligations of the parties under IHL and there is no need of continuous, sustained and concerted hostilities.

This understanding of the protracted armed violence is without any doubt a significant progressive leap from the idea of non-international armed conflict as mentioned in Article 1(1) of the Additional Protocol II. This formulation was also used by the Rome Statute with a minor alteration. The Rome statute uses the term 'conflict' against the term 'violence' as used in the Tadic judgment.[36]

The ICTY generally and Tadic case particularly is also remembered for breaking the whole single situation in international and non-International armed conflicts depending upon the facts existing on the ground.[37] Before this, the whole situation in former Yugoslavia was discussed in academic circles either as international or non-international armed conflict. But,

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[32]*Prosecutor* v. *Limaj et. al*., ICTY Trial Chamber II, Case no. IT-03-66-T of November 30, 2005, para. 94-134, *available at*: http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf (last visited on November 30, 2018).

[33] Anthony Cullen (2010), *supra* note 30 at 128. Author quoted the statement of Bahia Thahzib-lie and Olivia Swaak Goldman, from Thahzib-lie and Swaak-Goldman, "Determining the Threshold", in Liesbeth Lijnzaad, *et.al.*, *Making the Voice of Humanity Heard* 248 (Martinus Nijhoff Publishers, Leiden/Boston, 2004).

[34] Anthony Cullen (2010), *supra* note 30 at 137-139.

[35]*Id*. at 140-142.

[36] Rome Statute of the International Criminal Court, 1998, art. 8.2.f, *available at*: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (last visited on November 30, 2018).

[37]*Supra* note 9, para. 72.

ICTY boldly denied it and announced a more nuanced and meaningful approach that IHL provides for different kinds of protection depending upon the identity of the parties involved in different geographical locations. Though this was not the new approach and International Court of Justice had already pronounced it in much discussed Nicaragua case but ICTY's unequivocal acceptance has further provided an impeccable place for this understanding in the international criminal law jurisprudence.[38]

B. Jurisprudence in Defining the Doctrine of Joint Criminal Enterprises

The ICTY has also contributed to the development of the doctrine of the Joint Criminal Enterprise under international criminal law. The doctrine assumes that the international crimes are mostly committed by the politically motivated plan conceived at one level and executed at another level. Thus, the behavior of political and military leaders responsible for conceiving plans for the commission of international crimes cannot be excluded from the criminal liability. All those who are participating in common criminal plan aware of its purpose having requisite criminal intent also share the criminal liability whatever role they may have played in the whole phenomenon. Though this doctrine was not specifically mentioned in the ICTY statute nevertheless, the ICTY employed it considering it the established principle under customary international law.[39]

The ICTY positively affirmed the JCE in the Tadic Appeal Chamber Judgment of 1999 by considering it a part of the customary international law. However, Tribunal's reliance on this doctrine while fixing criminal liability has subsequently contributed to further clarity and development of this doctrine. Tadic Appeals Chamber judgment has also distinguished JCE from other modes of liability like aiding and abetting.[40] It is also distinct from criminal conspiracy because JCE is always the mode of liability in completed crime while for conspiracy, completion of crime is not *sine qua non*.[41] There are three categories of

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[38] Case Concerning Military and Paramilitary Activities in and Against Nicaragua 1986, International Court of Justice, 1986, para. 219. The ICJ observed "The conflict between the contras forces and those of the Government of Nicaragua is an armed conflict which is not of an international character. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts." This statement is also quoted in Christopher Greenwood (1998), *supra* note 19 at 117.

[39]*Supra* note 28, art. 7(1). This Article states that- "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime". Also see, Giulia Bigi, "Joint criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of the Senior Political and Military Leaders: The Krajisnik Case" in 14 *Max Planck Yearbook of United Nations* 51, 57 (2010). The author observes that the Tribunal finds this form of culpability under the category of "committing" the crime under art. 7(1).

[40]*Prosecutor* v. *Dusko Tadic*, ICTY Appeal Chamber Judgment of July 15, 1999, Case No. IT-94-1-A, para. 229, *available at*: http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (last visited on November 30, 2018).

[41]*Prosecutor* v. *Milan Milutinovic, Nikola Sainovic and Dragoljub Odjanic*, ICTY Appeals Chamber Decision of May 21, 2003, Case No. IT-99-37-AR72, para. 23. *available at*: https://cld.irmct.org/assets/Uploads/full-text-dec/2003/03-05-21%20Milutinovic%20et%20al%20Decision%20on%20Ojdanic%20JCE%20Jxn%20Challenge.pdf (last visited on November 30, 2018). The Tribunal observes that: "Joint criminal enterprise and "conspiracy" are two different forms of liability. Whilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.

JCE based on the requisite mental element: namely basic, systematic and extended or they may also be called as JCE I, JCE II and JCE III.[42]

C. Important Innovations in Procedural Matters

The ICTY has also evolved a specific set of procedural rules for conducting of trials that subsequently enriched the corpus of international criminal law. These procedures are meant for ensuring just, safe and secure environment for the witnesses and victims so that they should not feel any sort of direct or indirect hindrances while deposing their testimonies. The procedures evolved by the Tribunal particularly in the cases of sexual violence are of much importance in this respect. Rule 96(1) of the Tribunal's Rules of Procedure and Evidence specifically provides that corroboration of testimony of the victim of the sexual violence is not required.[43]

This rule stated that the prior sexual conduct of the victim is at all no defense in such proceedings and thus, it protected the victims from humiliation and embarrassment. The Rule further prescribed the following conditions under which defence of consent can be ruled out. These conditions are first, if the victim "has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression" or second, the victim "reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear".[44] This is a practical acceptance of the grim and horrendous situation on the ground and the consent as a defence was rightly denied.

ICTY has also contributed to the jurisprudence of the witness protection and counseling. Under Rule 34, a special victims and witnesses section was established under the Registry of the Tribunal. This Office was mandated to offer counseling and support to the witnesses particularly in the cases of 'rape and sexual assault'. Victims and Witnesses Section has evolved the following mechanisms to protect the victims and witnesses from adverse consequences. These are: (1) maintaining complete secrecy about witness' identity in all public records; (2) blurring of witness face and distortion of his/her voices in the court video telecast, (3) providing opportunity to testify from witness's home country through

[42]*Supra* note 40, para. 220. The Tribunal observes about three kinds of JCE. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).

[43]Rules of Procedure and Evidence, rule 96(1), *available at*: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf (last visited on November 30, 2018).

[44]*Id*., rule 96(2).

video connectivity, (4) making arrangements so that witness could not see the accused and thus be protected against subsequent trauma, (5) relocation of the witnesses or victims in the third countries in cases of any veritable fear at their present location, (6) counseling to the victims and witnesses so that they could come out of the trauma. These initiatives have heralded a new era of the victims and witnesses protection in the international criminal law jurisprudence and positively informed subsequent development of the international law in this respect.

IV. CONCLUSION

The ICTY contributed immensely to the development of International Humanitarian Law and International Criminal Law. It has enriched the jurisprudence and provided an impetus for the renewed interest of the scholars in these subjects. Prosecution for international crimes has become the key word for the maintenance of international peace and security. Many hybrid and mixed tribunals were subsequently established towards this end. It has also heralded the new era of transitional justice where providing justice to the victims of the erstwhile totalitarian regimes became an important component in any peacebuilding exercises. Though the issues like efficacy of these developments in contributing and enforcing psychology of peace in international relations and whether prosecution is better than reconciliation are beyond the scope of this paper; but in pure jurisprudential sense, the contribution of ICTY towards refining, streamlining and redefining some of the concepts of International Humanitarian Law and International Criminal Law remains impeccable.