

Is There a Text in This Court? The Purposive Method of Interpretation and the *ad hoc* Tribunals

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Abstract

The *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) have contributed to the humanisation of humanitarian law inter alia by resorting to the purposive approach to interpretation. The application of the purposive approach to interpretation contributed to the development and extension of international humanitarian law. The *ad hoc* Tribunals also made new law in this way. The Tribunals also prioritised the humanisation of international law by blowing new life into the *Martens* Clause. Drawing on the work of *Stanley Fish* and his work on interpretive communities, this article will suggest that one of the ways to understand the purposive lawmaking of the Tribunals is to adopt the hermeneutical theory of deriving the meaning of a text from an “interpretive community”. In the context of international criminal law such interpretive community will consist of the members of the international community who are sympathetic to the aims of international criminal law.

I. Introduction

As the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda are nearing the conclusion of their work, it is fitting to look back and consider the many and varied contributions these Tribunals made to the development of international criminal law. In fulfilling their mandate to prosecute those responsible for the most serious violations of interna-

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tional humanitarian law in the respective territories, the Tribunals have made both substantive and procedural law¹ and have developed an impressive body of precedent. *Theodor Meron* has observed that the ICTY has created more precedent than all the previous international and domestic war crimes cases combined.² Following in the tradition of the Nuremberg and Tokyo Tribunals, the Tribunals have transformed the nature of international criminal responsibility from a responsibility that formerly attached primarily to states to *individual* criminal responsibility. But the Tribunals have made another fundamental and dramatic contribution. They have contributed to the humanization of humanitarian law³ and in many ways *prioritized* the humanization of international law over competing legal concerns. They have done this in at least two important ways: firstly, they often resorted to the purposive approach to interpretation. In the specific context of the *ad hoc* Tribunals, the application of the purposive method of interpretation contributed to the development and extension of international humanitarian law. By electing to apply the purposive interpretation the *ad hoc* Tribunals also made new law. A second way in which the Tribunals prioritized the humanization of international law was to blow new life into the *Martens* Clause. The Tribunals' adoption of the purposive approach has often led to the criticism that the Tribunals have exceeded their mandate in that they not only applied the law, but also made law.⁴ The mandate (as clearly expressed in the Report of the Secretary General on the Establishment of the ICTY in 1993) was to apply existing law (*lex lata*) and not to make new law.

This article will draw on the work of the literary theorist *Stanley Fish*, in particular his work on interpretive communities.⁵ It will be suggested that one of the ways to understand the purposive lawmaking (lawmaking by way of purposive interpretation) of the *ad hoc* Tribunals is to adopt the hermeneutical theory of deriving the meaning of a text from an "interpre-

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¹ Procedural lawmaking involves the drafting and amending of the Rules of Procedure and Evidence. Since procedural changes can affect the substantive changes of the accused, the distinction between substance and procedure is not always clear.

² Conference program: The ICTY at Ten, New England School of Law in Boston, Massachusetts (9.11.2002).

³ *T. Meron*, *The Humanisation of Humanitarian Law*, AJIL 94 (2000), 239.

⁴ See Report of the Secretary General Pursuant to Para. 2 of Security Council Resolution 808 (1993) (presented 3.5.1993) (S/25704) para. 34. See also the statement of the Appeals Chamber in *Prosecutor v. Delalić*, Decision on Application for Leave to Appeal by *Hazim Delić* (Defects in the Form of the Indictment) IT-96-21-A, 20.2.2001: "The Tribunal's Statute does not create new offences but rather serves to give the Tribunal jurisdiction over offences which are already part of customary law, para. 26.

⁵ *S. Fish*, *Is There a Text in this Class? The Authority of Interpretive Communities*, 1980.

tive community". In the context of international criminal law such an interpretive community would consist of the members of the international community who are sympathetic to the aims of international criminal law. I will argue that it is the implied consent of the international interpretive community that lends legitimacy to the Tribunals' use of the purposive approach and therefore to the lawmaking that takes place as a result of the adoption of such an approach. It can be argued that the humanization of humanitarian law forms the normative justification for the lawmaking activities of the Tribunals. I will argue that the consent of the international community forms an acceptable justification for Tribunals' strong reliance on the purposive approach (although there are other forms of justification) and therefore legitimizes the lawmaking that took place by way of purposive interpretation. *Thomas Franck* defines legitimacy as "a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively".⁶ The Tribunals therefore can only demand compliance because they have the quality of legitimacy.

I will start by considering the notion of the "humanization" of international law. I will proceed to discuss the hermeneutical framework set out in *Delalić*.⁷ I will then make suggestions as to how one can give content to the notion of an "interpretive community" in the context of international criminal law. I will discuss the correlation between the idea of an interpretive community, as proposed by *Stanley Fish*, and the way the purposive method of interpretation is employed by the *ad hoc* Tribunals.

II. The Humanization of International Law

The dramatic legal and conceptual transformation that occurred in relation to the position of individuals before and after the Second World War has been described as a transformation that has "internationalized human rights and humanized international law".⁸ This growing prominence of human rights and the strengthening of the movement towards humanization have given substance to *Roosevelt's* vision of the "moral order".⁹ In the context of the changes observed in the 1990s (the movement towards human

⁶ *T. Franck*, *The Power of Legitimacy Among Nations*, 1990, 16.

⁷ *Prosecutor v Delalić et al.*, IT-96-21-T ("Čelebići"), 16.11.1998.

⁸ See *T. Buergenthal*, *Human Rights: A Challenge for Universities*, *UNESCO Courier* 31 (1978), 25, 28.

⁹ *F. D. Roosevelt* spoke of "a moral order" in his 1941 Four Freedoms Speech. His call for a new moral order became the clarion call of then nations that fought the Axis powers and that founded the United Nations. *F. D. Roosevelt*, 1941 Four Freedoms Speech, 21.

rights has been described as an “incipient normative revolution”),¹⁰ *Elazar Barkan* has noted the possible beginnings of “a new international morality”.¹¹ The “humanization of humanitarian law”, a term formulated by *Theodore Meron*, fits into this normative framework.¹² By making use of the purposive approach to interpretation the Tribunals have supported the movement towards humanization in international law.

Meron points out that the law of war has always contained rules based on chivalry, religion, and humanity designed for the protection of non-combatants and especially women, children and old men.¹³ The current changing nature of conflicts from international to internal conflicts has drawn humanitarian law closer to human rights law.¹⁴ Under the influence of human rights the law of war has changed and acquired a more human face.¹⁵ The humanitarian and humanizing aspect of humanitarian law is epitomized by the *Martens Clause*.¹⁶ *Theodor Meron* has argued that principles of humanity as reflected in the *Martens Clause* provide authority for interpreting international humanitarian law consistently with the principles of humanity and the “dictates of public conscience”.¹⁷

The idea that international law should have a humanitarian function might serve as an acceptable justification for adventurous lawmaking. Some, such as *Sassoli* and *Olson* have argued that lawmaking could be an extension of the protection of humanitarian law to those not previously protected.¹⁸ The Appeals Chamber in *Tadić* relied on Art. 4 of the Fourth Geneva Convention, directed at protecting civilians to the maximum extent possible, to extend the protection of humanitarian law.¹⁹ This decision in *Tadić* had a significant impact on subsequent jurisprudence and will be examined below.

¹⁰ *P. de Greiff*, Reparations, International Law and Global Justice: A New Frontier, in: *P. de Greiff* (ed.), *The Handbook of Reparations*, 2006, 479.

¹¹ *R. Falk*, Reparations, International Law and Global Justice: A New Frontier, in: *P. de Greiff* (note 10), 479 et seq.

¹² *T. Meron* (note 3).

¹³ *T. Meron* (note 3).

¹⁴ *T. Meron* (note 3), 3.

¹⁵ *T. Meron* (note 3).

¹⁶ *T. Meron* (note 3), 5.

¹⁷ *T. Meron*, The Martens Clause, Principles of Humanity and Dictates of Public Conscience, *AJIL* 94 (2000), 87 et seq.

¹⁸ *M. Sassoli/L. M. Olson*, The Judgment of the ICTY Appeals Chamber on the Merits in the *Tadić* case, *Int'l Rev. of the Red Cross* 82 (2000), 733.

¹⁹ *Prosecutor v. Tadić*, IT-94-1-A, 15.7.1999 (hereinafter *Tadić Appeals Judgment*), para. 168.

III. Lawmaking by the Tribunals

As a point of departure it is clear that *ad hoc* international criminal tribunals make law and have made law since their establishment. One reason for the necessity for lawmaking at the Tribunals was the rudimentary nature of international criminal law at the time of the establishment of the Yugoslavia Tribunal. What are the consequences of the unwritten, rudimentary nature of international criminal law and how does this affect the lawmaking of the judges? International criminal law rules, because of their essentially unwritten nature, are relatively indeterminate, adaptable to new circumstances and possess a certain “malleability” and flexibility.²⁰ This malleability can also make this field of law easy to manipulate. Because there is less law and less precedent in international criminal law it seems more appropriate, even necessary, to make law.

What does making new law (often euphemistically called “developing the law”) mean in the context of international criminal law? It is argued here that developing international criminal law will involve extending the application of humanitarian law to new areas and updating international humanitarian law. One way of extending the application of international humanitarian law is by resorting to purposive interpretation. Making law by means of interpretation is no longer considered particularly controversial. It is widely acknowledged that judges make law through interpretation. Judicial gap-filling by means of the interpretative conventions such as the purposive method of interpretation is, according to the Tribunal, a means of securing and giving effect to the drafters’ intentions.²¹ Interpretation of a statute is a task infused with discretion. As in domestic systems judges in international courts frequently choose which of a number of interpretations of a statute to adopt. In a common law system when judges reformulate rules in the process of applying them to particular cases, the reformulations become part of the body of “sources” of law in later cases.²² One can of course understand the term “interpretation” in a broad and a narrow sense.²³ An ex-

²⁰ A. Cassese, *International Criminal Law*, 2003, 16.

²¹ *Prosecutor v. Delalić et al.* (note 7), para. 165.

²² D. Kennedy, *A Critique of Adjudication*, 2001, 32. According to Kennedy this means that law can be made even in the most routine application of rule to facts. *D. Kennedy* (note 22), 26.

²³ A. Barak, *Purposive Interpretation*, 2005, 5. The court in *Delalić (Čelebići)* distinguished between a broad and a narrow method of interpretation in the following way: “The Trial Chamber is aware that the meaning of the word ‘interpretation’ in the context of statutes, including the Statute of the Tribunal, may be explained both in a broad and in a narrow sense. In its broad sense, it involves the creative activities of the judge in extending, restricting

pansive understanding of interpretation would hold that all texts require interpretation (even a text whose meaning is undisputed). A constrictive definition of interpretation restricts the need for and scope of legal interpretation and only makes room for interpretation where the text is unclear or ambiguous.²⁴

Adventurous interpretation occurs when judges fill gaps in the law by using a specific method of interpretation. Adventurous interpretation is often attacked as constituting lawmaking.²⁵ In his separate opinion in *Tadić* Judge *Li* described the majority decision as “an unwarranted assumption of legislative power”.²⁶ But it is clear that the tools of interpretation, specifically purposive interpretation, have helped judges to fill gaps in the Statutes and the law.

Tribunal judges have relied on the grave nature of the crimes in question as a justification for adventurous lawmaking.²⁷ The serious nature of international crimes was vividly described in the *Eichmann* case. The *Eichmann* case also made it clear that crimes of such gravity affect a grouping called the “international community”:

Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations.²⁸

Since the *ad hoc* Tribunals were established by the Security Council and are therefore “derived” from the United Nations (UN) Charter²⁹ the provisions of the Vienna Convention on the Law of Treaties on interpretation can be applied. In the *Tadić* decision it was decided that even though the Statute is not a treaty the rules of treaty interpretation contained in the Vienna Convention are relevant.³⁰ Even though Tribunal judges have not always explicitly mentioned the Vienna Convention they have used the inter-

or modifying a rule of law contained in its statutory form. In its narrow sense, it could be taken to denote the role of a judge in explaining the meaning of words or phrases used in a statute.”

²⁴ *A. Barak* (note 23).

²⁵ *W. Schabas*, *Interpreting the Statutes of the Ad Hoc Tribunals*, in: L. C. Vohrah/F. Pocar/Y. Featherstone/O. Fourmy (eds.), *Man’s Inhumanity to Man*, 2003, 848.

²⁶ *Tadić Jurisdictional Decision*, Separate Opinion of Judge *Li*, para. 13.

²⁷ The preamble of the International Criminal Court (ICC) Statute states that it is the task of the ICC to “prosecute unimaginable atrocities that deeply shock the conscience of mankind”.

²⁸ *Attorney General of Israel v. Eichmann*, Israel Supreme Court, ILR 36 (1968), 304.

²⁹ *W. Schabas* (note 25), 847.

³⁰ *Prosecutor v. Tadić*, Decision on the Defence Motion on Jurisdiction (*Tadić Jurisdictional Decision*) IT-94-1-T, 10.8.1995, para. 18.

pretative scheme of the Convention, including the support it provides for a purposive or contextual approach.³¹ In order to analyze the ICTY's method of interpretation it is important to see what the ICTY itself has said on the subject of interpretation and to understand how it views its interpretative role. The *Delalić* Trial Chamber decision³² set out a clear hermeneutical framework for the Tribunals and therefore assists the most in this regard.

The Trial Chamber in *Delalić* clearly set out the traditional canons of interpretation the Tribunals can resort to.³³ The Trial Chamber followed the traditional approach: it first states that since the Tribunal is influenced by both common law and civil law traditions, the Tribunal will have regard for different approaches to interpretation.³⁴ In its introductory comments on the question of interpretation, the Trial Chamber states that the essence of interpretation is to discover "the true purpose and intent" of the statute in question, thereby already indicating its purposive bent.³⁵

The Trial Chamber starts off by discussing the literal interpretation and states that in every legal system where the meaning of the words in a statute is clearly defined, the obligation of the judge is to give the words their clearly defined meaning and apply them strictly.³⁶ The Tribunals have also relied on the literal approach or the "ordinary meaning" of words³⁷ but have not made law in this way.

The Trial Chamber then proceeds to cases in which adherence to the grammatical sense of a word may lead to absurdity or repugnance.³⁸ In such cases the golden rule of interpretation will be followed. This means that the common law court as well as the civil law court will modify the grammatical sense of the word to avoid injustice, absurdity, anomaly or contradiction, as clearly not to have been intended by the legislature.³⁹

The Trial Chamber then arrives at the purposive approach, teleological approach or "extensive" approach. It states that this approach belongs to civilian jurisprudence and forms a contrast with the legislative historical ap-

³¹ *Prosecutor v. Tadić* (note 30).

³² *Prosecutor v. Delalić* (note 7).

³³ *Prosecutor v. Delalić* (note 7).

³⁴ *Prosecutor v. Delalić* (note 7), para. 158.

³⁵ *Prosecutor v. Delalić* (note 7).

³⁶ *Prosecutor v. Delalić* (note 7), para. 161. The Trial Chamber refers to *Johnston v. Ireland*, ECHR 9 (1987) 329, (= *Johnston v. Ireland*, 18.12.1986, Series A, No. 112).

³⁷ The Tribunals applied the "ordinary meaning" *inter alia* in *Prosecutor v. Bagasora et al.*, ICTR-98-37-A, 8.6.1998, paras. 28-29 and *Prosecutor v. Aleksovski*, IT-95-14/1, 25.6.1999, para. 35.

³⁸ *Prosecutor v. Delalić* (note 7), para. 162.

³⁹ The Trial Chamber here cites from *Lord Simon of Glaisdale in Maunsell v. Olins*, (1975) A. C. 373, 391.

proach.⁴⁰ The Trial Chamber states that this method of interpretation allows for interpretation “within the context of contemporary conditions”.⁴¹ The idea of the approach is to adapt the law to changed conditions, be they special, economic or technological, and attribute such change to the intention of the legislation. Interestingly, the Trial Chamber makes the following observation about purposive interpretation constituting a form of gap-filling in the context of the Tribunals:

The method of judicial “gap-filling”, which may be adopted under the teleological interpretation of the civilian jurisprudence, would, under a common law approach, suggest two approaches. The first of these is to consider that, because the observation of the doctrine of the separation of powers preserves the judicial function to the judiciary, any judicial law-making would be an abuse of the legislative function by the judiciary. The second view is that courts are established to ascertain and give effect to the intention of the legislature. Filling any gap is also a means of securing this objective.⁴²

But the above-mentioned theories do not form an exhaustive list of interpretative methods. *Schabas* argues that in criminal cases the rule of strict construction can be a more appropriate method of interpretation than purposive interpretation.⁴³ As the court explains in *Delalić*, the rule of strict construction requires that the interpreter of a certain provision can only determine whether a case falls within the intention of a criminal statute by construction of the express language of a provision.⁴⁴ Strict construction requires one to interpret a law against the state.⁴⁵ The result of applying the method of strict construction to a criminal statute is that where an ambiguous sentence leaves reasonable doubt about its meaning and the canons of construction fail to solve this ambiguity, then the benefit of the doubt should be given to the subject and against the legislature. According to this method ambiguous criminal statutes should be construed *contra proferentem*.⁴⁶ The Tribunals have however made use of strict construction only to a very limited extent. In *Tadić* the Appeals Chamber held that “... in applying these criteria, any doubt should be resolved in favour of the defence, in ac-

⁴⁰ *Prosecutor v. Delalić* (note 7), para. 163.

⁴¹ *Prosecutor v. Delalić* (note 7).

⁴² *Prosecutor v. Delalić* (note 7), para. 165.

⁴³ *Prosecutor v. Delalić* (note 7).

⁴⁴ *Delalić* (note 7), para. 410.

⁴⁵ *J. C. Jeffries*, Legality, Vagueness and the Construction of Penal Statutes, Va. L. Rev. 71 (1985), 198.

⁴⁶ See *R v. Wimbledon JJ*, ex. P. Derwent [1953] 1 QB 380n as cited in *Delalić* (note 7), para. 413.

cordance with the principle *in dubio pro reo*".⁴⁷ The principle of strict construction was discussed fairly extensively in *Čelebići*.⁴⁸ Whereas the principle of strict construction applies primarily to criminal law, the purposive method of interpretation applies to all areas of the law. And whereas the principle of strict construction is a mechanism to solve a conflict, the purposive method, as employed by the *ad hoc* Tribunals, can be regarded as promoting a certain humanitarian *philosophy*.

The focus of this article is on the purposive approach. The purposive approach is of course the approach more suitable to making law. *Nollkaemper* describes the ICTY's approach to the identification of law as "quintessentially teleological".⁴⁹ In the spirit of the purposive approach, the Tribunals have, for example, referred to their purpose in protecting "human dignity". In *Furundzija* the Trial Chamber redefined rape and stated that the broader definition helped to promote the "fundamental principle of protecting human dignity".⁵⁰ It can be argued that the Tribunals have at times been more concerned with what is *desirable* than with what is required by positive law. The lawmaking that took place by way of the purposive interpretation needs to be justified. I will argue that such justification and legitimation can be found in the consent of the international community. Before analyzing examples of purposive lawmaking by the Tribunals, I will therefore explore the concept of the international community as interpretive community.

IV. The International Community as Interpretive Community

The notion of interpretive communities originated in the work of the literary theorist *Stanley Fish*. *Fish* writes that it is interpretive communities,

⁴⁷ *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15.10.1998, para. 73. Strict construction was also employed in *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1, 21.5.1999 para. 03 and *Prosecutor v. Akayesu*, ICTR-96-4, 2.9.1998, para. 319.

⁴⁸ *Prosecutor v. Delalić* (note 7), paras. 408 et seq.

⁴⁹ A. Nollkaemper, *The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia*, in: T. A. J. A. Vandamme/J.-H. Reestman (eds.), *Ambiguity in the Rule of Law, the Interface between National and International Legal Systems*, 2001, 18.

⁵⁰ *Prosecutor v. Furundzija*, IT-95-17/1, 10.12.1998, para. 184. See also the ICTY's reliance on the "elementary considerations of humanity and common sense" in *Tadić* on the question of whether restrictions on certain categories of weapons apply in internal armed conflict. *Prosecutor v. Tadić*, IT-94-1, 2.10.1995, para. 119.

rather than the text or the reader that produce meanings.⁵¹ *Fish* recounts the story of a student who, after taking a class from him, asked another teacher whether there was a text in *Fish*'s class. The other teacher thought at first that the student was making a routine inquiry about textbook assignment, but it soon became clear that she had a more fundamental concern. She was asking whether, in light of *Fish*'s emphasis on the creative role of the reader in interpretation, the literary text retained any meaning or relevance of its own.

Fish argues against the formalist position which holds that the text alone is the basic, knowable, neutral and unchanging component of literary experience. He is concerned with the extent to which the interpretation of a text depends on the reader's acceptance of a common set of foundational assumptions or texts. To claim that each reader essentially participates in the making of a text is however not an invitation to unchecked subjectivity or to the endless proliferation of conflicting interpretations. Each reader approaches a literary work not as an individual but as part of a community of readers. For *Fish*, the interpretive community serves to "police" readings to an extent which serves to prohibit extreme or wildly implausible interpretations. The reason for this is that readers within an "interpretive community" share reading strategies, values and interpretive assumptions.

To transfer the term "interpretive community" to the international legal context is not as outlandish as it may seem at first. *Fish* himself stated that the concept can find application in the field of legal interpretation.⁵² Furthermore, it is an exercise that has already been undertaken by *Papastavridis* in the context of the interpretation of Security Council Resolutions.⁵³ *Papastavridis* propounds the thesis that the interpretive exercise should be guided and concomitantly constrained by the assumptions, practices and conventions inherent in the institutional "interpretive" community of the Security Council.⁵⁴ In the same way one can argue that the exercise of interpreting the Statute of the *ad hoc* Tribunals should be guided by the assumptions, practices and conventions inherent in the institutional "interpretive community" within which the *ad hoc* Tribunals function. It is submitted that transferring this interpretive approach to the context of international criminal law is not particularly controversial. Few lawyers would doubt the influence of "assumptions, practices and conventions" on legal

⁵¹ *S. Fish* (note 5), 147et seq.

⁵² See *S. Fish* (note 5).

⁵³ *E. Papastavridis*, Interpretation of Security Council Resolutions Under Chapter VII In the Aftermath of the Iraq Crisis, ICLQ 56 (2007).

⁵⁴ *E. Papastavridis* (note 53), 94.

interpretation. More controversial is the question of what or who would constitute this interpretive community. I propose that the international community could be an interpretive community. In a concrete sense, the community would include the drafters of the Statute, those lawyers who staff the Tribunals and work in the system (defence lawyers for example), academic commentators, those who are considered “experts” on humanitarian law and international criminal law and the broader legal and political community supporting the international criminalization of serious violations of international humanitarian law including undergraduate and graduate students, interns with various international organizations, University researchers, attorneys working in international practice areas, NGO lawyers and many more. The community would certainly include international diplomats such as those who drafted the Statutes of the *ad hoc* international criminal Tribunals and the ICC Statute.⁵⁵

The term “international community” is mostly used quite loosely. In giving substance to this abstract notion, the observations of *Johnstone* are helpful. He imagines the interpretive community to consist of two concentric circles.⁵⁶ The inner circle consists of all individuals directly or indirectly responsible for the formulation, negotiation, conclusion, implementation and application of a particular legal norm. This inner circle is surrounded by an outer circle of lawyers and other experts engaged in professional activities associated with the practice regulated by the norm. He observes that the broader community is what *Oscar Schachter* has termed the “invisible college of lawyers”.⁵⁷ This college of lawyers consists of a group of professionals dispersed throughout the world who are dedicated to a common intellectual enterprise and engage in a continuous process of communication and collaboration.^{58 59} It is of course not clear who the members of this commu-

⁵⁵ This community would include the concept of “like-minded states”. A group of delegations known as like-minded states were a significant driving force behind the ICC’s momentum between 1995 and 1998. This group of states included: Argentina, Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, Sweden, Switzerland, Trinidad and Tobago, Uruguay and Venezuela. See *M. Cherif Bassiouni* (ed.), *The Legislative History of the International Criminal Court*, Vol. 1, 2005, 74. According to *Bassiouni* Non-Governmental Organisations also played an important role in the process of drafting the ICC Statute.

⁵⁶ *I. Johnstone*, *Security Council Deliberations: The Power of the Better Argument*, *EJIL* 14 (2003), 450.

⁵⁷ See *O. Schachter*, *The Invisible College of International Lawyers*, *Nw. U. L. Rev.* 72 (1977), 217 et seq.

⁵⁸ *O. Schachter* (note 57).

⁵⁹ *Akhavan* writes that it is reasonable to assume that the progressive internalization of international criminal justice will gradually spread from the periphery to the center and give

nity are. Depending on one's philosophical conviction or inclination one would either support the existence of such a community or oppose it. One's philosophical orientation would also determine who one believes has membership of the international community.

In the context of describing the "invisible college of international lawyers" (a concept that could approximate the "international interpretative community" in the sense that the college and the community could overlap and the membership of both groups are in a sense "invisible") *Oscar Schachter* writes of the "legislative" role of the professional community of international lawyers.⁶⁰ Interestingly, *Schachter* does not specify who the members of the "invisible college" are – he merely refers to "international lawyers" (including government officials and career academics). *Schachter* writes that the members of the invisible college are dedicated to "a common intellectual enterprise". In his view the invisible college has long been concerned with a "sense of justice" (*la conscience juridique*). This concept might be vague, but had considerable influence in doctrine and in decisions as a basis for legal concepts. The role of the nonofficial community of lawyers in giving the conception specific meaning and effect constitutes "the noblest function of the invisible college".⁶¹

Georges Abi Saab warns that one should be careful when using the term "international community": in the past the notion of a *societas gentium* (an expression of the fundamental unity of the human race) was a theoretical construct only rather than an existent reality.⁶² *Abi Saab* uses the term "international community" in the sense of a community of states. He states however that in doing so one should not ignore the social forces which make those states act or which transcend them.⁶³ The term "community" is of course a relative concept and its existence is a matter of degree. The notion of "community" may also exist in different degrees of intensity. *Abi Saab* believes that because of the relative and fragmentary nature of the term "community" it is better to speak of the *degree* of community existing within a group.⁶⁴ In order for a group to constitute a community it must first attain a certain threshold of intensity or stability (or normality) in rela-

rise to a more inclusive universal framework, possibly through a widely ratified ICC Statute together with vigilant and invigorated national or foreign courts. *P. Akhavan*, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, *AJIL* 95 (2001), 30.

⁶⁰ *O. Schachter* (note 57), 225.

⁶¹ *O. Schachter* (note 57), 226.

⁶² *G. Abi-Saab*, *Whither the International Community?*, *EJIL* 9 (1998), 250.

⁶³ *G. Abi-Saab* (note 62), 248.

⁶⁴ *G. Abi-Saab* (note 62), 249.

tions among its members, enabling them to be identified and distinguished from other subjects in the same sphere.⁶⁵

Bruno Simma writes that the rapidly increasing international concern with human rights and other considerations such as the environment and the global commons amply illustrates that there is a worldwide social consciousness at work today that “communalizes” international relations far beyond the traditional understanding of governmental interaction.⁶⁶ This is another signal of a clear move away from the traditionalist bilateralist legal imagination and a move toward a “community” orientation.⁶⁷

Even the most critical of scholars agree on the existence of an international community. *David Kennedy* writes that something called an “international community” exists, even in a spatially disembodied way.⁶⁸ He writes that the international community can be said to exist more firmly in time than in space. It can be said to have acted and to have “agreed” to some things and foregone agreements on others. He writes:

The international community is the thing which has repeatedly aspired to respond to war with law and reason, which has built an ever more solid normative fabric, an ever more elaborated list of precedents for intervention, an ever larger toolkit for policy-making, whose constituents were in the forefront of the battle for human rights and so forth.⁶⁹

Moreover, *Kennedy* admits that the international community shares a commitment to a global progressive project: “To be fluid and antiformal is to be part of a governance capacity more attuned not only to doing things globally, but to do doing progressive things globally.”⁷⁰

And *Michael Reisman* argues that the international community also includes the media. He has argued that the state-dominated “international decision process” embodied by the UN Charter has been replaced in recent years by a process in which the lawfulness of international actions is assessed, by a group consisting not only of governments but also of “international organizations, non-governmental organizations and, in no small measure, the media.”⁷¹

⁶⁵ *G. Abi-Saab* (note 62).

⁶⁶ *B. Simma*, *From Bilateralism to Community Interest in International Law*, RdC 250 (1994), 234.

⁶⁷ *B. Simma* (note 66), 235.

⁶⁸ *D. Kennedy*, *The Politics of the Invisible College*, *European Human Rights Law Review* 6 (2001), 493.

⁶⁹ *D. Kennedy* (note 68).

⁷⁰ *D. Kennedy* (note 68).

⁷¹ *M. Reisman*, *Unilateral Intervention and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, *EJIL* 11 (2000), 3 (18).

Fish refers to the idea of a common set of “foundational assumptions” shared by the members of an interpretative community. At this stage of the development and evolution of international criminal law one can safely say that the development of humanitarian law to facilitate the prosecution of the most serious international crimes should fall into this category. The international community as interpretive community may be founded either on shared meanings, values or assumptions or alternatively, on the institutional setting in which it operates. It can be argued that today the foundational values of the international community (certainly the international criminal law community) include values such as respect for the principle that those who committed serious violations of humanitarian law should not enjoy impunity and respect for *ius cogens* norms.⁷² The agreement that exists about the importance of these values also reflects the consent that exists within the international community with regard to the shared values. The international community consents to be bound by the obligations that attach to observing and respecting certain values. The significance of the consent of the international community reflects the importance of consent in international law generally. Positivists argue that no international law can be made without the consent of states and that consent is the source of all legal obligations.⁷³ Since international law is moving away from a state centred approach it can be argued that the consent of non-state entities can also form a source of legal obligation. It is clear that the international interpretative community consists not only of states but also of individuals and organizations. It can be argued that it is the implied consent of the international interpretive community that lends legitimacy to the Tribunals’ use of the purposive approach and therefore to the lawmaking that takes place by employing the purposive approach. But what does the purposive method entail and how has it been employed by the Tribunals?

V. Purposive Interpretation

Papastavridis writes that the hermeneutical paradigm proposed by *Fish* seems to have a strong correlation with a new purposive interpretation in law. According to *Barak* the purposive method of interpretation is a norma-

⁷² See *Case concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), Judgement of 3.2.2006, ICJ Reports 2006 et seq. for the ICJ’s (belated) acceptance of *ius cogens*.

⁷³ *J. Dugard*, *International Law, A South African Perspective*, 2007, 13.

tive concept that has two foundations: subjective and objective purpose. The subjective purpose is the authorial intent (the goal that the author seeks to achieve) and the objective purpose can be understood as the intention of the system, in the sense that at the supreme level it actualizes the fundamental values of the legal system.⁷⁴ Applying this theory to the *ad hoc* Tribunals, the “subjective purpose” can be said to be the collective intent of the judges, lawyers, academics and other international actors whereas the “objective intent” is the purpose described in the Statutes of the ICTY and the ICTR. In *Tadić* the teleological approach was followed in conjunction with the perusal of the *travaux* and the Report of the Secretary General to provide the “context” indicating the close connection between the object and purpose of a particular instrument and the relevant intention of the drafters.⁷⁵

It is also important that the “object and purpose” criterion is intertwined with the principle of effectiveness and specifically with “*la règle de l’efficacite*”, i.e. the rule that the instrument as a whole, and each of its provisions, must be taken to have been intended to achieve some end and that an interpretation that would make the text ineffective to achieve the object in view is *prima facie* suspect.⁷⁶ One objection to this kind of methodology is that this might mean that the law follows the instrument. The instrument can reform the law in many ways. *Papastavridis* applies *Fish’s* theory to Security Council Resolutions. It is therefore not too much of a stretch to apply *Fish’s* theory to the interpretation of the ICTY Statute (since the ICTY was established by way of SC Resolution).

The judges of the ICTY and ICTR have frequently justified progressive decisions and the extension of the applicability of humanitarian law to new areas by resorting to purposive or teleological interpretation. What is the purpose of the ICTY? Art. 1 of the ICTY Statute can be the starting point in this discussion. Art. 1 is headed “Competence of the International Tribunal”:

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

⁷⁴ *A. Barak* (note 23), 96.

⁷⁵ See *E. Papastavridis* (note 53) 102 f. and *G. Fitzmaurice*, *The Law and Procedure of the International Court of Justice, 1951-4: Treaty Interpretation and Other Treaty Points*, BYIL 33 (1957), 207.

⁷⁶ *E. Papastavridis* (note 53), 103.

The primary purpose of the ICTY – as reflected explicitly in its mandate – is to prosecute serious violators of humanitarian law. As *Wagner* has pointed out, the teleological approach adopted by the Tribunal provides a persuasive authority and necessary development in broadening individual responsibility in cases of modern international inter-ethnic conflict.⁷⁷ After its extensive discussion of principles of interpretation, the Trial Chamber in *Čelebići* stated that:

The International Tribunal is an *ad hoc* international court, established with a specific, limited jurisdiction. It is *sui generis*, with its own appellate structure. The interpretation of the provisions of the Statute and Rules must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to its creation ... The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of existing provisions of international customary law.⁷⁸

Aharon Barak has described the essence of purpose as follows: “The purpose of a text is a normative concept. It is a legal construction that helps the interpreter understand a legal text.”⁷⁹ In determining purpose, judges should look to the relevant context of the text, which is defined as “the data that provides information about the text’s purpose”.⁸⁰ To *Barak*, in the context of constitutional law, purpose is different from intent: “The purpose of a constitution is not to realize the intent of the founders. The purpose of a constitution is to provide a foundation for the social structure and its fundamental values.”⁸¹

In the field of human rights purposive interpretation is nothing new. Human rights courts have frequently employed the idea of the object and purpose of the treaties they interpret to support an expansive interpretation

⁷⁷ *N. Wagner*, The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the ICTY, *Int’l Rev. of the Red Cross* 85 (2003), 352.

⁷⁸ *Prosecutor v. Delalić (“Čelebići”)* (note 7), para 170. “The interpretation of the provisions of the Statute and Rules must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to its creation. The kinds of grave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in many other parts of the world, and continue to exhibit new forms and permutations. The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of the existing provisions of international customary law.”

⁷⁹ *A. Barak* (note 23), 110.

⁸⁰ *A. Barak* (note 23), 111.

⁸¹ *A. Barak* (note 23).

of the rights contained in those treaties.⁸² A former President of the European Court of Human Rights (ECtHR) has observed that “the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights”.⁸³ It should however be borne in mind that the Tribunals are *criminal* Tribunals. A method of interpretation which is commendable in the context of human rights law cannot be employed in a criminal setting if this violates the principle of legality and fair trial standards.⁸⁴

The European Court of Human Rights has explicitly dealt with the implications of considering “purpose” when interpreting the Convention:

In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (...). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (...). In addition, any interpretation of the rights and freedoms guaranteed must be consistent with the “general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society” (...).⁸⁵

Because human rights treaties confer rights on individuals, human rights bodies strive to interpret treaties in such a way that the protection offered to individuals is real. In order to assess whether the protection offered is real, their investigation goes beyond the intention of the parties, into *reality*.⁸⁶ According to *de Feyter*, human rights judges are well advised not to use the community of lawyers as the only source of interpretive authority. Usually, the “ordinary” meaning of a treaty provision in international law is the meaning as understood by the relative disciplinary community, i.e. the community of (international) lawyers.⁸⁷ In human rights law, however, other interpretive communities⁸⁸ (who use other assumptions to determine

⁸² A. M. Danner/J. S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, Calif. L. Rev. 93 (2005), 132.

⁸³ A. Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, EJIL 14 (2003), 529 (534) (quoting Professor R. Bernhardt, a former President of the European Court of Human Rights).

⁸⁴ For the fundamental differences between human rights law and criminal law see A. M. Danner/J. S. Martinez (note 82), 88.

⁸⁵ European Court of Human Rights, *Soering v. United Kingdom*, judgment of 7.7.1989, Series A, No. 161, para. 87.

⁸⁶ K. de Feyter, *Treaty Interpretation and the Social Sciences Draft*, 2007.

⁸⁷ D. Vagts, *Interpretation and the New American Ways of Law Reading*, EJIL 4 (1993), 484 (507 et seq.).

⁸⁸ S. Fish defines interpretive communities as “not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that individuals

the meaning of a text) are equally relevant for the purposes of constructing the meaning of a human rights provision in such a way that effective protection is achieved.⁸⁹ Such an *effective and evolutionary* approach to interpretation is not necessarily contradictory to the Vienna Convention.⁹⁰

Because the gap or space between human rights law and international humanitarian law is shrinking,⁹¹ a method of interpretation that works in the field of human rights law will also work for the *ad hoc* Tribunals. The protection of humanitarian law has also been extended through the use of purposive interpretation. This mode of interpretation advances the purpose of the ICTY Statute: to provide a criminal forum for the punishment of those who have perpetrated especially serious violations of international humanitarian law.⁹²

One of the best examples of Tribunal lawmaking by resorting to purposive interpretation is the *Tadić* Appeals Chamber decision on the definition of “protected persons”. In the *Tadić* case the Appeals Chamber decided to abandon the literal definition of protected persons and (in the spirit of purposive interpretation) focused more on the factor of allegiance than formal nationality in determining the protective regime.⁹³ By finding that the

shared in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community’s enterprise, community property”. *Fish* continues: “Of course, if the same act were performed by members of another community (...), the resulting text would be different, and there would be disagreement; not, however, a disagreement that could be settled by the text because what would be in dispute would be the interpretive ‘angle’ from which the text was to be seen (...).” See *S. Fish, Doing What Comes Naturally. Change, Rhetoric and the Practice of Theory in Literary and Legal Studies*, 1989, 141.

⁸⁹ *K. de Feyter* (note 86), 5. See also *J. Weiler, A Quiet Revolution: The European Court of Justice and its Interlocutors*, *Comparative Political Studies* 26 (1994), 517. The European Court of Human Rights has stated on many occasions that the European Convention on Human Rights is a living instrument which (...) must be interpreted in the light of present-day conditions, European Court of Human Rights, *Tyrer v. UK*, judgement of 25.4.1978, Series A, No. 26, para. 31 and that the Convention should be interpreted in a manner which renders the rights not theoretical or illusory, but practical and effective. See European Court of Human Rights, *Artico v. Italy*, judgement of 13.5.1980, Series A, No. 37, para. 33.

⁹⁰ The section on interpretation in the Vienna Convention makes no explicit mention of either an effective or an evolutionary approach to interpretation. *A. Cassese* nevertheless argues that the authors of the Vienna Convention “set great store by the principle of ‘effectiveness’ (...), a principle plainly intended to expand the normative scope of treaties, to the detriment of the old principle whereby in case of doubt limitations of sovereignty were to be strictly interpreted”. See *A. Cassese, International Law*, 2006, 179.

⁹¹ *Merón* writes that the current changing nature of conflicts from international to internal has drawn humanitarian law in the direction of human rights law. *T. Merón* (note 3), 2 et seq.

⁹² *A. M. Danner/J. S. Martínez* (note 82), 132.

⁹³ *Prosecutor v. Tadić* (note 19), para. 163 et seq.

Bosnian Serbs acted as *de facto* agents of another state (the FRY), the Appeals Chamber also expanded the scope of protection of humanitarian law.⁹⁴ With regard to the question of conflict classification and with regard to all aspects of lawmaking in *Tadić* one can argue that the Tribunal exercised a choice. Confronted with the choice between a literal or purposive interpretation of the Statute, the Appeals Chamber did not follow the literal interpretation but instead preferred the purposive approach.⁹⁵

Had the ICTY not qualified the conflict in which *Tadić* committed those crimes as international the Appeals Chamber could not try *Tadić* for grave breaches. When applying the purposive interpretation the ICTY and ICTR must take the objects and purpose of the Statutes into consideration as well as the social and political considerations which gave rise to their creation.⁹⁶ In order to give effect to the purpose of the ICTY Statute i.e. to prosecute persons for serious violations of international humanitarian law, it was therefore crucial for both the Trial and Appeals Chambers to classify the conflict as international.

The expansive understanding of rape adopted in *Kunarac* can be described as an instance of purposive interpretation by the tribunals.⁹⁷ In *Furundzija* the ICTY adopted a purpose-oriented approach to “protecting human dignity” to broaden the definition of the crime of rape.⁹⁸ It should be borne in mind that the Tribunals are *criminal* Tribunals. A method of interpretation which is commendable in the context of human rights law cannot be employed in a criminal setting if this violates the principle of legality and fair trial standards.⁹⁹

Finally, with regard to the *Furundzija* Trial Chamber’s expansion of the list of prohibited purposes by the inclusion of the word “humiliation” which results in a more expansive definition, one can consider this as a good example of purposive interpretation of the ICTY Statute. Since the word

⁹⁴ *Prosecutor v. Tadić* (note 19), para. 168.

⁹⁵ One can apply the rules of customary international law on treaty interpretation as codified in Arts. 31 and 32 of the 1969 Vienna Convention on the Law of Treaties to the ICTY and ICTR Statutes. Art. 31 of the Vienna Convention states:

“1. A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁹⁶ *Prosecutor v. Delalić (“Čelebići”)* (note 7), para. 170. See also *T. Meron*, Cassese’s *Tadić* and the Law of Non-International Armed Conflicts, in: L. C. Vohrah/F. Pocar/Y. Featherstone/O. Fourmy (note 25), 535 f.

⁹⁷ *Prosecutor v. Kunarac*, IT-96-23, 22.2.2001.

⁹⁸ *Prosecutor v. Furundzija*, IT-95-17, 2.6.1998, para. 183.

⁹⁹ For the fundamental differences between human rights law and criminal law see *A. M. Danner/J. S. Martinez* (note 82), 88.

humiliation is so close in meaning to that of intimidation it will not disadvantage an accused or catch an accused by surprise and therefore does not threaten the principle of legality. As can be seen in subsection (iii) of the above enumeration of the elements of torture, the *Furundzija* Trial Chamber considered that the humiliation of the victim must also be one of the possible purposes of torture.¹⁰⁰ The Trial Chamber justified the inclusion of “humiliation” by referring to “the general spirit of international humanitarian law”¹⁰¹ stating that the primary purpose of international humanitarian law was to safeguard human dignity.¹⁰² The Trial Chamber stated that the term “humiliation” was close to the term “intimidation” (the term found in the Torture Convention). The Trial Chamber also referred to the Geneva Conventions which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from “outrages upon personal dignity”.¹⁰³ This approach by the Trial Chamber is consistent with a purposive interpretation of the ICTY Statute.

In *Todorovic*¹⁰⁴ the Trial Chamber turned to Art 31 (1) of the Vienna Convention on the Law of Treaties 1969 which provides: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.¹⁰⁵ The Trial Chamber noted that tribunal case law repeatedly emphasizes the importance of giving due weight to the object and purpose of its provisions. *Henquet* writes that “by relying on the object and purpose of the provision the Trial Chamber engaged in lawmaking rather than law finding”.¹⁰⁶ The time has indeed come to recognize the lawmaking function of the Tribunals and the role of purposive interpretation as lawmaking tool.

VI. Conclusion

The question of the hermeneutical devices and strategies of the *ad hoc* Tribunals has been underexplored. The consent of the international community as legitimating device for international lawmaking should not be

¹⁰⁰ *Prosecutor v. Furundzija* (note 98), para. 162.

¹⁰¹ *Prosecutor v. Furundzija* (note 98).

¹⁰² *Prosecutor v. Furundzija* (note 98).

¹⁰³ *Prosecutor v. Furundzija* (note 98). See in this regard Art. 3 (1) (c) of the Geneva Conventions, Art. 75 (2) (b) of Additional Protocol 1 and Art. 4 (2) (e) of Additional Protocol 2.

¹⁰⁴ See *T. Henquet*, Accountability for Arrests, in: G. Boas/W. A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, 2003, 138 et seq.

¹⁰⁵ *Prosecutor v. Stevan Todorovic*, IT-95-9/1, 31.7.2001.

¹⁰⁶ *T. Henquet* (note 104).

overestimated. But it can quite safely be argued that the international community exists; that the international community forms an interpretive community and that the international community, like other interpretive communities, share foundational assumptions and categories of understanding that are embedded in the relevant practice and that the consent of the international community forms a justification for lawmaking.

According to *Lamb* the “nub of the issue” is not the acceptability of law-making devices such as the purposive approach to interpretation but fashioning criteria and limitations for their exercise.¹⁰⁷ In the context of the *ad hoc* Tribunals one can argue that the interpretative enterprise embarked on by the *ad hoc* Tribunals should be guided and constrained by the assumptions, practices and conventions inherent in the institutional “interpretive” community of the various participants in pursuing the project of prosecuting those most responsible for violations of humanitarian law. But it is clear that instances of Tribunal lawmaking through the use of purposive interpretation such as the criminalization of sexual offences and the extension of the protection of humanitarian law can be seen as significant moral and legal achievements.

The work of the *ad hoc* Tribunals will not be completed when the Tribunals shut down for business. The “completion” of their work will depend on the extent to which shared humanitarian values have penetrated into the consciousness of the members of the international community and the extent to which those values seep into the law through lawmaking, interpretation and practice. The high level of acceptance for the way in which the Tribunals have integrated humanitarian principles into their judgments indicates that far from exceeding their mandate, the judges have made the extension of humanitarian law part of their mandate.

¹⁰⁷ S. *Lamb*, Legal Limits to United Nations Security Council Powers, in: I. Brownlie (ed.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, 1999, 384.

