

SOME CHALLENGES OF DEFENDING INTERNATIONAL CRIME SUSPECTS:

Politics, Joint Criminal Enterprise and Command Responsibility at the ICTR and Special Court for Sierra Leon -Kennedy ogetto¹

ABSTRACT

The constitutive instruments of international criminal tribunals provide lofty entitlements for suspects of International crimes. This partly explains the misconception that international criminal tribunals provide justice that is not susceptible to some of the intrigues that some high profile national criminal processes may be prone to. A new practitioner in International criminal trials will not take long to discover how politically polarized international criminal justice can be. These trials often take place in highly charged environments that pose very fundamental challenges both to the accused and defense counsel. This paper looks at some of these challenges from the perspective of a defense lawyer. The views expressed herein do not in any way purport to underrate the importance of international criminal justice as a vehicle for confronting impunity. On the contrary it seeks to identify; for debate, a few of the challenges facing a system that is otherwise indispensable in the fight against impunity- if only fairness and impartiality were to be its hall-mark.

In the highly emotive and political atmosphere that international criminal trials are conducted, criminal liability has often been predicated on principles that do not necessarily meet the threshold of proof beyond reasonable doubt. The theories of Joint Criminal Enterprise and Superior Responsibility have in some instances been interpreted liberally and to the disadvantage of the accused person. The first part of this paper provides a brief exposition of the political nature of international trials while the second briefly examines the application of JCE and Superior Responsibility by the Special Court for Sierra Leone and Tribunal for Rwanda-ICTR and suggests a more cautious approach if the apparent drift towards guilt by association is to be contained.

1. Introduction

¹ LLB,LLM (Nairobi) Advocate of the High Court of Kenya, Lead Defense Counsel at The International Criminal Tribunal For Rwanda-ICTR Military one case, and Special Court For Sierra Leone, on the List Of Eligible Counsel, International Criminal Court. Has served as Vice President and later President of the Defense Lawyers Association at the ICTR-ADAD, and is a member of the Kenya and East Africa Law Societies. kenogetto@yahoo.co.uk. Paper presented at the first Defense Lawyers international conference-Hague,Netherlands-14 and 15 November 2009

Defending those charged before international criminal tribunals presents a herculean challenge to the defense lawyer. American attorney, Peter Robinson who has appeared for suspects both at the International Criminal Tribunal for Rwanda (ICTR) and the Tribunal for the former Yugoslavia (ICTY) likens this challenge to David loading and aiming his slingshot at Goliath as the giant approaches².

On the face of it, one of the most attractive attributes of defending an accused charged before the emerging tribunals, including the International Criminal Court (ICC) is the clarity and detail with which his/her fundamental rights are entrenched in the courts' constitutive legal instruments. These instruments clearly articulate that all persons are equal before the tribunals; that the accused is entitled to a fair and public hearing; and that the accused is presumed innocent until proved guilty³.

Procedural safeguards ensure the right to counsel and trial without undue delay. The accused must "be informed, if he does not have legal assistance, of this right" and "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."⁴ During interrogation "questioning by the prosecutor of an accused, including the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel,

² Peter Robinson; *So you want to Be an International Criminal Lawyer? Getting and Defending a Caser at the International Criminal Tribunal for Rwanda* 2008 14 New Eng.J.Int'l &comp.L.277

³ Article 21 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (1993), [hereinafter ICTY Statute]; Article 20 of the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, [hereinafter ICTR Statute]; Article 17 of the Statute of the Special Court for Sierra Leone, [hereinafter SCSL Statute]; Article 21 of the Rome Statute of the International Criminal Court, [hereinafter ICC Statute].

⁴ Rules 42 and 45 of the International Criminal Tribunal for the former Yugoslavia, Rules of Procedure ; Rules 42 and 44 of the International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rules 42 and 44, of the Special Court for Sierra Leone, Rules of Procedure and Evidence, adopted on 16 January 2002, as amended 27 May 2008 ; Rule 21 of the International Criminal Court, Rules of Procedure and Evidence.

questioning shall thereupon cease, and shall only resume when the accused's counsel is present”⁵.

Although these rights are clear and specific, their interpretation and practical application is arguably a different matter altogether.

Despite these noble statutory pronouncements, defending genocide and other international crimes suspects poses challenges of monumental significance. Because of the scale of atrocities committed and the attendant emotions, the predominant expectation is convictions and long jail terms for suspects of international crimes.⁶ The success of international criminal tribunals is therefore invariably measured not by the quality of its procedural and substantive out-put but rather by the volume of convictions and the pace at which they are pronounced. As one leading international criminal attorney has summed it up:

“..The dynamics of international trials are very different and offer unprecedented challenges. Unlike most domestic cases, international prosecutions have not primarily emerged from the need to administer justice, but rather from the firm belief that we should prosecute the perpetrators of those crimes we believe are the most heinous. The eagerness of the media, politicians, and some nongovernmental organizations to achieve convictions, not merely fair proceedings, puts pressure on international trials. The popular perception is that an acquittal is a failure. This is the reason why international prosecutors may well be inclined to play a creative trial game in order to secure convictions, rather than assisting the court in finding the truth⁷.

It is not unusual to find people who question the moral correctness of defending persons suspected to be perpetrators of grave international crimes, considered guilty *ab initio* and not deserving a trial. I have often met individuals, including lawyers who openly

⁵ ICTY RPE, *supra*, rule 63; ICTR RPE, *supra*, rule 63; SCSL RPE, *supra*, rule 63.

⁶ Commenting on euphoric nature of international criminal justice, Hans Kochler in his seminal book “Global Justice or Global Revenge?” argues that in situations following an armed conflagration, the circumstances are unlikely to be conducive to legal proceedings that meet universal standards of the rule of law. He argues that, “Political emotions prevent a rational analysis of the causes of and responsibilities for the war on all sides. The protagonists of the conflict are not able to detach themselves from the emotional dynamic that may have triggered and continuously fuelled the confrontation.” HANS KOCHLER, GLOBAL JUSTICE OR GLOBAL REVENGE? Pg 9 (Springer-Verlag Wien 2003).

⁷ Professor Michail Wladimiroff 40 Case W. Res. J. Int'l L. 27

lament and criticize the fact that I am involved in the defense of “these murderers.”⁸ Yet those suspected of even the most horrendous of crimes deserve a fair trial. As has been quite accurately observed, it is not that defence counsel has any difficulty in agreeing that criminals should be prosecuted. Rather, they merely reckon that prosecutions should be conducted in a fair way.⁹ Mere holding of offenders accountable for their alleged deeds will never be sufficient to earn the label “justice” until the process through which we hold perpetrators of grave crimes accountable is fair and just.¹⁰

Besides the presumption that we are representing people who are already guilty and do not in fact deserve a trial, what then are some of the other practical challenges facing a defence lawyer in international criminal proceedings?

2. Confronting the Politics of International Criminal Justice

In the context of trying some of the gravest crimes against humanity, international prosecutions are in many instances a peculiar mix of law and politics going well beyond the political overtones associated with some domestic criminal trials¹¹. The level of

⁸ Professor Michail Wladimiroff, a leading defence attorney at the ICTY, asserts that such challenges arise from the tendency of “the eagerness of the world community to expect convictions, not merely fair proceedings from war crimes trials.” Michail Wladimiroff, *The Challenges for Defence Lawyers Taking Cases Before an International Tribunal*, 53 *Deutscher Anwaltstag, Arbeitsgemeinschaft Strafrecht* 1, 2 (10May2002)http://www.wlaws.com/challenges_for_defence_lawyers_taking_cases_before_an_international_tribunal.pdf (last visited 5 Aug. 2009). He rightly notes that this pressure comes from many sources, including the media, politicians and non-governmental organizations. Popular perception has largely maintained that an acquittal of a suspected war criminal is a failure. Professor Wladimiroff warns that this should never be allowed to influence an independent judiciary; “[fair] trials are bound to result in acquittals of some guilty men as well as innocent ones; that is the inevitable consequence of the principle enshrined in the high standard of proof imposed on the Prosecution in any properly conducted criminal trial. Moreover, a proper administration of law should not make any distinction between ‘ordinary’ criminals and those who are prosecuted for alleged war crimes.” *Id.*

⁹ Wladimiroff *supra* note 7

¹⁰ David M Paciocco, *Defending Rwandans Before The ICTR: A Venture Full of Pitfalls And Lessons For International Criminal Law* (Unpublished) on file with the author.

¹¹ Apart from the political nature of international criminal justice MIRJAN DAMAŠKA argues that “at various times, the courts have expressed their intention to produce a reliable historical record of the context of international crime, to provide a venue for giving voice to international crime’s many victims, and to propa-gate human rights values. Courts have also expressed their aspiration to make advances in international criminal law, and to achieve objectives related to peace and security—such as stopping an ongoing conflict—that are far removed from the normal concerns of national criminal justice. And they have always insisted that these—and some additional—objectives be pursued in proceedings solicitous of the rights of the accused. It does not require much pause to realize that the task of fulfilling all these self-imposed demands is truly gargantuan. Unlike Atlas, international criminal courts are not bodies of titanic

political intrigues in international criminal prosecutions; although not readily obvious to the general public, is monumental. And for the defence lawyer, the political reality of international prosecutions is a phenomenon that confronts his/her task much more than it does prosecutors or judges. For instance speaking of the ICTY, University Professor Larry Hammond laments that:

From the very beginning the ICTY was established to carry out a specific political purpose: to restore peace... There may nothing wrong with this purpose, but it is not one that should guide a court that exists to assure just trials. There is no hint of any presumption of innocence, or of the possibility that persons brought before the tribunal might not be “responsible for serious violations” of law. There exists an always present pressure to gain convictions¹².

And writing on the politics of the Rwanda Tribunal, Kingsley Moghalu, a former Special Counsel and Spokesman of the International Criminal Tribunal for Rwanda (ICTR), argues that war crimes tribunals simply cannot be understood from a strictly legal or justice stand point, as this would divorce the aspects of international relations and world politics intricately in such tribunals.¹³ Luc Cote, a former prosecutor who has worked both at the ICTR and the Special Court for Sierra Leone admits that politics plays a critical role in international criminal prosecutions. He argues that although international Prosecutors often state publicly that their decision to indict is only legal, 'based on evidence only' or is part of a purely academic exercise, these statements should not conceal the eminent political dimension of the exercise of prosecutorial discretion, particularly on the international scene, where conflicts are ongoing¹⁴ In

strength, capable of carrying on their shoulders the burden of so many tasks. Even national systems of criminal justice, with their far greater enforcement powers and institutional support, would stagger under this load. But the overabundance of tasks is not the only problem with these goals. MIRJAN DAMAŠKA, *What is The Point of International Criminal Law* CHICAGO-KENT LAW REVIEW Vol 83:1 at p 331

¹² Statement of Law Professor Larry A. Hammond University of Texas, Before the United States House of Representatives, International Relations Committee, 28 Feb 2002 quoted in; David M Paciocco *id*

¹³ KINGSLEY CHIEDU MOGAHALU, *RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE* (Palgrave Macmillan 2005). Moghalu also quotes former ICTR President Navanethem Pillay, who would later become judge of the International Criminal Court and now United National High Commissioner for Human Rights, as admitting that “Justice can be selective, it can be political.”

¹⁴ Luc Cote *Reflections on The Exercise Of Prosecutorial Discretion In International Criminal Law* Journal of International Criminal Justice ICJ 3.1(162) March 2005

shocking revelations, former Chief Prosecutor of the ICTR/ICTY Carla del Ponte provides further insights into the politics of international criminal justice.¹⁵

2.1 Judicial Vindication of the Politicization of International Prosecutions:

ICTR and the Case of Jean Bosco Barayawiza

Some may argue that it is difficult to measure, both qualitatively and quantitatively the level of political manipulation in the international criminal process and that this is a matter that has remained largely in the realm of academic discourse.

However, there are many cases in which political influence is evident with the case of Jean Bosco Barayawiza being, perhaps, the most outstanding judicial vindication of the pervasive influence of power politics in the administration of International Criminal Justice.

Barayawiza, formerly a senior official in the government of assassinated Rwanda President Juvenal Habyarimana, fled to exile in Cameroon in July 1994 soon after the regime collapsed. He was arrested in Younde, Cameroon at the request of the ICTR in February 1997. In March 1997, an ICTR Judge ordered that Barayawiza be transferred to the tribunal's seat in Arusha. He was however not transferred as ordered until November 19, 1997.

In February 1998, Barayawiza filed a motion seeking nullification of his arrest on the ground that his pre-trial fundamental rights had been violated. The Trial Chamber dismissed the application, finding that the Barayawiza failed to establish that the Prosecutor had violated his rights with respect to the length of his provisional detention or the delay in transferring him to the Tribunal's detention unit. The Trial Chamber ruled that the "period of detention under Rule 40 from 21 February until 3 March 1997

¹⁵ See Peter Erlinder; Preventing the Falsification of History: An unintended Consequence of ICTR Disclosure Rules. On file with the author. Peter Erlinder discusses at length Del Ponte's book- Confrontations with Humanity's Worst Criminals and the Culture of Impunity in which Del Ponte exposes the cover up of crimes committed in 1994 by the Rwanda Patriotic Front RPF. This cover up is made possible by powerful Western States including the USA and Britain

did not violate [Barayawiza's] rights under rule 40¹⁶ and that his provisional detention was legally justified.¹⁷

2.2 Appeals Chamber Releases Barayawiza

Aggrieved, Barayawiza took the matter to the Appeals Chamber. The Appeals Chamber overruled the Trial Chamber and agreed that the accused's pre-trial rights had been irreparably violated. Regarding the Trial Chamber's application of rule 40 and 40bis, the Appeals Chamber observed that the right for Barayawiza to be promptly released under rule 40bis had been violated, stating that:

*We cannot accept that the Prosecutor...has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40bis places time limits on such detention if the suspect is detained at the Tribunal's detention unit. Rather, the principle of effective interpretation mandates that these Rules be read together and that they be restrictively interpreted.*¹⁸

The Appeals Chamber found that the 96-day delay between Barayawiza's transfer and initial appearance violated the statutory requirement that the initial appearance is held without delay. It further observed that there was no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant and it was important for the protection of his rights that his initial appearance was held without delay.¹⁹

The Appeals Chamber dismissed the indictment against Barayawiza. It found that the accused's rights had been fundamentally eroded and, as a remedy, nothing short of nullification of the indictment would suffice. The court further ordered that the prosecutor could not re-arrest Barayawiza and observed:

To proceed with the Appellant's trial when such violations have been committed would cause irreparable damage to the integrity of the judicial process. As

¹⁶ *Prosecutor v. Barayawiza*, Case No. ICTR-97-19-T, Decision on Extremely Urgent Motion For Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect Filed on 17 November 1998.

¹⁷ *Id.*

¹⁸ *Prosecutor v. Barayawiza*, Case No ICTR-97-19-AR72 Decision of 3 November 1999 para 46 (emphasis added).

¹⁹ *Id.* at para 69.

difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.²⁰

2.3 Threats From Rwanda

After this decision, there was a public outcry in Rwanda and in a swift re-action, the Rwandan government fore-warned that it would suspend its co-operation with the ICTR unless the decision to release Barayawiza was reversed. This placed the ICTR in an awkward position, particularly since it relied on the country's co-operation for a vast majority of its prosecution witnesses.

The co-operation of a government in international criminal justice is perhaps a necessary evil, more often than not imbued with politics more than legal considerations. This is attributable to the fact that the efficacy of international criminal law is fragmented between multiple national jurisdictions²¹ and reflects the problem of "enforcement over two or more jurisdictions."²² Thus, the absence of the Rwandan government's co-operation would have caused heavy prejudice to continued prosecutions.

The situation worsened, prompting the American government to intervene and assure the Rwandese government that the ICTR prosecutor would seek a reversal of the Barayawiza release order²³. That the American government would get involved in a matter that was ideally purely within the ICTR prosecutor's exclusive discretionary powers clearly demonstrates the jig-saw political puzzle that international criminal trials can be.

Rwanda's ultimatums and threats to the ICTR on the other hand exemplify the deeply political state of International Criminal Justice. Rather than face the eventuality of lack of prosecution witnesses, the ICTR seemed all set to ensure the reversal of the Barayawiza release order; the violation of his rights notwithstanding.

²⁰ *Id.* at para 108.

²¹ Goran Sluiter, *The Surrender of War Criminals to the International Criminal Court*, 25 LOY L.A. INT'L & COMP. L. REV. 605, 941 (2003).

²² Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 670-71 (2007).

²³ Kingsley Moghalu, *The Politics of Global Justice* op cit p 110

2.4 Appeals Chamber Reverses Decision to Release Barayawiza

As promised by the American government, the Prosecutor, not long afterwards submitted before the Appeals Chamber a motion for review of the Barayawiza release order and during the hearing of this motion, the Rwandan government was allowed to appear as *amicus curiae*, where it openly threatened the “non co-operation of the peoples of Rwanda with the tribunal if faced with an unfavorable Decision by the Appeals Chamber on the motion for review”²⁴. The ICTR Chief Prosecutor Carla del Ponte on the other hand took an even more intimidatory and bellicose approach warning the court that:

“Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigation depend on the government of Rwanda. That is the reality that we face. What is the reality? Either Barayagwiza can be tried²⁵ by this Tribunal, in the alternative; or the only other solution that you have is for Barayagwiza to be handed over to the state of Rwanda to his natural judge, *judis naturalis*. Otherwise, I am afraid, as we say in Italian, *possiamo chiudere la baraca*. In other words, we can as well put the key to the door, close the door, and then open that of the prison. And in that case, the Rwandan government will not be involved in any manner”²⁶.

The Appeals Chamber reversed its earlier order for the release of Barayawiza and ordered instead that he face trial, arguing that the Prosecution had demonstrated discovery of new information absolving the Prosecution from blame for the violation of Barayawiza’s rights²⁷. While the court allowed Barayawiza’s Appeal to a limited

²⁴ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, The Rwandan Government Representative gave a long speech before the Court which focused on guilt of the accused and why it was in the best interests of the ICTR to review the Barayawiza release order .In a tone smacking of blackmail and intimidation the Rwandan government representative concluded by noting that he would be failing in his duty if “ I did not draw to your attention the terrible consequences which a decision to release the appellant without a prospect of prosecution by this Tribunal or some other jurisdiction will give rise to.....A decision of this nature will cost the Tribunal heavily in terms of the support and goodwill of the people of Rwanda, which has been painstakingly built over the past few years. This decision will undermine the credibility of the Tribunal and affect, possibly cripple its effective performance of the matter to which it has been entrusted”.

²⁵ *Prosecutor v Barayawiza:supra*, Transcript of 22 February 2000, pg 27, lines 18-27

²⁶ *id*

²⁷ *Prosecutor v Barayawiza supra* Decision on Prosecutor’s Request For Review or Reconsideration 31 March 2000 at par 74

extent, it rejected the Appellant's argument that he should be released in terms of the earlier order²⁸.

Although the Court went out of its way to fend off accusations of political manipulation²⁹, the decision to review its own earlier order raised serious issues in relation to the independence of international criminal prosecutions. In many jurisdictions the world over, lawyers understand how difficult it is for courts to review their own decisions. It is not just the mere discovery of new information. An applicant must demonstrate that even with the exercise of all due diligence, he/she was unable to obtain the purported new information at the earliest opportunity. The ICTR rules of procedure and evidence indeed have set this high threshold. Rule 120 specifies a new fact to be one not known to the moving party at the time of the proceedings and which could not have been discovered through the exercise of due diligence.

In the Barayawiza case, the prosecution was not subjected to this universal and stringent burden of proof. The Prosecution was never required to demonstrate and indeed did not demonstrate that it could not have discovered any of the alleged "new facts" at the time of the initial proceedings³⁰. According to Schabbas, a leading International criminal law scholar and author, the Appeals Chamber allowed some rather dubious fresh evidence to be adduced in order to justify revising its earlier decision. He further argues, quite rightly that, none of the "new facts" admitted by the Appeals Chamber were

²⁸ The Appeals Chamber acknowledged that the Appellant's rights were violated and that all violations demand a remedy. However the Chamber considered it fit to alter the remedy it had earlier given the Appellant and substituted it with a reduction of sentence should he be found guilty after trial. *Id*

²⁹ In his Declaration (Separate concurring opinion) Judge Rafael Nieto-Navia committed 18 out of 30 paragraphs to the defense the Appeals Chamber decision and to emphasize that it was not influenced by any political manipulation. He stated "In my view the Appeals Chamber although mindful of [the] essential need for co-operation by the Rwandan government, is also mindful of the role the Tribunal plays in this process and therefore I refute most strenuously the suggestion that in reaching decisions, political considerations should play a persuasive or governing role, in order to assuage States and ensure co-operation to achieve the long term goals of the Tribunal. On the contrary, in no such circumstances would such considerations cause the Tribunal to compromise its judicial independence and integrity. This is a Tribunal whose decisions must be taken, solely with the intention of both implementing justice to the case before it, not as a result of political pressure and threats to withhold co-operation being exerted by an angry government

³⁰ For a discussion of the alleged "new facts" cited by the Prosecution see generally William Schabbas *International Decision: Barayagwiza v. Prosecutor.* American Journal of International Law, Vol.94, 2000 available at <http://www.heinOnline.org/HOL/page?handle=hein.journals/ajil94&id=1&size>

“discovered” nor were they unknown when the Appeals Chamber first heard the case in 1999³¹.

It is therefore reasonable to argue that the Appeals Chamber decision to review its own earlier order was prompted more by the dynamics of international politics rather than a desire to interpret rules impartially and dispassionately. Given the many odds that the accused and their defence teams face, it certainly would have been near impossible for the defence to obtain a review order in its favor in circumstances such as those cited by the Prosecution in the Barayawiza case. In the words of Schabbas:

“In view of the lamentable legal reasoning in the review decision, the Judges insistence that Rwanda’s pledge not to co-operate with the tribunal-a threat echoed by the Prosecutor-had no bearing in their deliberations was and remains unconvincing. The price to pay has been some rather embarrassing contortions of the applicable law including a threshold for admissibility of ‘new facts’ that no other self respecting appellate tribunal anywhere in the world would accept”³²

The Barayawiza legal tussle is not an isolated one- off saga. The politicization of the judicial process at the ICTR often takes extremist dimensions every time the court makes a decision that does not go down well with Rwanda. Although acquittals are rare at the ICTR; whenever an ICTR trial chamber announces one, the Rwanda government mounts loud and noisy protests- many of which are clearly in contempt of the court.

3. Grappling with Overly Broad and Subjective Theories of Individual Criminal Responsibility.

Perhaps the result of an over-eagerness to convict based on a largely political process; international criminal tribunals have in some situations interpreted certain theories of criminal responsibility in a manner that disregards fundamental elements of individual criminal responsibility.

Modern criminal justice which draws its inspiration from Kant’s individualistic approach to criminal justice and responsibility is informed by the philosophy that

³¹ *Id*

³² Schabbas *supra*

individuals have free will and are able to make rational self interested choices and that as autonomous moral agents, they can fairly be held accountable and punishable for the rational choices they make.³³ However, the question of individual criminal responsibility has been rendered questionable by developments in the international criminal law arena where open-ended use of theories as joint criminal enterprise and command responsibility seem to be taking center stage.

Defense attorneys at the emerging international criminal tribunals often have to deal with the challenges posed by overly expansive interpretations of some of these principles, particularly when such interpretations conflict with the principle of individual culpability. There has been a lingering concern by the defense and international criminal law scholars over the expansive use of the theories of joint criminal enterprise and command responsibility by international criminal tribunals.

The thinking behind the two theories is that those who contribute to the commission of atrocities without playing cognizably direct roles should in some fashion be held to account for their crimes³⁴. The presumption is that individuals who plan, finance or otherwise sanction atrocities at the very highest level would normally strive to cover their tracks and unless their responsibility is gauged by more indirect lenses, they are likely to escape prosecution. The argument seems to be that international criminal justice will be an exercise in futility if planners and financiers of atrocities were to escape prosecution simply for lack of direct evidence to implicate them, yet this group ultimately bears the greatest responsibility for many of the crimes³⁵.

³³ I Dennis “ The Critical Condition of Criminal Law (1997), 50 current legal problems 237 Quoted in Jean Marie Kamatali The Challenge of linking International Criminal Justice and National Reconciliation: The Case of ICTR. Leiden Journal of International Law 16(2003) pp 115-133.

³⁴ See for instance Danner and Martinez who argue that in the Chaotic conditions in which war time violations occur and due to the post-war dislocation experienced by many victims, it is often very difficult to locate specific evidence proving that defendants have committed particular crimes. Joint criminal enterprise helps secure convictions when such proof may be lacking. Allison Marston Danner and Jenny S. Martinez, *Guilty Associations, Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CAL.L.REV.75 132 (2005) at 546

³⁵ This is the point the Appeals Chamber made in Tadic when it held that “To hold liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time depending upon the circumstances, to hold the latter liable only as aiders and abettors

Be that as it may, these theories represent, in more than one way, a departure from conventional individual criminal responsibility as we have hitherto understood it. In their most extended application, the two theories personify arguably the most radical paradigm shift in criminal liability analysis. These theories focus on the collective as opposed to the individual as the target of individual criminal responsibility and tend to attribute criminal responsibility to an individual for crimes committed by others. Fundamental questions therefore arise as to whether a guilty mind is any longer the basis for apportioning criminal liability³⁶.

3.1 Joint Criminal Enterprise

The modern formulation of the theory of Joint Criminal Enterprise is to be found in the ICTY case of Tadic in which the court explained the justification for this theory. It argued that although only some members of a group may physically perpetrate a criminal act, the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question and that therefore the moral gravity of such participation is often no less – or indeed no different - from that of those actually carrying out the acts in question.³⁷ The Appeals Chamber identified three categories of JCE liability:³⁸

First, is the case 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

might understate the degree of their criminal responsibility”. Tadic Appeals Chamber Judgment 15 July 1999 paras 191-192

³⁶ Regarding the Extended form of JCE for instance, the hypothetical example is given of three individuals A, B and C officials of a state who agree to conduct a widespread and systematic campaign to exterminate all those opposed to their government policies. In carrying out this agreement C further intends to conduct this campaign in order to destroy, in whole or in part a religious group which also opposed the State’s policies. Although A and B have no intent to commit genocide, they may be found to have committed the same too it was a natural and foreseeable consequence of the execution of the initial plan. Thus the extended form of JCE serves to impose criminal responsibility for crimes carried out by others even if the former lacks the *mens rea* required for the crime.

³⁷ Tadic Appeals Judgment para 191

³⁸ Tadic Appeals Judgment para 220

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.³⁹

This theory has thereafter been applied in several ICTY and ICTR Cases. The Appeals Chamber of the Special court for Sierra Leone has also recently upheld a Trial Chamber's broad application of joint criminal enterprise in the RUF trial.

3.2 Application of JCE at the Special Court for Sierra Leone

In the RUF trial of the Special Court for Sierra Leone the accused were charged for various crimes under the joint criminal enterprise liability. The prosecution had alleged that the RUF including the accused shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas.⁴⁰

The Trial Chamber found that the objective of taking power and controlling the territory of Sierra Leone in and of itself is not criminal and therefore does not amount to a

³⁹ In Tadic the Trial Chamber had found that Tadic's participation in attacks at two different cities was part of a policy to rid the region of non-serb population by committing inhumane and violent acts against them in order to achieve the creation of a greater Serbia. Five men were killed at one of the cities after Tadic and his group of attackers had left. Nothing as to the circumstances of their death was known. The Trial Chamber found that there was no proof beyond a reasonable doubt that the Appellant Tadic had any part in the killing of the five men. The Appeals Chamber overturned the Trial Chamber holding stating that "in the light of the facts found by the Chamber, the Appeals Chamber holds that in relation to the possibility that another group killed the five men, the trial Chamber misapplied the test of proof beyond a reasonable doubt. On the facts found, the only reasonable conclusion the trial Chamber could have drawn is that the armed group to which the Appellant belonged killed the five men" Para 183 see also paras 175,181

⁴⁰ See Case No SCSL-2004-15-PT Prosecutor against Isaa Hassan Sesay et al Corrected Amended Indictment paras 36,37

common purpose within the meaning of the law of joint criminal enterprise.⁴¹ Although the Chamber concluded that there could be a criminal enterprise where the attainment of the common purpose is through criminal means, the fact that the main objective is not criminal *per se* ought to have prompted the Chamber to more cautiously approach the accused's alleged responsibility in the JCE.

Apparently influenced by the accuseds' perceived positions of responsibility within the RUF rebel movement, the Chamber found them liable for every conceivable crime committed throughout the territory of Sierra Leone over a period of close to one year. This unfairness was compounded by the manner in which the indictment was pleaded. JCE was pleaded in two broad paragraphs to the effect that the accused were liable for killings, abductions, forced labour etc which were either within the JCE or were a reasonably foreseeable consequence of JCE.⁴² The indictment jointly charged the 3 accused with identical conduct without any attempt to specify the particular contribution of each accused to the JCE, only concluding that the 3 by their acts or omissions were individually criminally liable pursuant to Article 6.1 of the Statute (incorporating JCE). In the judgment there was minimal attempt to demonstrate any significant contribution by the accused to the crimes committed apart from the regular reference to command position, the prestige they commanded, close relationship and proximity to the *de facto* leader etc.⁴³ Indeed a contextual reading of the judgment

⁴¹ See Prosecutor v. Sesay et al SCSL-2004-15-T, Trial Judgment 2 March 2009 para 1979. In an earlier Decision by Trial Chamber two of the Special Court for Sierra Leone, had ruled dismissed the JCE charge in a similar indictment arguing that the common objective pleaded "that of taking any actions necessary to gain and exercise political control over the territory of Sierra Leone was not inherently criminal-See Prosecutor against Brima et al SCSL-2004-16-T Trial Chamber Judgment 20 June 2007 paras 56-85. This holding was however overturned by the Appeals Chamber which stated that "the requirement that the common design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute or contemplate crimes within the Statute as the means of achieving its objective. Prosecutor v Brima et al Appeals Chamber Judgment 22 Feb 2008 para 80.

It should be noted that the position at the Special Court is markedly different from that at the ICTY for instance where indictments have largely charged common purposes that amount to crimes within the Statute of the ICTY Statute. At the Special Court the common purpose is not criminal *per se* but the means used to attain that purpose.

⁴² Para 37 of the RUF indictment

⁴³ Regarding the first accused Issa Sesay, the Chamber concluded that, given his position of power, authority, and influence, including his role, rank, and close relationship and cooperation with Bockarie, the accused contributed significantly to the joint criminal enterprise.-RUF Trial Judgment para 1996

clearly demonstrates that the accused persons were convicted for the crimes committed by RUF organization. In several instances in the judgment the Chamber discusses crimes committed by unidentified rebels and other persons without any link with the accused and only much latter briefly concludes that the accused are liable for those crimes.⁴⁴

The Chamber found that although the accused did not personally commit any of the crimes charged, they were nevertheless guilty under JCE⁴⁵. This conclusion *per se* is not problematic, as the essence of JCE liability is that physical/personal perpetration of a crime is not necessary. However it ought to be demonstrated that an accused has significantly contributed to the commission of the crimes. This cannot be legitimately accomplished by mere reference to positions of authority a factor that clearly was central to the Trial Chamber's conviction of the accused. As a consequence of the Trial Chamber's cavalier attribution of JCE responsibility to the Appellants, convictions was entered based on several crimes that the accused were not even aware of least of all intended.

While the Trial Chamber attempted to discuss in most general terms, the membership in the common enterprise of which the accused were said to be part, it does very little, if anything, to indicate why the accused should carry the burden of non-members who were the direct perpetrators of the vast majority of the crimes. Most importantly, the

Regarding the 2nd accused Morris Kallon the Chamber noted that as a senior RUF official he was one of the few RUF Commanders to be a member of the AFRC Supreme Council, and that by his membership in the Supreme Council he was involved in decisions or policy-making by the Council. None of the decisions of the Supreme Council was found to be criminal in nature. In apparent response to this, the Chamber merely concluded that though Kallon's participation did not directly involve the commission of crimes, "the Chamber recalls that it is not necessary for the participation to involve the commission of any crime, nor is it necessary for the accused to be present at the time a crime was committed."RUF Trial Judgment para 2004

Regarding the accused Gbao the Chamber noted "that Gbao's status, assignment, rank and personal relationship with Sankoh, as well as his knowledge of the RUF's ideology, are all factors that, in the Chamber's considered view, demonstrate that Gbao had considerable prestige and power within the RUF in Kailahun District"RUF Trial Judgment para 2032

If criminal liability were to be based on command positions, prestige and proximity to power, no defendant before an international tribunal would ever secure an acquittal -indeed there will be no need for a trial.

⁴⁴ See for instance paras 991-1041 of the Trial Judgment in relation tp crimes committed in BO district.

⁴⁵ See paras1976,2053,2066,2157 of the RUF Trial Judgment

Judgment appears to conflate similarity of action with commonality of purpose. While the direct perpetrators may have been committing acts that could be conceived of as consistent with the common purpose advanced by the Prosecutor, there was no proof that the direct perpetrators shared any common purpose with the accused or were in any way affiliated with the accused.

It is noteworthy that the tenuous connection between individual culpability and the expansive theory of joint criminal enterprise liability advanced by the Prosecution in the RUF trial was specifically questioned by two of the three justices who sat on the RUF trial and decided the judgment. In his separate concurring opinion, Justice Bankole Thompson “question[s] . . . the legal justification for category (c) [of joint criminal enterprise liability], from the perspective of the principle of legality in its proscriptive and penological contexts, given the logical pitfalls latent in them.” Indeed, he questioned just “how expansive . . . the scope of liability envisaged by the third category” of Joint Criminal Enterprise liability should be, especially concerning the “principle that the attribution of criminal responsibility to a person charged with violation of a proscriptive norm can only be predicated upon his or her own individual conduct, and . . . the principle that a person found guilty of criminal wrongdoing can only be penally sanctioned for his individual choice to engage in such conduct.”⁴⁶

Justice Pierre Boutet’s dissenting opinion similarly expressed a hesitancy to accede to an overly-expansive understanding of type-III joint criminal enterprise liability. In particular, Justice Boutet sought to require that, especially in “such a broadly pleaded joint criminal enterprise,” courts should “require a close connection between the goals of the common design, as pleaded, and the contribution of each of the Accused. This is even more important when the purpose is such that is not even reflective of a crime which would fall under the jurisdiction of this Court.”⁴⁷

⁴⁶ RUF judgment Concurring Opinion of Justice Bankole Paras 18-22

⁴⁷ RUF Trial Judgment Dissenting Opinion Of Justice Pierre Boutet Para 16

Surprisingly despite their hesitancy regarding the application of JCE liability the two Justices nevertheless applied the theory to the RUF case in a most broad and open-ended fashion.

The Appeals Chamber of the Special Court recently confirmed the Trial Chamber application of JCE but not without a scathing dissent from one of the Judges. In her dissent the Hon Justice Fischer stated that the doctrine of JCE, since its articulation by the ICTY Appeals Chamber in *Tadić*, has drawn criticism for its potentially overreaching application and international criminal tribunals must take such warnings seriously,⁴⁸ and ensure that the strictly construed legal elements of JCE are consistently applied⁴⁹ to safeguard against JCE being overreaching or lapsing into guilt by association.⁵⁰ Regarding the Majority's conviction of the 3rd Appellant, Justice Fisher stated that the "Trial Chamber and the Majority have abandoned the safeguards laid down by other tribunals as reflective of customary international law. As a result, the [Appellant] stands convicted of committing crimes which he did not intend, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend. She termed the Majority's decision to uphold these convictions regrettable and expressed her hope that the "primary significance of that decision will be as a reminder of the burden resting on triers of fact applying JCE, and as a warning of the unfortunate consequences that ensue when they fail to carry that burden"⁵¹

3.3 Command Responsibility

Command responsibility doctrine allows military and civilian leaders to be held liable for the criminal acts of their subordinates. The doctrine encompasses two different forms of liability. The first is direct or active command responsibility-when the leader takes active steps to bring about the crime by for example, ordering his subordinates to

⁴⁸ See RUF Appeals Judgment SCSL 26 Oct 2009 citing *Brđanin* Appeal Judgment, para. 426; *Krajišnik* Appeal Judgment, paras 657-659, 670, 671; *Krajišnik* Appeal Judgment, Separate Opinion of Judge Shahabuddeen; *Milutinović et al.* Decision on Jurisdiction- JCE, paras 24-26; *Rwamakuba* JCE Decision.

⁴⁹ Citing *Krajišnik* Appeal Judgment, para. 671.

⁵⁰ Citing *Brđanin* Appeal Judgment, paras 426-431.

⁵¹ SCSL, RUF Appeal Judgment supra, dissenting opinion of Justice Fischer Para 46.

do something unlawful. The second type of command responsibility and the one most commonly referred to involves “indirect” or “passive” command responsibility⁵². Because direct proof that a commander actually ordered his troops to commit crimes is not always forthcoming, the second type of command responsibility is more significant in both theory and practice as a distinct theory of liability. Articles 7(3) and 6(3) of the ICTY and ICTR Statutes respectively, for example provide for command responsibility as follows;

The fact that any of the acts referred to in articles 2 to 5 of the present statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof⁵³.

The ICC Statute contains a similar provision although its language is slightly different. The Provision imposes liability on military commanders who “knew or, owing to the circumstances at the time, should have known” as well as civilian leaders who “knew, or consciously disregarded information which clearly indicated” that their subordinates were committing or were about to commit crimes.⁵⁴

Command responsibility doctrine under the case law of the ICTY and ICTR requires three elements: The existence of a superior-subordinate relationship of effective control the existence of the requisite *mens rea*, namely that the commander knew or had reason to know of his subordinates crimes and that the commander failed to take the necessary steps to prevent or punish the offenses⁵⁵.

⁵² However, some opinions have suggested that the omissions of a commander may also give rise to aiding and abetting liability under 7(1). *See* Prosecutor v. Kordic, Judgement, ICTY Trial Chamber, *supra* note 102, at Para 371 “Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).”

⁵³ ICTY Statute, , at art 7(3). Article 6(3) of the ICTR Statute provides an essentially identical provision as do the statutes for the Sierra Leone and East Timor special courts. United Nations, Statute for the Special Court in Sierra Leone, *supra* note 3, at art 6(3); U.N. Transitional Administration in East Timor, , at art. 16

⁵⁴ ICC Statute, at art 28.

⁵⁵ *See* Prosecutor v. Blaskic, Judgment, ICTY Trial Chamber, at Para. 294, case No. IT-95-14-T(Mar. 3,2000); Prosecutor v. Delalic, Judgement, ICTY Trial Chamber, at para, 346; Prosecutor v.Kordic, judgement,, at para 294.

Under the ICTY and ICTR statutes an accused is liable where he/she “knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”⁵⁶. Thus, the ICTY and ICTR statutes endorse liability for something less than actual knowledge. Certain interpretations of the first and second elements of command responsibility often pose considerable difficulties for the defence. The existence of a superior subordinate relationship need not be determined by a formal (*de jure*) relationship. The test is whether the superior had effective control of those perceived to be his subordinates. In many cases the evidence used to determine a superior subordinate relationship can be very subjective, and open to more than one reasonable interpretation. It would therefore seem inappropriate to rely on such evidence to establish command responsibility.

In the ICTR case of Prosecutor v Alfred Musema⁵⁷ an ICTR Trial Chamber found the accused, a civilian tea factory manager liable under the command responsibility rubric for the crimes committed by workers at the factory during the 1994 genocide. The Chamber explained the accused’s liability as follows:

“The Chamber finds that ...Musema exercised de jure authority over employees of Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory even if those duties were performed outside factory premises. The chamber notes that Musema exercised legal and financial control over these employees particularly through his power to appoint and remove these employees from their positions at the Tea Factory. The Chamber notes that Musema was in a position, by virtue of these powers to take reasonable measures such as removing, or threatening to remove an individual from his her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute..”⁵⁸.

It would seem speculative to assume that by virtue of the fact that a civilian employer exercises economic control over his employees he is equally in a position to exercise a

⁵⁶ ICTR Statute, at art. 6(3); ICTY Statute, at art. 7(3); see also United Nations, Statute for the Special Court in Sierra Leone, *supra* note 3, at art 6(3) (using similar language); U.N. Transitional Administration in East Timor, *supra* note 3, at art. 16 (using similar language)

⁵⁷ Prosecutor V Alfred Musema Case No ICTR -96-13-T Judgment of 27 January 2000

⁵⁸ *Id par 880*

military fashion control over these employees and thus prevent crimes committed by the employees. Mere economic influence over subordinates does not in itself confer the material ability to prevent the commission of international crimes particularly at a time when there is an absolute breakdown of law and order.

Although the jurisprudence as established that mere *de jure* position does not suffice to incur command responsibility, some decisions seem to rely simply on the position and or rank of an accused to establish command responsibility. In the ICTR case of Bagosora and 3 others, the court found one of the accused responsible for the attack by militia of a church simply because he was the military commander of the area. However, there was no evidence linking the accused to that attack. The Chamber ruled as follows:

“...There is no direct evidence that Nsengiyumva gave an order to attack Nyundo parish. Furthermore it appears that the attacks were perpetrated only by militiamen....The manner in which the attack unfolded reflects coordination. Moreover the repeated nature of the attack as well as its target, a major religious institution indicates that it was not merely sporadic violence. In the Chamber’s view, the only reasonable conclusion is that it was an organized operation which **must have been sanctioned and ordered by the area’s military commander, the accused.**”⁵⁹

Significantly, the trial chamber failed to consider the fact that the region where the attack took place also had other senior officers including the police chief who *could* very well have ordered the attack in terms of the Chamber’s theory.

The formulation of this conclusion by the Chamber clearly demonstrates the difficulties defense counsel faces where a court relies on what appears to be speculation as opposed to evidence establishing proof beyond reasonable doubt. It is almost impossible to mount any meaningful defense in the face of such subjective considerations. It demonstrates a process whose focus is the apportionment of criminal responsibility even when the basis for doing so is not entirely clear.

⁵⁹ *Prosecutor v Bagosora et al Case No ICTR-98-41-T* Judgment of 18 Dec 2008 Par 1203. In our respectful opinion the use of language in this holding to the effect that the operation *must have been sanctioned* by the accused is irreconcilable with principle of proof beyond reasonable doubt. However this language is employed throughout the judgment.

4. Conclusion

The trend in which perceived positions of authority *per se* seem to have become the cornerstone of criminal liability in international criminal proceedings presents a worrying scenario in which proof of individual responsibility and a guilty mind will soon be rendered redundant. What is the need for a protracted expensive trial, one may ask; if all the prosecution needs to allege and demonstrate is that the accused in some fashion, occupied an important position of responsibility?

This worrying trend is compounded by the frequent use (read misuse) of circumstantial evidence to establish criminal liability in cases where the prosecution has been unable to prove its case by direct evidence. In many of these cases, the prosecution theory has been based solely on direct testimony, yet some Chambers have stepped in to salvage the prosecution case by resorting to circumstantial evidence to enter a conviction. This is evidence in respect of which accused persons invariably have no notice and is largely made up of perceptions and subjective opinions of the judges in question.

The ease with which prosecutors have in some instances secured convictions through the theories of joint Criminal enterprise and superior responsibility must start to raise more frequent questions regarding many of the traditional fair trial rights of an accused before international criminal tribunals. In many situations where guilt has been determined purely on subjective and broad use of certain theories of liability and also improper application of circumstantial evidence, it can no longer be convincingly argued that proof beyond reasonable doubt is still a meaningful safeguard available to accused persons before these tribunals. There is considerable merit in the perception that an unchecked application of joint criminal enterprise and superior responsibility theories will ultimately obliterate the necessity of a guilty mind as the *sine qua non* for attributing liability in criminal law. The fear that the application of these theories may in fact be fast drifting towards the realm of “guilt by association” would seem well founded.

Significantly these concerns have been raised not only by legal practitioners and leading criminal law scholars but also by some among the more critical judges of international criminal tribunals. The lack of more direct evidence against those who are deemed to

have participated in planning large scale crimes may be a potent justification for the application of JCE and command responsibility. However this justification is fast losing legitimacy as international tribunals continue to rely on presumptions, hypotheses and overly subjective circumstantial evidence to base their convictions.

Criminal liability should look beyond mere membership of an organization and suspects should not be punished simply for belonging to organizations in which some members are engaged in criminal activity. This is more so in large scale groupings where an individual member may have little control over the activities and or conduct of his colleagues. Although it may not be necessary or indeed possible to always prove a formal agreement to commit crime, it is desirable to require more objective criteria as a basis for JCE and superior liabilities. These must be criteria that go beyond mere association with criminals. This is particularly critical for the extended form of joint criminal enterprise where the nexus between the accused and the physical perpetrators may be tenuous or even too remote.