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# THE *TADIC* DECISION AND ITS IMPLICATIONS FOR THE LAW OF WAR CRIMES. A STUDY OF JUDICIAL AND PROSECUTORIAL METHOD.

Elena Martin Salgado

Master of Jurisprudence

September 2000

## Abstract

This thesis focuses on the criminalisation in international law of violations of international humanitarian law committed in internal armed conflict. The ICTY Appeals Chamber Decision on Jurisdiction in the *Tadic* case is analysed. The Decision confirms the customary development of the law of war crimes to include the criminality in international law of offences committed in internal armed conflict.

Thus the emphasis is on proceedings before the Ad Hoc International Tribunals. The thesis describes the customary development of the law of war crimes by highlighting the method employed by Judges and the Prosecutor to allow for the maximum reach of the law. A major limitation they have encountered is that, though offences in internal conflict now entail individual criminal responsibility in international law, the disparate treatment of violations in internal conflicts versus violations in international conflicts has not been superseded. This treatment has consequences for the elements of the definition of war crimes: the character of the conflict remains an element of the crime even though it is indifferent to moral fault. In this connection, the strategies employed by the Prosecutor to avoid engaging in contentious and lengthy conflict classification are reviewed.

The disparate treatment of violations in internal and international conflicts is traced to the 'two-box' approach to international humanitarian law, which in turn stems from states' choice to be less restricted in their conduct in an internal armed conflict than they would be in an international conflict. This work recognises the limits posed by the law as it stands today: the recurrent theme throughout the thesis is the paramount importance of the principle of non-retroactive application of criminal law.

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September 2000



26 APR 2002

<b>Table of Cases and Decisions</b>	<b>iii</b>
<b>Introduction</b>	<b>1</b>
<b>Chapter 1: On International Criminal Law</b>	<b>3</b>
1.1 Introduction: the scope of international criminal law	3
1.2 International crimes	6
1.3 Recognising a crime against international law	12
1.4 The criminal standard in international law	16
1.5 The sources of international criminal law	18
<b>PART ONE: THE PROCESS OF CRIMINALISING OFFENCES IN INTERNAL CONFLICTS</b>	<b>23</b>
<b>Chapter 2: The <i>Tadic</i> Decision</b>	<b>23</b>
2.1 Introduction to Part One	23
2.2 The 'two- box' approach to international humanitarian law and the customary development of the law applicable to internal armed conflicts	24
2.3 The <i>Tadic</i> Decision	32
<b>PART TWO: THE CONSEQUENCES OF THE PROCESS</b>	<b>46</b>
<b>Chapter 3: Consequences for the Substantive Law Applicable by the International Tribunals (I)</b>	<b>46</b>
3.1 Introduction to Part Two	46
3.2 Grave breaches of the Geneva Conventions	47
3.3 Serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II	62
<b>Chapter 4: Consequences for the Substantive Law Applicable by the International Tribunals (II)</b>	<b>74</b>
4.1 Violations of the laws and customs of war	74
4.2 War crimes in the Statute of the International Criminal Court	88
<b>Chapter 5: The Implications for Culpability</b>	<b>100</b>
5.1 The 'two-box' approach to culpability	100
5.2 The character of the conflict as an element of war crimes.	101
<b>Conclusion</b>	<b>117</b>
<b>Bibliography</b>	<b>121</b>

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## Table of Cases and Decisions

References to cases, Judgements and Decisions in the text as they appear in this table. The table is in chronological order.

### INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

#### JUDGEMENTS

<b>Appeals Chamber</b>	<b>Appears in the text as</b>
<i>The Prosecutor v Drazen Erdemovic</i> , Judgement, Case No IT-96-22 (7 October 1997).	<i>Erdemovic</i> Judgement (Appeals Chamber)
<i>The Prosecutor v Dusko Tadic</i> , Judgement, Case No IT-94-1 (15 July 1999).	<i>Tadic</i> Judgement (Appeal on Merits)
<i>The Prosecutor v Dusko Tadic</i> , Judgement in Sentencing Appeals, Case No IT-94-1 (26 January 2000).	<i>Tadic</i> Sentencing Judgement (Appeals Chamber)
<i>The Prosecutor v Zlatko Aleksovski</i> , Judgement, Case No IT-95-14/1 (24 March 2000).	<i>Aleksovski</i> Judgement (Appeals Chamber)
<i>The Prosecutor v Anto Furundzija</i> , Judgement, Case No IT-95-17/1 (21 July 2000).	Furundzija Judgement (Appeals Chamber)

Trial Chambers	Appears in the text as
<i>The Prosecutor v Dusko Tadic</i> , Opinion and Judgement, Case No IT-94-1 (7 May 1997).	<i>Tadic</i> Judgement (Trial on Merits)
<i>The Prosecutor v Dusko Tadic</i> , Sentencing Judgement, Case No IT-94-1 (14 July 1997).	<i>Tadic</i> (First) Sentencing Judgement (Trial Chamber)
<i>The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic, and Esad Landzo</i> , Judgement, Case No IT-96-21 (16 November 1998).	<i>Celebici</i> Judgement
<i>The Prosecutor v Anto Furundzija</i> , Judgement, Case No IT-95-17/1 (10 December 1998).	<i>Furundzija</i> Judgement (Trial Chamber)
<i>The Prosecutor v Zlatko Aleksovski</i> , Judgement, Case No IT-95-14/1 (25 June 1999).	<i>Aleksovski</i> Judgement (Trial Chamber)
<i>The Prosecutor v Dusko Tadic</i> , Sentencing Judgement, Case No IT-94-1-T (11 November 1999).	<i>Tadic</i> (Second) Sentencing Judgement (Trial Chamber)
<i>The Prosecutor v Goran Jelusic</i> , Judgement, Case No IT-95-10 (14 December 1999).	<i>Jelusic</i> Judgement
<i>The Prosecutor v Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic and Vladimir Santic</i> , Judgement, Case No IT-95-16 (14 January 2000).	<i>Kupreskic</i> Judgement

Trial Chambers	Appears in the text as
<i>The Prosecutor v Tihomir Blaskic</i> , Judgement, Case No IT-95-14 (3 March 2000)	<i>Blaskic</i> Judgement

## DECISIONS

Appeals Chamber	Appears in the text as
Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, <i>Prosecutor v Dusko Tadic</i> , Case No IT-94-1 (2 October 1995).	<i>Tadic</i> Decision

Trial Chambers	Appears in the text as
Decision on the Defence Motion on Jurisdiction, <i>Prosecutor v Dusko Tadic</i> , Case No IT-94-1 (10 August 1995).	<i>Tadic</i> Decision on Jurisdiction (Trial Chamber)
Decision on Defence Motion on Form of Indictment, <i>Prosecutor v Dusko Tadic</i> , Case No IT-94-1 (14 Nov 1995).	

Trial Chambers	Appears in the text as
Decision to Reconfirm the Indictment and to Issue an International Warrant of Arrest (Rule 61 Procedure), <i>Prosecutor v Milan Martić</i> , Case No IT-95-11 (8 March 1996).	<i>Martić</i> (Rule 61 Procedure)
Decision to Reconfirm the Indictment and to Issue an International Warrant of Arrest (Rule 61 Procedure), <i>Prosecutor v Karadžić and Mladić</i> , Case No IT-95-5 ('Bosnia-Herzegovina') and Case No IT-95-18 ('Srebrenica') (11 July 1996).	<i>Karadžić and Mladić</i> (Rule 61 Procedure)
Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, <i>Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo</i> , Case No IT-96-21 (2 October 1996).	
Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject-matter Jurisdiction), <i>Prosecutor v Anto Furundžija</i> , Case No IT-95-17/1 (29 May 1998).	<i>Furundžija</i> Decision
Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of <b>Articles 2 and 3</b> , <i>Prosecutor v Dario Kordić and Mario Cerkez</i> , Case No IT-95-14/2 (2 March 1999).	<i>Kordić and Cerkez</i> Decision

Trial Chambers	Appears in the text as
Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts, <i>Prosecutor v Miroslav Kvočka, Mijoljica Kos, Mlado Radic and Zoran Zigic</i> , Case no IT-98-30 (19 March 1999).	
Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, <i>Prosecutor v Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric</i> , Case No IT-95-9 (25 March 1999).	<i>Simic Decision</i>
Decisions on Judicial Notice, <i>Prosecutor v Miroslav Kvočka, Mijoljica Kos, Mlado Radic, Zoran Zigic and Dragoljub Prcac</i> , Case No IT-98-30 (8 June 2000).	<i>Kvočka Decision</i>
Decision on Motion for Acquittal, <i>Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic</i> , Case No IT-96-23 (3 July 2000).	<i>Kunarac Decision</i>

## INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

## JUDGEMENTS

Trial Chambers	Appears in the text as
<i>The Prosecutor v Jean-Paul Akayeshu</i> , Judgement, Case No ICTR-96-4 (2 September 1998).	<i>Akayeshu</i> Judgement
<i>The Prosecutor v Jean Kambanda</i> , Judgement and Sentence, Case No ICTR-97-23 (4 September 1998).	<i>Kambanda</i> Judgement
<i>The Prosecutor v Clément Kayishema and Obed Ruzindana</i> , Judgement, Case No ICTR-95-1 and Case ICTR-96-10 respectively (21 May 1999).	<i>Kayishema</i> Judgement
<i>The Prosecutor v George Anderson Nderumbumwe Rutaganda</i> , Judgement and Sentence, Case No ICTR-96-3 (6 December 1999).	<i>Rutaganda</i> Judgement
<i>The Prosecutor v Alfred Musema</i> , Judgement and Sentence, ICTR-96-13 (27 January 2000).	<i>Musema</i> Judgement
<i>The Prosecutor v Georges Ruggiu</i> , Judgement and Sentence, Case No ICTR-97-32 (1 June 2000).	<i>Ruggiu</i> Judgement

- For 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 (ICTY, or 'the Tribunal'), all documents can be found in <http://www.un.org.icty/index.html>
  
- For the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Serious Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (ICTR), all documents can be found in <http://www.ictr.org>

## Introduction

This thesis attempts to clarify the international legal regime on war crimes as these are understood after the Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the *Tadic* case. This Decision by the International Tribunal for the Former Yugoslavia (ICTY) confirmed the criminalisation in customary law of violations of international humanitarian law committed in internal armed conflict. This thesis will focus on this development and on the implications of the *Tadic* Decision for the law of war crimes.

The investigation focuses on the proceedings before the Ad Hoc International Tribunals and on the Statute of the International Criminal Court (ICC). Though the principal actors in establishing customary international law are states, through their practice including participation in multilateral treaties, the processes of the International Tribunals and the negotiations of the ICC Statute have provided exceptional opportunities for the crystallisation of customary law. When reference is made to the 'International Tribunals', this must be understood to include the practice of the Prosecutor in addition to the decisions and judgements of the courts.

Chapter 1 sets out the parameters of the inquiry to be undertaken. It seeks to establish the importance for the criminalisation of conduct as an ingredient in the rule of international law, as distinct from some standard of moral evaluation of widely condemned conduct. Nonetheless, the difficulties in the way of establishing clear and coherent criminal standards in the decentralised international legal system are acknowledged. The balance between the role of legislator and judge may have to be struck rather differently in the international legal system than it would in a domestic legal order.

Part One of the thesis constitutes of one chapter. It focuses on the customary development of international humanitarian law applicable to internal conflicts. It then turns to the *Tadic* Decision for confirmation of this development, and analyses the arguments of the Presiding Judge that allowed the ICTY to assert jurisdiction over offences committed in internal conflicts.



Part Two goes on to elucidate the implications for the law of war crimes of the *Tadic* Decision, in two separate chapters. Chapter 3 reviews grave breaches in particular to determine what are the obstacles to their application to conduct occurring in internal armed conflict. This chapter also looks at charges brought under violations of common Article 3 and Additional Protocol II before the International Criminal Tribunal for Rwanda (ICTR) and at the lack of convictions on these charges. In contrasting grave breaches and violations of common Article 3 and Additional Protocol II, the chapter explains the 'two box' approach to international humanitarian law.

Chapter 4 continues the analysis of the implications of the *Tadic* Decision for the substantive law. It concentrates on the prosecutorial method following the Decision insofar as it focuses on the strategies adopted by the Office of the Prosecutor of the ICTY to avoid the necessity of conflict classification. It also looks at how the ICC Statute confirms the process of criminalisation of violations of international humanitarian law in internal conflict insofar as it pronounces them war crimes. The ICC Statute provides further evidence that the 'two-box' approach to violations of international humanitarian law has not been superseded.

Chapter 5 returns to the 'two-box' approach to demonstrate that it has resulted in an approach to culpability which may turn on the characterisation of the conflict (as an element of the crime), which carries no moral significance. It attempts to determine why this is so. It looks at the activities of the Prosecutor again, this time at strategies that seek to rely on judicial notice to avoid the character of the conflict being put in issue again and again. This chapter is followed by the conclusion.

## Chapter 1: On International Criminal Law

### 1.1 Introduction: the scope of international criminal law

International criminal law constitutes the wider setting in which war crimes are inscribed. The purpose of the following chapter is to establish the parameters for the present enquiry. Therefore, in this chapter I will comment upon selected aspects of international criminal law that are relevant to this thesis.

Prior to the creation by the Security Council of the ICTY in 1993 and of the ICTR Rwanda in 1994,<sup>1</sup> international criminal law could only relate to the substantive definition of international offences. There was little else: in the absence of International Tribunals with a criminal jurisdiction, international criminal law was missing a body of international criminal procedure, an international forum and consequently a means to develop the law other than through national courts. There was no such thing as an international criminal system. National courts, on the other hand, did and do belong in a complete system of law.

Hence international offences could only be tried by national courts. Two consequences stem from the need to rely on national courts: first, the relation between the international criminal standard and the domestic of the state becomes of great significance. Secondly, reliance on national courts meant that international criminal law as a discipline evolved in a manner far from systematic. This must be coupled with the absence of a central legislator in the international system. International criminal law develops in an erratic manner through the means at the disposal of international law: treaty and custom, and their enforcement by national courts of the states, severally.

In view of this inconsistent evolution, scholars amalgamated under the name of 'International Criminal Law' a series of topics that were only incidentally connected.<sup>2</sup> For this reason, the coherence of the discipline of international criminal law has often been questioned. The connection between the topics that

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<sup>1</sup> S/RES/827(1993) and S/RES/955(1994) respectively.

<sup>2</sup> American Bar Association Task Force, 'Report of the ABA Task Force on Teaching International Criminal Law' (1994) 5 Crim. LF 91.

compose it is very loose: 'the unity imposed is purely phenomenological'.<sup>3</sup> Even the reality of the discipline has been called into question.<sup>4</sup> Therefore to determine the scope and content of international criminal law is not an easy task.

In order to make sense of the discipline it is useful to recall Bassiouni's classic distinction. He distinguishes criminal aspects of international law, which deal 'essentially, if not exclusively with substantive international criminal law or international crimes' from international aspects of municipal criminal law.<sup>5</sup> The latter consist of 'questions of jurisdiction over crime, the choice of law in criminal cases and the recognition of foreign penal judgements'.<sup>6</sup> From this distinction it is possible to observe that all sorts are included under the name of 'international criminal law': not only would it include the definition of substantive offences, but also matters of interstate co-operation and assistance. It is necessary to determine what is relevant for the purposes of this thesis. Matters essentially of interstate co-operation and assistance are out of the scope of the enquiry. The main focus of this thesis rests in the definition of substantive offences. According to Wise, the definition of substantive offences integrates international criminal law *stricto sensu*.<sup>7</sup>

In any event, with the creation of the two Ad Hoc International Tribunals and the Statute for an International Criminal Court<sup>8</sup> it is possible to speak about international criminal law. There is evidence of the existence of a system, however embryonic, of international criminal law. As part of this system, there now actually exists a means to develop the law. This is important for the sake of this thesis. Moreover Wise is of the opinion that, 'in its strictest possible sense, international criminal law would be the law applicable in an international criminal court'.<sup>9</sup> However, I find this definition too limited for it is restricted to those

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<sup>3</sup> E. Wise, 'Terrorism and the Problems of an International Criminal Court' in J. Dugard and C. van den Wyngaerts (eds), *International Criminal Law and Procedure* (Dartmouth: Aldershot, 1996), 47.

<sup>4</sup> G. Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 CLP 263.

<sup>5</sup> M. C. Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law' in J. Dugard and C. van den Wyngaert n.3, 329.

<sup>6</sup> n.3, 41.

<sup>7</sup> *ibid* 44.

<sup>8</sup> Rome Statute of the International Criminal Court, UNDoc.A/CONF.183/9\*(17 July 1999, as corrected by the *procès-verbaux* of 10 November 1998 and 12 July 1999).

<sup>9</sup> n.3, 44.

crimes that come within the jurisdiction of the International Tribunal or Court. Yet, aside from the crimes within the jurisdiction of the Court there exist a number of other international offences, both customary and conventional. The law to be applied in an International Criminal Court would definitely constitute international criminal law, but, in my opinion, not exclusively.

In addition this restrictive definition disregards that the need to rely on national prosecutions has not disappeared, and will not disappear in the event of a permanent International Criminal Court. A deficient international system characterised by a lack of central enforcement means that the indirect enforcement through national courts remains essential. Indirect enforcement poses a problem that will be illustrated below as to the correct analysis of the obligation. This indirect enforcement accounts in many cases for the lack of practice.

The question remains as to, if there is 'the inevitable need to rely on national prosecutions',<sup>10</sup> what is the reasoning behind the establishment of International Tribunals. 'Why are individuals punished by international procedures for violations of international criminal law?'<sup>11</sup> Richard Goldstone, the former Prosecutor for the ICTY affirmed that 'without international enforcement, there might as well not be international criminal law'.<sup>12</sup> Hence, ultimately the need for international criminal law itself is questioned. As regards war crimes, the object of the present enquiry, it is possible to anticipate the advantage of trying these offences before International Tribunals. As Plattner observes, 'the risk would remain of only those who fought for the lost cause being prosecuted, and seems to be inherent in any mechanism creating an international penal responsibility for acts committed in situations of armed conflict, as long as repressive measures are applied by national organs.'<sup>13</sup> For the moment I will use international criminal law in the sense of a body of law integrated by the international definition of criminal offences. This will be my working definition.

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<sup>10</sup> C. Warbrick, 'The United Nations System: a Place for Criminal Courts?' (1995) 5 *Transnational Law and Contemporary Problems* 237, 240.

<sup>11</sup> *ibid* 242.

<sup>12</sup> Cited in M. P. Scharf, 'The Prosecutor v Dusko Tadic: an Appraisal of the First International War Crimes Trial since Nuremberg' (1997) 60 *Albany Law Review* 861, 882.

<sup>13</sup> D. Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non- International Armed Conflicts' (1990) no.30 *IRRC* (printed version) 409, 417.

## 1.2 International crimes

This thesis will focus on the definition of international offences, so it is necessary to ask who can commit those offences. It has been suggested that there is more than one way 'of understanding the relevant subject of international criminal law'.<sup>14</sup> In this connection we must distinguish between crimes of states and crimes of individuals. The former do not come within the scope of the present enquiry. We are interested in them only insofar as they bear any relation to crimes of individuals.

### A) Crimes of states.

The crime of state is a modality of international responsibility of states considered by the International Law Commission (ILC) in its Draft Articles on State Responsibility. The ILC drew the distinction between a crime of state and a delict. The delict represented the usual mode of state responsibility.

The standard model is a bilateral, delictual rule, carrying an obligation of reparation. The primary right, the new right in the event of a violation of the primary right and the right to take measures to enforce those rights, typically belong in one State and operate against another state'.<sup>15</sup>

Delictual responsibility will be relevant in relation to human rights violations and to the unwillingness by states to carry out other obligations under international law, as explained below in the context of the obligation to try or extradite for some international offences.

On the other hand, the notion of crime of states was previously defined in section 2 of Article 19 of the ILC Draft Code on State Responsibility. Section 3 provided some examples.

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<sup>14</sup> G. Simpson, 'War Crimes: a Critical Introduction' in T. L. McCormack and G. S. Simpson (eds), *The Law of War Crimes: National and International Approaches* (Boston: Kluwer Law International, 1997), 17.

<sup>15</sup> n.10, 238.

An international crime may result, *inter alia*, from:

- a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
- b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
- c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as that prohibiting slavery, genocide and apartheid;
- d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the environment or of the seas.<sup>16</sup>

The interest in this section lied in that some of these crimes also constitute crimes of individuals. The relationship between the two types of criminal responsibility (of states and of individuals) must be analysed carefully. The question, however, boils down to whether we accept the notion of crimes of state.

In connection to the suggested relation between crimes of states and crimes of individuals, Pellet talks in terms of 'the transparency of the state that committed a crime. This means that when an international crime is committed, not only the state itself is responsible, but also the natural persons who decided, committed, planned (...) and so on, such a crime'.<sup>17</sup> He suggests that this transparency is actually one of the characteristics of a crime of state. I do not entirely agree with the way he discusses this relation. First, it is necessary to specify the particular 'crime' of state in order to determine whether it does involve individual criminal responsibility. Secondly, it is submitted that this transparency would be reversing the principle that the act of state doctrine cannot be applied where international offences are concerned. This would be a direct consequence of determining the criminal responsibility of the state in the first place and only after that of the individual. It is the opinion of this author that crimes of individuals

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<sup>16</sup> Report of the International Law Commission on the Work of its Forty- Eight Session, GAOR 51<sup>st</sup> Session, UNDoc.A/51/10 (6 May- 26 July 1996).

should be left out of the discussion on state criminality, as they can be determined independently of any hypothetical state criminality. Using crimes of individuals as an asset to support the notion of crime of state seems to be doing either mode of criminal responsibility no good.

As to whether we accept the idea of a crime of state, notwithstanding the more technical problems posed by the definition as found in the ILC's Draft Code,<sup>18</sup> there are also a number of conceptual obstacles to the notion of crime of state itself. The absence of a mental element poses considerable problems: strict liability crimes are very rare, and in the absence of those there is a need for intention as the basis for ascribing criminality. 'The commission often requires an element of intention or moral turpitude that states as corporate bodies may not possess'.<sup>19</sup> On the contrary Meron sees a precedent for assigning intention to corporate entities like the state in the criminalisation of acts of corporations. Determining the intent of the corporation, 'was achieved through imputing to the corporation not only the acts, but also the mental state, of its employees'.<sup>20</sup>

Yet this constitutes precisely the biggest objection in relation to crimes of states. 'Ascribing criminal responsibility to legal persons runs the risk of imposing costs on individuals who do not share the notion of responsibility which is at the root of the justification for criminal sanction.'<sup>21</sup> In addition Ad Hoc International Tribunals have been justified in that they prevent the collective guilt of entire populations. A development that would mean the criminalisation of whole populations as nationals of a criminal state seems to run counter-productive to this aim. It seems quite clear that there is no possible advantage that is worth risking the collectivisation of guilt. Irrespective of any arguments, however, for the purpose of this thesis the most important fact is that the notion of crime of state is still at an embryonic stage. It does not at this stage reflect state practice and therefore we should not consider it as such.<sup>22</sup>

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<sup>17</sup> Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 EJIL 425, 432.

<sup>18</sup> *ibid* 428-430. Also D. W. Bowett, 'Crimes of State and the 1996 Report of the International Law Commission on State Responsibility' 9 (1998) EJIL 163.

<sup>19</sup> n.14, 17.

<sup>20</sup> T. Meron, 'Is International Law Moving towards Criminalization?' (1998) 9 EJIL 18, 20.

<sup>21</sup> C. Warbrick, 'Crimes Against International Law: Setting the Agenda' in P. J. Cullen and W. C. Gilmore (eds), *Crime Sans Frontiers: International and European Legal Approaches* (Edinburgh: Edinburgh University Press, 1998), 6.

<sup>22</sup> At date of submission, the controversial notion of crimes of states had been removed. It did not appear in the Draft Articles Provisionally Adopted by the Drafting Committees on Second Reading, ILC 52<sup>nd</sup> Session, A/CN.4/L.600 (11 August 2000).

The discussion on crimes of state is useful, though, in the sense that it questions the relationship between the regime of state responsibility and international criminal law. This is so because in the regime (as yet to crystallise) on crimes of states, states are the subjects of the obligation. In international criminal law, the obligation is directed to individuals (with due caveats to follow). But if in the face of a conventional obligation to prosecute or extradite an individual suspected of committing a specific crime against international law a state does not do as much, the state would not be committing a crime. Instead it would incur in state responsibility. Hence the marked difference as to whom is the subject of the obligation under international law. It is however enough to determine at this stage that 'the rule of state responsibility provides some basis for the duty to punish violators'.<sup>23</sup>

#### B) Crimes of individuals.

Offences in international law involve the criminal responsibility of the individual. The analysis of the responsibility of the individual in international law raises legal problems because there is a contradiction between the fact that individuals are not subjects of international law and the same individuals' international criminal responsibility.

This contradiction can become of some importance in such cases as those of Adolf Eichmann and Dusko Tadic. 'In principle locus standi in Public International Law is limited to states and certain international institutions',<sup>24</sup> which raises concern when an individual is being tried for international offences, in particular in relation to complaints arising from the way the defendant has been brought to trial. Argentina made Israel answer for the abduction of Eichmann, but the obligation of reparation was owed to the Argentinean state and in this instance did not entail the return of the defendant. Furthermore, it has only been possible recently and in front of an international tribunal for the individual to challenge the manner in which he was brought to trial.<sup>25</sup> This was so in the *Tadic* case.

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<sup>23</sup> M. Bothe, 'War Crimes in Non-International Armed Conflicts' (1994) 24 Israel YB HR 241, 248.

<sup>24</sup> H. McCoubrey and N. D. White, *International Law and Armed Conflict* (Aldershot: Dartmouth, 1992), 329.

<sup>25</sup> S. C. Neff, 'Past and Future Lessons from the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda' in P. J. Cullen. and W. C. Gilmore (eds) n.21, 59.

Hence international criminal law is faced with a difficulty in determining who are its subjects. There are two approaches; first, it is suggested that international criminal law poses obligations directly on individuals in that there is a direct visitation of criminal responsibility on the individual. The contrary view maintains that, because the individual is not strictly speaking a subject in international law, he is addressed only through the state. In actual practice, both answers are correct to an extent. It is useful to introduce at this point 'a non- technical distinction between crimes by international law and crimes against international law'.<sup>26</sup>

In crimes by international law the obligation is posed on the state to criminalise conduct in its domestic law, irrespective of whether this conduct is also criminal in international law. Usually this obligation is posed on states by way of treaty. In respect of these crimes the traditional doctrine of mediatisation stays true, because the individual is only indirectly addressed through the state. Yet is it 'that the duty of trial and punishment -incurred by the Contracting States as such-is the sole obligation created by the treaties, and the individual is only indirectly affected by this obligation as an object of the conduct of the state?'<sup>27</sup> This might not always be the case; a treaty can pose an obligation on states to criminalise but can also establish that the given conduct constitutes a crime against international law (eg Genocide Convention). In this event the criminality of the conduct is prescribed by international law, therefore the individual is the direct recipient of obligations. The subsidiary obligation to criminalise the conduct in domestic law, on the other hand, falls on the state. The relation between the international criminal standard and domestic law is analysed below.

For crimes against international law, international law envisages individual criminal responsibility. Where a crime constitutes a crime against international law, the subject is the individual directly; there is a 'direct visitation of international criminal responsibility' on the individual.<sup>28</sup> These are usually (but not necessarily) crimes under customary international law, rather than by treaty; yet the possibility of having a treaty that makes conduct criminal in international

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<sup>26</sup> C. Warbrick, E. Martin-Salgado and N. Goodwin, 'The Pinochet Cases in the United Kingdom' (1999) 2 YIHL 91, 107.

<sup>27</sup> Depends on the obligations created by the treaty. Y. Dinstein, 'International Criminal Law' (1975) 5 Israel YB HR 55, 79.

law is not ruled out. In the case of customary law crimes only International Tribunals have the capacity to try them; most states need to enact legislation - statutes of transformation in domestic law- before national courts can try these crimes. An exception to this rule is found in those legal systems that directly adopt international customary law into national law. However such an adoption can raise concerns in relation to the principle of legality for national courts, in particular to the degree of specificity involved in customary law.<sup>29</sup> On the other hand if states decide to enact laws to enable them to try crimes against international law, it is necessary to look at the national standard so as to determine if it reflects the international definition of the crime.<sup>30</sup> It might not mirror it exactly. The final caveat is the one mentioned previously in relation to treaties that establish the individual criminal responsibility for a given conduct in international law but also pose on states the obligation to criminalise the said conduct in domestic law.

Schwarzenberger is of the opinion that all international crimes are crimes by international law, and that outside of the obligation posed on states to criminalise in their domestic laws, there exists no such thing as an international standard.<sup>31</sup> With the benefit of hindsight, we can inquire that if there is no international standard, what is it that the Ad Hoc International Tribunals apply? In any case and for the purposes of this thesis, we are particularly interested in crimes against international law. In addition, this thesis will concentrate on the application of the law by the Ad Hoc International Tribunals. As will be illustrated throughout, Ad Hoc International Tribunals have ascertained the customary law character of the crimes as a preliminary issue to trying a defendant of these charges. For this reason, the main focus of this thesis will be on crimes under customary law.

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<sup>28</sup> n.24, 330.

<sup>29</sup> Discussed in section 1.4 and n.52.

<sup>30</sup> L. S. Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: from Touvier to Barbie and Back Again' (1994) 32 Columbia JTL 289.

<sup>31</sup> n.4, 268.

### 1.3 Recognising a crime against international law

The purpose of this section is to find out whether features common to crimes against international law exist that permit their identification. Identifying a particular conduct as a crime against international law also enables to distinguish it from ordinary crimes. The importance of differentiating between ordinary crimes and crimes against international law is illustrated below. Three issues are considered to attempt to identify crimes against international law. These are the content of the conduct, the criminality of the conduct and the type of jurisdiction that is attached to these crimes.

#### A) The content of the criminal conduct.

The issue is whether crimes against international law crimes share common substantive traits. It is widely believed that crimes against international law constitute serious violations of human rights. Though this might generally be so, there are some exceptions, like counterfeiting, which has 'nothing to do with a violation of human rights as such'.<sup>32</sup> Another opinion holds that crimes against international law share the trait that they regulate matters on which states have a strong interest. This is a correct view, since it devolves to the practice of states. The answer therefore is that crimes against international law do not necessarily share any common traits in their content. Rather the common traits, if at all present, are incidental. 'The practice of states is the conclusive determinant in the creation of international law (including international criminal law), and not the desirability of stamping out obnoxious patterns of human behaviour'.<sup>33</sup> It is important to bear this in mind. The temptation to apply a 'bad man' definition instead of relying on categories of crimes rooted in state practice is strong for crimes against international law, where the conduct in question will be heinous. However, if the aim is to avoid the retroactive application of criminal law, then defendants must be tried on the basis of identified criminal categories, and not on abstract notions of justice.

#### B) Individual criminal responsibility

It is one thing to say that a given conduct constitutes a breach of international law, and a very different one to say that it constitutes a crime against international law. The problem is 'how to distinguish between norms that merely

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<sup>32</sup> n.27, 76.

prohibit conduct and those that also impose individual criminal responsibility on the violators (...) it is simply not sufficient that treaties or customary international law proscribe certain types of conduct. The prohibited conduct must also lead to individual criminal responsibility of the violators'.<sup>34</sup>

The distinction indicated previously must be borne in mind: crimes by international law do not necessarily involve a conduct that is criminal IN international law. Whether they do will be determined by reference to the terms of the treaty. The problem found in treaties is that they tend to use neutral terminology because of the political connotations of the word 'crime'. The Geneva Conventions, for example, talk in terms of grave breaches rather than of crimes.<sup>35</sup> On the other hand crimes against international law prescribe the international criminal responsibility of the individual. In both types of crimes, therefore, we will have to refer back to the source of the criminal standard, which again implies the need to rely on state practice. The problem is that the criminality for a given conduct cannot be assumed, but needs to be proven by reference to the practice of states.

In this manner the *a priori* determination of criminality is not exempt from difficulties. Does this uncertainty violate the principle of legality? Though there is a danger that this might be the case, the present state of affairs must not be overstated. First, most of the conduct that constitutes a crime against international law will constitute a crime under national law at the time of the offence. This will to an extent guarantee a fair outcome for the individual defendant. It will constitute a crime either under the domestic law enacting the crime against international law, or under provisions of General Criminal Law.<sup>36</sup> 'Indeed most violations of the laws of war also violate rules of general criminal

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<sup>33</sup> *ibid* 67.

<sup>34</sup> n.20, 23-24.

<sup>35</sup> Geneva Conventions for the Protection of Victims of War of 12 August 1949 (Geneva Conventions): Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). In Article 85 of Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 1977 (Additional Protocol I) the connection is finally made between grave breaches and war crimes.

<sup>36</sup> Eg genocide and crimes against humanity be murder or conspiracy to murder.

law'.<sup>37</sup> Yet we have to appreciate whether treating crimes against international law like ordinary crimes is desirable. The Statutes of the International Tribunals seem to think otherwise, perhaps in relation to the different aims that war crimes (in a broad sense) trials serve.<sup>38</sup> For it is not a matter of the penalty but of calling things by their name. In this sense, distinguishing crimes against international law from ordinary crimes serves a function.

In addition, the importance of distinguishing crimes against international law from ordinary crimes cannot be overstated in the cases that concern this thesis. It is very probable that any violation of the laws of war committed in the context of an internal armed conflict will constitute a crime in the domestic law. The government may want to employ general criminal law to deal with the rebels. Yet in internal armed conflicts precisely the opposite is being considered: in this respect 'the essential problem involved in these provisions is that of possible justification'.<sup>39</sup> Justifications may be provided for in the law applicable in internal armed conflict that would exempt the rebel- contender from criminal responsibility. For example, killing a member of the armed forces would in itself not constitute an unlawful action, and could not therefore be tried for murder.

The difficulty of *a priori* determining international criminality is also attenuated because it might also be the case that these crimes violate international agreements. For example, the Appeals Chamber in the *Tadic* Decision resolved that the contending parties in Yugoslavia had contracted agreements to apply certain provisions of international humanitarian law.<sup>40</sup> 'This was a sufficient answer to any claim of retrospectivity about the UN Security Council's decision on the Tribunals judgement'.<sup>41</sup> However the Appeals Chamber did not stop at this reasoning but argued about the applicable customary law. Why did it go into so much trouble? Greenwood believes that the Appeals Chamber 'took the opportunity of the first case to come before it to explore the whole of the

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<sup>37</sup> n.23, 242.

<sup>38</sup> See **Article 10(2)** of the Statute of the International Tribunal for the Former Yugoslavia (ICTY Statute). The ICTY Statute is contained in the Annex to the Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Pursuant to Par. 2 of S/RES/808 (1993) UN Doc. S/25704 (Report of the Secretary-General).

<sup>39</sup> n.23, 243.

<sup>40</sup> *Tadic* Decision par.143-44.

<sup>41</sup> n.10, 258.

substantive law applicable to internal armed conflict'.<sup>42</sup> I support the view that the Appeals Chamber went into such great length because it was not enough that the law had been implemented among the parties, but it was necessary to demonstrate that these violations of international agreements attached the requisite criminality. It was also necessary to demonstrate that the ICTY had jurisdiction over these offences.<sup>43</sup>

C). Jurisdiction and the content of the obligation on the state.

Again the question remains whether we can assume that all crimes against international law attach a duty or a right of universal jurisdiction. In talking about universal jurisdiction we are referring to judicial jurisdiction. However, in the case of crimes by international law, where the obligation is posed on the State to criminalise conduct in domestic law, it will concern legislative jurisdiction. In the case of piracy, on the other hand, the jurisdiction entailed is enforcement jurisdiction, to seize the pirates and apply executive measures to them. In fact some crimes involve all three, like grave breaches of the Geneva Conventions.

Important as the question of universal jurisdiction remains, it is necessary to realise that in most cases these crimes will be addressed on the basis of territorial jurisdiction. This is even the case for the Ad Hoc International Tribunals (not the ICC) where the conduct is tried on a territorial basis; the only difference is that it is tried by an International Tribunal in a different place. In respect of the jurisdiction of the ICTR jurisdiction, the principle of active personality is also relevant, for Rwanda's nationals committing crimes in the territory of neighbouring states are subjected to the tribunal's jurisdiction.<sup>44</sup> In any case, none of the International Tribunals, including the ICC, work on the basis of universal jurisdiction.

However, determining judicial jurisdiction only involves difficulties in relation to national courts; International Tribunals have their jurisdiction (substantive, territorial and temporal) ascertained in their Statutes. Hence we can say that universal jurisdiction is an issue -because International Tribunals already have their jurisdiction defined in their statutes, and none of them has universal

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<sup>42</sup> C. Greenwood, 'International Humanitarian Law and the *Tadic* Case' (1996) 7 EJIL 265, 277.

<sup>43</sup> Section 2.1.

<sup>44</sup> **Article 1** of the Statute of the International Criminal Tribunal for Rwanda (ICTR

jurisdiction- only for national courts. This is compounded by the deficiency of the international system that has to rely on indirect enforcement through national prosecution. In this way, the answer to what jurisdiction applies to the given crime will only be found by reference to the source of the criminal standard. If it is by treaty then these questions can be answered more easily than in the case of a customary law crime. Therefore the focus in this case returns once more to the practice of states.

Hence there is no common feature that, identified *a priori*, can identify a crime against international law. 'The only basis which now exists is empirical or experiential; conventional and customary international law implicitly or explicitly establish that a given act is part of international criminal law'.<sup>45</sup> Besides 'no institution of the international community of states exists to answer this question other than the States themselves, severally'.<sup>46</sup> As mentioned previously this thesis will focus on crimes under customary law, in particular on their treatment by the Ad Hoc International Tribunals. As reflected in the Statutes of the Ad Hoc Tribunals, these crimes will be genocide, crimes against humanity and war crimes. The limitation mentioned previously, the absence of recourse to orderly treaty-making, results in a certain degree of overlap between war crimes and crimes against humanity that will be indicated throughout this work.

#### 1.4 The criminal standard in international law

It is of some consequence to understand the relationship between the international criminal standard and the domestic law of a given state. The importance of this relationship resides, as indicated previously, in that even when a permanent international court comes about, the bulk of prosecutions will be undertaken by domestic courts. It is important to understand this relationship in order to be realistic as to what domestic courts can do.

Simpson, handling a broad concept of war crimes, contends that 'the classical war crimes trials both prior to and since 1945 have generally occurred in

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Statute). The ICTR Statute is contained in an Annex to S/RES/955 (1994).

<sup>45</sup> n.5, 330.

<sup>46</sup> n.10, 240.

domestic settings under national rather than international law'.<sup>47</sup> To understand how this is the case it is useful to recall the distinction between crimes against international law and crimes by international law. The latter derive from the inevitable need to rely on national prosecutions: 'this causes states sometimes to forbear criminalising conduct in international law, and to create an obligation on states to criminalise the conduct in their own law'.<sup>48</sup> Crimes by international law do not necessarily entail an international criminal standard, as the obligation posed on states is to criminalise this conduct in national law. Still it can be the case that the treaty that obliges states to criminalise conduct can include a definition of the proscribed conduct, presumably the definition to be enacted in domestic law. States can incur in international responsibility if they fail to carry out their international obligations. It might be advisable therefore to enact legislation that mirrors treaty definitions exactly, in order to make it watertight.

In crimes against international law, the question remains as to what extent does the definition of the crime enacted in domestic law reflect international criminality. States may think it is in their interest to enact laws to enable them to prosecute these crimes irrespective of a treaty obligation to do so. When there exists no duty to criminalise, if international law envisages the criminality of a given conduct, then there is the power to criminalise it in domestic law. States can however decide to adopt a definition different to the international prescription. So it will therefore be necessary to consider what is being applied, whether an international definition or a parallel definition in domestic law. Whether national courts, for the purpose of prosecuting crimes against international law, are considered 'organs of the international community applying international criminal law and bringing it home to the individual, who is directly subjected to international obligations'<sup>49</sup> is for 'the national legal system' to resolve.<sup>50</sup> Equally if they are to be regarded merely as 'organs of the domestic order, the international crime being given a parallel, national existence'.<sup>51</sup>

In relation to crimes against international law, it has already been mentioned that they are for the most part customary law crimes. The international criminal standard can be applied in proceedings before International Tribunals. States

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<sup>47</sup> n.14, 5.

<sup>48</sup> n.10, 240.

<sup>49</sup> n.27, 73.

<sup>50</sup> n.21, 3.

that consider customary international law as part of the law of the land will need no specific enactment of the definition of the crime. However, due to the vagueness inherent in customary law crimes, their prosecution can violate the principle of legality in two different ways. First, it might not be so clear that the wrongful conduct attaches individual criminal responsibility in international law. Secondly, national courts in trying customary law crimes will face issues of specificity. 'Establishing that conduct is criminal in customary international law is beset by the uncertainties of the customary law process. This is a matter of particular concern if recourse is to be had to national courts, whose principles of legality might not be satisfied by the vagueness of the products of customary international law.'<sup>52</sup> Precisely because they are complete systems of law, lack of specificity might be more problematic for national courts. International Tribunals, on the other hand, may find it easier, indeed necessary to be less stringent on the need for specificity. In either case, one of the challenges posed in relation to crimes against international law is 'to define with sufficient precision to satisfy the principle of legality'.<sup>53</sup> In this sense customary international law is more problematic. An additional problem and very real obstacle for national courts, though, is that 'many states do not have national laws in place that allow them to prosecute offenders'.<sup>54</sup>

## 1.5 The sources of international criminal law

International criminal law belongs to international law. Therefore its sources cannot differ from the sources of international law. These are to be found listed in Article 38(1) of the Statute of the International Court of Justice. They are

- a) international conventions
- b) international custom
- c) general principles of law
- d) subsidiarily, judicial decisions and the teachings of qualified publicists

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<sup>51</sup> *ibid* 3.

<sup>52</sup> n.26, 98. This was the point raised by Lord Slynn in *R v. Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte* (Amnesty International and other intervening) [1998] 4 *All ER* 897.

<sup>53</sup> n.21, 9.

International law criminalises conduct by way of treaty or of custom. Yet general principles of law are also of significance in international criminal law. They are particularly relevant for deciding matters relating to the general part of Criminal Law, such as *mens rea* and *actus reus*. They also have an incidence in deciding procedural issues, such as *non bis in idem*. As can be inferred from this, general principles of law become most relevant in relation to International Tribunals. As discussed previously, International Tribunals do not belong in complete systems of law, like national courts do, therefore they need complementing in some matters, and general principles are ideal for this task. The pre-eminent general principle is the principle of legality, *non bis in idem*, which forbids the retroactive application of the law. Meron believes that 'the prohibition of retroactive penal measures is a fundamental principle of criminal justice and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals'.<sup>55</sup> This principle will be taken into consideration throughout this thesis.

Multilateral treaties are the usual way by which states criminalise conduct. An example of this action is found in the Geneva Conventions. Criminalising conduct by way of treaty is relatively straightforward. A treaty will not only envisage a definition of the proscribed conduct, but will also spell out the obligations incumbent upon state parties as regards jurisdiction (like obligation to criminalise in domestic law or to prosecute or extradite). Yet the importance of multilateral treaties resides also in their relation to custom: whether the treaty reflects existing customary law or whether it constitutes progressive development of the law poses significant questions in relation to non-parties to the treaty. However there is a paradox, in that the larger the number of parties to a treaty, custom tends to become irrelevant, as it tends to fall in line with the treaty.<sup>56</sup> This has been the case of the Geneva Conventions, which are now generally recognised to constitute customary law.

Some of the problems involved in criminalising conduct through customary law, such as lack of specificity, have already been anticipated, but there are additional aspects. These relate to the constitutive elements of customary law:

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<sup>54</sup> T. Meron, 'International Criminalization of Internal Atrocities' (1995) 89 AJIL 554, 573.

<sup>55</sup> *ibid* 565.

<sup>56</sup> R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965-66) 41 BYIL 275.

widespread and uniform state practice and evidence of *opinio juris*. In relation to crimes under customary law, there is arguably a need to weigh the requisite of *opinio juris* against state practice. This has been the case for war crimes.

Because of their connection to international humanitarian law, there are a number of considerations that apply to war crimes. International humanitarian law is mainly a preventive law, rather than a law for the prosecution of offenders. As a preventive law, international humanitarian law is a law of negative obligations. It is therefore necessary to give added weight to the element of *opinio juris* in the absence of a known uniform and widespread state practice. The *Tadic* Decision submitted the argument of the importance of *opinio juris* for violations of international humanitarian law. In the Decision, the reasons alleged for paying more attention to formal rules rather than to actual practice were described as the difficulty encountered in discerning state practice, a difficulty exacerbated by the impossibility of finding out precisely what went on in the field in the event of an armed conflict.<sup>57</sup> Events in the field are difficult to discern not least because of propaganda and misinformation encouraged by participants.

The argument that *opinio juris* must be taken into account more than actual practice has been supported by a few authors,<sup>58</sup> and is not unheard of in the field of human rights. The argument maintains that actual deviation from international human rights law cannot be characterised as practice evidencing law, but rather that it should be regarded as violations of the law; human rights law is also a law of negative obligations, where the obligation is posed on states **not** to violate human rights. For example, it is submitted by human rights lawyers that the widespread occurrence of torture (committed by state officials, as defined in the 1984 Torture Convention) is not an example of state practice. That states condemn in no unclear terms the occurrence of torture, is evidence of *opinio juris*, which in this case outweighs practice.

Yet the differences between human rights law and international humanitarian law soon become apparent. In international humanitarian law, for the case of provisions that envisage individual criminal responsibility, an area of convergence with international criminal law, the negative obligation is posed on

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<sup>57</sup> *Tadic* Decision par.99.

<sup>58</sup> T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford:

individuals, not on states. For this reason, violations of international humanitarian law involve the international criminal responsibility of those responsible, whilst violations of human rights law do not (there are exceptions, such as the case of torture under the terms of the 1984 Torture Convention). Moreover in international humanitarian law, there are additional positive obligations posed on states, such as the obligation to search for, to prosecute and extradite and to train troops in the provisions of the law of armed conflict. To what extent can the same rule of giving pre-eminence to *opinio juris* be said to apply? Is the absence of national prosecutions evidence of state practice? Though this is possible, these positive obligations are for the most part spelt out in treaties, so that deviant practice will constitute examples of violation of the terms of the treaty.

Reliance on *opinio juris* in determining customary law has ultimately to be weighed against a finding on individual criminal responsibility. One would think that the burden of proof in these cases would be higher than the evidence provided by statements by government officials and military manuals. Greenwood is of the opinion that when the German military manual establishes that grave breaches apply to internal armed conflicts it is an expression of German policy rather than anything else.<sup>59</sup> This highlights the difficulty in distinguishing between evidence of *opinio juris* and that which is not in the absence of clear state practice. Therefore we can again hint at the tension between the need to rely on *opinio juris* and the need not to violate the principle of legality. This tension will be further exacerbated in relation to the elements of the crimes, where customary law is not sufficiently specific due to lack of practice. This tension will be inherent throughout, in the problems found between doing things by international law (the whole process of making conduct criminal by international law, in particular customary law) and the need to respect the principle of legality.

It seems relevant at this point to suggest that other sources can prove enlightening as evidence of *opinio juris*. These are Resolutions of the Security Council, including the annexed Statutes of International Tribunals. The Ad Hoc Tribunals have also made extensive use of the writings of authors. Also relevant

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Clarendon Press, 1989)

<sup>59</sup> n.42, 276.

are the decisions by these Tribunals, particularly as the decisions of the Appeals Chamber bind the Trial Chambers, and that the Appeals Chamber tends to follow its own decisions. In particular I will be looking at the *Tadic* Decision, which is significant for the purpose of this thesis because it confirms the development of the criminalisation of violations of international humanitarian law in internal armed conflict.<sup>60</sup>

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<sup>60</sup>Note: throughout this work I speak about the 'criminalisation of violations of international humanitarian law applicable in internal conflicts' and the 'criminalisation of violations of international humanitarian law (committed) in internal conflicts'. Though aware that they mean different things, I will use them interchangeably because the customary development has affected both the standards applicable to internal conflict and the criminality of those standards. Section 2.2.

## PART ONE: THE PROCESS OF CRIMINALISING OFFENCES IN INTERNAL CONFLICTS

### Chapter 2: The *Tadic* Decision

#### 2.1 Introduction to Part One

Part One will describe the way in which states make conduct criminal in international law, by focusing on the process that criminalised violations of international humanitarian law in internal armed conflict. No conduct, whether an act or an omission, is inherently criminal. It is only the law that makes it criminal. For war crimes, it is international or domestic law. In some instances, it is both; this is the case of grave breaches of the Geneva Conventions. Moreover, it has also been highlighted previously how states may decide to forbear criminalising conduct in international law and simply create an obligation on states to do so in national law. This manner of rendering conduct criminal does not occupy us at present: I will concentrate on war crimes as crimes against international law. As crimes against international law, the source of the criminal standard is found in international law. As will be discussed below, in the present case we will be dealing with customary law.

Thus this Part will focus on the customary development of violations of international humanitarian law applicable in armed conflicts. Describing this process encounters some difficulties because due to the absence of a central legislator the substantive definitions of the offences have not developed in a consistent manner. This Part will explain how the process unfolded. It will place particular emphasis on the *Tadic* Decision, which represented the first judicial determination that confirmed that this process had taken place. The *Tadic* Decision also ascertained the jurisdiction of the ICTY over offences committed in internal conflicts, and this in turn meant the crystallisation of the legal regime belonging to these offences in proceedings before the Tribunal and at a later date before the ICTR. I will look at the implications of the *Tadic* Decision in Part Two.

## 2.2 The 'two- box' approach to international humanitarian law and the customary development of the law applicable to internal armed conflicts

It is maintained that there has been a customary law development of the international humanitarian law applicable to internal armed conflict. Previously international humanitarian law applicable to internal armed conflicts had been neglected in comparison to the law that applied to international conflicts. It is worth noting that the authors speak in terms of a 'reform' or a 'development'.<sup>1</sup> They do not talk about emergence of the law. The presumption behind this terminology is that the law was already there, whether in treaty or in customary form, and it has been transformed in relation to internal armed conflicts.

It is useful at this stage to draw a distinction between the development of appropriate standards to apply to internal armed conflicts -such as common Article 3<sup>2</sup> and Additional Protocol II, and as will be noted some Hague law rules- and the development of criminality for breaches of these standards. Following this distinction, it is possible to conclude that the development of the international humanitarian law for internal armed conflicts has responded to a two-tier transformation. In the first place, standards that used only to apply to international conflicts have been extended to cover internal conflicts (Hague law rules). In the second place individual criminal responsibility for breaches of these and other standards (such as those that already made reference to internal conflicts, but which did not envisage criminal responsibility for violations, common Article 3 and Additional Protocol II) has been developed. Thus the development with respect to internal conflicts has occurred in both standards and criminality.

Before this development in the law, the regulation of conduct in internal conflicts had been sparser in comparison to the regulation of international conflicts. This held true for both standards applicable to internal conflicts and for criminality of breaches of these standards. 'Indeed, only since the mid- 1990s has there been a clear tendency and a direct movement to reduce the distinctions between civil

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<sup>1</sup> 'Reform' suggests a considered and careful project, and this has not been the case.

<sup>2</sup> Common Article 3 to the Geneva Conventions, n.35 in Ch.1. In footnotes it will appear as CA3.

wars and international wars'.<sup>3</sup> The difference in regulation between the two types of conflicts had become known as the 'two- box' approach to international humanitarian law. One big box for international conflicts and a smaller box for internal conflicts. As will be demonstrated below, with the development of customary law, the differences between the two have been bridged; though this approach has not been superseded. What interests at present is finding the reasoning behind the previous regime, whereupon internal conflicts were largely overlooked. Fewer standards were applicable to internal conflicts, why? In particular as regards the main focus of this thesis, why were violations of the standards applicable to internal armed conflicts not deemed crimes? An historical overview is necessary to understand the previous regime and the actual development.

Since the Spanish Civil War and the Second World War there has been a trend away from the need for formal declarations in armed conflicts. Thus, there was a movement away from declarations of 'war' and 'belligerency' as the appropriate legal categories, dependent in large measure on the declarations of states, to the objective facts of 'international' or 'internal' 'armed conflict'. The development consisted of the following: whereas before the question 'is there an armed conflict?' depended largely on the declarations by states, now-a-days this question is answerable by reference to objective criteria, in particular as concerns the application of international humanitarian law. There are caveats to this assertion that will be considered below.

Yet the movement away from formal declarations also meant that in case of an internal armed conflict, the state lost the monopoly of deciding when violence in its territory amounted to a conflict regulated by rules of international law. The 1974- 1977 Diplomatic Conference, which adopted the Additional Protocols,<sup>4</sup> did so with a view to reaffirming the regime of objective determination of the existence of an 'armed conflict'. 'Thus the impetus behind (...) the Diplomatic Conference in this regard was to (...) to develop objective criteria which would not be dependent on the subjective judgements of the parties'.<sup>5</sup>

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<sup>3</sup> K. D. Askin, 'Crimes within the Jurisdiction of the International Criminal Court' (1999) 10 *Crim. LF* 33, 57.

<sup>4</sup> Additional Protocol I and Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Noninternational Armed Conflicts of 1977 (Additional Protocol II). In footnotes they will appear as API and APII respectively.

<sup>5</sup> *Rutaganda* Judgement par.92.

As evidenced in the debates of the 1974- 1977 Diplomatic Conference, some states felt uneasy about applying internationally recognised rules to internal armed conflict.<sup>6</sup> There are three motives for this, and these motives in turn explain the marginal development of the law applicable to internal armed conflicts in comparison to that applied to international conflicts.

In the first place states feared that by having objective criteria which determine the moment when international humanitarian law applies, the application of such law would grant the rebels legal status under international law. This fear stems from the basic inequality between warring parties in internal conflicts. One of the parties will be the government of the state; as the state it will enjoy legal personality in international law. This will not be the case for the rebel group, which will have no international legal status, and states want to keep it that way.<sup>7</sup> The inequality between warring parties results in that 'states are willing to accept more detailed restrictions in the conduct of international armed conflict, between, legally speaking, sovereign equals than in the conduct of internal armed conflict where the warring factions are the established government and rebel groups which challenge the right of the government to exercise control over some or all of the state's territory'.<sup>8</sup> In this sense states were not reassured by the wording in common Article 3, whereupon its application 'shall not affect the legal status of the Parties to the conflict'.

As a direct consequence of the inequality between warring parties, states have been reluctant to criminalise violations of the law applicable to internal armed conflicts because they have preferred to deal with rebels through national criminal law rather than apply international standards. Chances are that if a state does not wish to grant the rebels any level of recognition it is because it regards the fighting as terrorism, and will therefore apply provisions of its own

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<sup>6</sup> F. Kalshoven, "Protocol II, the CDDH and Colombia" in K. Wellens (ed), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (The Hague: Kluwer Law International, 1998).

<sup>7</sup> National liberation movements, on the other hand, can make a unilateral declaration under Article 96 of API to bring into force the Geneva Conventions and API to national liberation wars. Yet no liberation movement has seriously attempted the required declaration, 'perhaps because it would have had difficulty accepting and carrying out all the obligations stated in the Protocol'. T. Meron, 'The Time Has Come for the United States to ratify Geneva Protocol I' (1994) 88 AJIL 678, 683.

<sup>8</sup> W. J. Fenrick, 'Should Crimes Against Humanity Replace War Crimes' (1999) 37 Columbia JTL 767, 770.

criminal law involving charges on treason, terrorism or organised crime.<sup>9</sup> Thus there is a clear disadvantage for the state in accepting international regulation. Because, whilst only some of the government forces' conduct will violate domestic law, all the rebel's conduct violates national law. International regulation of the conflict will mean that there are things that rebels can legitimately do to the government. This in turn will result in that the application of international standards to the internal conflict implies some degree of equality between government force and rebel force. For third states it is a different matter altogether; 'in the event of a non- international armed conflict, states not party to it [the internal conflict] would most probably be little inclined to exercise this competence [penal repression of war crimes] for fear of being accused of interfering in the internal affairs of the State in which the conflict has broken out'.<sup>10</sup> Finally, the idea of having internationally recognised standards to deal with rebel contenders was viewed by some states as interference in the internal affairs of the state (and hence violating national sovereignty). In addition, international regulation of internal conflicts could also provide an excuse for bad faith intervention from third parties. Yet the language of Additional Protocol II does not leave much scope for abuse.<sup>11</sup>

In practice, however, and regardless of the preceding considerations, if a state wished to deny that the violence occurring within its territory amounted to an internal armed conflict, there was little opportunity to contest its judgement, still less to obtain an authoritative decision as to whether or not it were correct. Furthermore, in the matter of internal conflicts, third states tend to keep their own counsel. The threshold of applicability of Protocol II is in practice very high. Moreover, Additional Protocol II applies to rebels if they can comply with these conditions. Yet, from a different perspective, international regulation imposes conditions upon the rebels that they might find difficult to accept in practice. Do rebels really want to fight fairly? Not fighting fairly constitutes in some cases what advantage they might have. In any case if they refused to take advantage of the protection provided by Additional Protocol II, they could be breaching

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<sup>9</sup> The Prosecutor of the ICTY had been seeking 'to examine whether there was "an armed conflict" underway in Kosovo. If so, alleged crimes would then fall under the Tribunal's jurisdiction. Belgrade in turn disputes this and argues "a legitimate fight against terrorism". Institute for War and Peace Reporting (IWPR), *Tribunal Update: Last Week in The Hague* no.117 (15- 20 March 1999).

<sup>10</sup> n.13 in Ch.1, 417.

<sup>11</sup> Article 3(2) of APII.

international humanitarian law, but they might still be punished less harshly than if these standards did not apply (for they would be punished for fighting, under national criminal law).

If all these obstacles stood in the way of the codification of law applicable to internal armed conflicts, what has changed that has allowed for the development of standards and for the criminalisation of violations? There are two reasons. In the first place, international humanitarian law was designed to deal with inter-state conflict, that is, with conflict between two legal equals. Yet at present the majority of conflicts is internal and takes place within the territory of a single state between government forces and rebel-contenders, or even between different rebel factions. In view of this reality in the field, law has adapted, mostly through custom. In connection with this new reality, the sheer concentration of diplomatic effort has facilitated the criminalisation of internal atrocities. In this way Wedgwood is of the opinion that internal armed conflicts provided 'the moral impetus for the negotiation of a Rome treaty'.<sup>12</sup>

The second reason is the development of human rights law. Human rights apply irrespective of nationality, and this has had an impact on those provisions in international conflict that envisage the protection of some persons, but not of other, depending on their nationality (eg grave breaches of the Geneva Conventions). The development of human rights law has been taking place since the first efforts at standard setting within the UN. But having finalised the standard setting process, the focus is now on the enforcement of these standards. Criminal law constitutes a means of enforcement, hence the newly found drive for the criminalisation of internal atrocities.

If the new reality is one where internal conflicts predominate, and if human rights law has had regard for the application of standards regardless of nationality requisites, how has international humanitarian law adapted to this new set of circumstances? The Appeals Chamber for the ICTY confirmed the development of applicable standards for internal armed conflicts in the *Tadic* Decision. Yet the *Tadic* Decision also illustrated that there has not been an unequivocal, single way by which international law has developed these standards for internal

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<sup>12</sup> R. Wedgwood, 'The International Criminal Court: An American View' (1999) 10 EJIL 93, 101.

conflicts. 'The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law (...) the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law'.<sup>13</sup> The development of norms to apply to internal conflicts has taken many guises; with particular reference to customary law, Meron explains that 'there are several ways that customary law strategies can figure...in the evolution of this law'.

First, rules initially stated in treaty provisions governing noninternational armed conflicts, such as common Article 3 and Additional Protocol II, can be transformed into customary law. Second, through customary law, some rules have also been recognised as norms whose violation gives rise to individual criminal responsibility (...) Third, general principles first developed for international wars, such as proportionality and necessity, may be extended through customary law to civil wars. Fourth, prohibitions on certain weapons and means of warfare (...) are gradually being applied to internal armed conflicts through customary law, as well as through the more visible process of treaty making.<sup>14</sup>

Thus it has been noted how in the development of standards to apply to internal conflicts there has been interplay between treaty and customary law. On the other hand, the development of criminality for breaches of these standards (i.e. the question as to whether the standards are criminal in international law), has come about entirely by customary law 'because none of the treaties governing internal conflicts set up rules of international criminal law'.<sup>15</sup> Moreover, there is no evidence of amendments to these treaties.

International humanitarian law has developed to apply to internal conflicts. Yet this development has been limited. There is no suggestion that the 'two-box' approach to international humanitarian law standards and to criminality of these standards has been abandoned. If only, the 'traditional dichotomy between

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<sup>13</sup> 'This holds true for CA3 (...), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, (...), to the core of APII.' *Tadic* Decision par.98.

<sup>14</sup> T. Meron, 'The Continuing Role of Custom in the Formulation of International Humanitarian Law' (1996) 90 AJIL 238, 244

<sup>15</sup> C. Warbrick, 'International Criminal Law' (1995) 4 ICLQ 466, 469.

international wars and civil strife' has been blurred.<sup>16</sup> There has been no immediate adaptation to internal armed conflict of the standards applicable to international armed conflict. They are adapted to internal armed conflict in a two-tier manner as reflected by the *Tadic* case:

Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.<sup>17</sup>

The development of criminality for these standards is less easily catalogued; it is rather a matter of taking into consideration whether the standards presently applicable to internal conflicts customarily entail individual criminal responsibility for the perpetrator of the violation. As I will note below, the 'two- box' approach to the international humanitarian law standards applicable to internal and to international conflicts, and the finding as to whether the standards are criminal, has derived in a 'two- box' approach to individual culpability. For the moment, there remains the question about the relationship between these vague principles of application of the law (i and ii) and the principle of legality in criminal law. The difficulty in reconciling these is compounded by the need expressed by the Appeals Chamber to rely on the *opinio juris* in an attempt to discover the present state of customary law applicable to internal conflicts.

The difficulty in discovering the present state of customary law pertains, in the first place, to absence of clear state practice. The *Tadic* Decision circumvented the paucity of state practice by instead heavily relying on the requirement of *opinio juris*. In the second place, to proving the existence of practice in the instances where there is interplay between treaty and custom, 'where there exists a prior multilateral treaty which has been adopted by the vast majority of States. The evidence of State practice outside of the treaty, providing evidence of separate customary norms or the passage of the conventional norms into the

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<sup>16</sup> *Tadic* Decision par.83.

<sup>17</sup> *ibid* par.126.

realms of custom, is rendered increasingly elusive, for it would appear that only the practice of non-parties to the treaty can be considered as relevant'.<sup>18</sup>

The initial distinction between the development of standards applicable to internal armed conflict, and the development of criminality for breaches of these standards is useful to discriminate what constitutes the main focus of this chapter. While there have been developments in the standards applicable to internal armed conflicts and in the criminalisation of the violation of some of these standards, it is only the latter which is of direct concern to this thesis. The development of criminality for breaches of these standards illustrates that previously these prohibitions at most entailed state responsibility. There is thus a difference between mere prohibitions and crimes.

The conceptual difference between mere prohibitions and crimes is that the latter entail the criminal responsibility of individuals responsible for their violation. For instance, grave breaches are specifically made criminal in the Geneva Conventions regime. Initially, violations of the law applicable to internal armed conflict, essentially common Article 3 and Additional Protocol II, did not entail individual criminal responsibility. Evidence for this fact is provided in statements made by the International Committee of the Red Cross (ICRC). Plattner, a member of the Legal Division of the ICRC wrote in 1990 that international humanitarian law 'applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty of violations'.<sup>19</sup> As early as 1993, the ICRC in its Preliminary Remarks on Setting up an International Tribunal for the former Yugoslavia underlined 'the fact that, according to humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflicts'.<sup>20</sup> As noted by the *Tadic* Decision, law today stands differently.

As to the actual significance of the criminalisation of violations of the law applicable to internal armed conflicts, perhaps one had better wait and see. They have been included as war crimes within the ICC Statute. Yet it will be indicative to look at actual prosecutions on these crimes, rather than just charges, in particular with respect to the ICTR. At present it is necessary to look

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<sup>18</sup> *Celebici* Judgement paras.302-303.

<sup>19</sup> n.13 in Ch.1, 414.

at the decision by the ICTY that confirms the development of criminalisation of offences in internal conflicts.

### 2.3 The *Tadic* Decision

The *Tadic* Decision was the first decision rendered by the Appeals Chamber of the ICTY. Of the three grounds of appeal, I am only interested in the ground concerning the Defence's contention that the Tribunal lacked subject-matter jurisdiction to hear the charges. I will be looking at this argument in particular with respect to violations of international humanitarian law committed in internal armed conflicts.

The first finding by the Appeals Chamber concerned the existence of an armed conflict in the territory of the former Yugoslavia at the time the alleged conduct took place.<sup>21</sup> The Appeals Chamber needed to ascertain the existence of an armed conflict as a requisite to apply the relevant Article.<sup>22</sup> Under the Statute of the ICTY, the existence of an armed conflict is a requisite for **Article 2** (grave breaches of the Geneva Conventions), **Article 3** (serious violations of the laws and customs of war) and **Article 5** (crimes against humanity).<sup>23</sup> It is not a requisite for a finding under **Article 4** (genocide), but at the moment of writing, the ICTY has not convicted any accused of this crime.<sup>24</sup>

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<sup>20</sup> Cited in the Separate Opinion of Judge Li on the *Tadic* Decision par.9

<sup>21</sup> The ICTY has coined a definition of armed conflict. 'An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'. *Tadic* Decision par.70. This definition has played a significant role; it encompasses both internal and international conflicts in one definition, so that the character of the conflict need not be determined to satisfy the preliminary condition of the existence of an armed conflict. This is important for **Articles 3** and **5**, which apply irrespective of the internal or international character of the conflict. To date the Tribunal has always found the existence of an armed conflict; it has not faced the issue of a minimum threshold. In relation to the situation in Kosovo before NATO intervened; the Prosecutor seems confident that she will be able to demonstrate at least an internal armed conflict, for she has charged Milosevic and associates with crimes against humanity and violations of the laws and customs of war. *The Prosecutor v Slodoban Milosevic, Milan Milutinovic, Nikola Sainovic, Dagoljub Ojdanic, Vljako Stojiljkovic*, Indictment, Case No IT-99-37 (22 May 1999).

<sup>22</sup> Articles of the ICTY and the ICTR Statute will appear in bold, but not Articles of the ICC Statute.

<sup>23</sup> This poses a limitation in relation to the definition of crimes against humanity in customary law. *Tadic* Decision par.141.

In finding that there was an armed conflict, the Appeals Chamber in *Tadic* did not decide on whether it was international or internal. However, it must at this point be understood that the reasoning of the Appeals Chamber was not inevitable, as it could from the start have treated the conflict as international. Many commentators believed from the outset that the conflict was international: 'the offences listed in **Articles 2 and 3** of the Yugoslavia Statute (...) indicate that the Security Council considered the armed conflict in Yugoslavia as international. The facts on the ground and the applicable rules of international law strongly support this conclusion.'<sup>25</sup> Yet the Appeals Chamber was reluctant to characterise the conflict as either internal or international, for the character of the hostilities was far from clear. 'One is tempted to cut the Gordian knot and simply argue that all the fighting that occurred in the territory of the former Yugoslavia between 1991 and 1995 was part of one large international armed conflict. It is difficult, however, to fit all the fighting into such a framework.'<sup>26</sup>

Judge Sidwha rightly considered that the character of the conflict 'was a mixed question of law and fact' to be determined in the conduct of proceedings.<sup>27</sup> Hence the Appeals Chamber left the character of the conflict to be decided at the trial stage on the basis of factual evidence. Of greater importance at present is the finding by the Appeals Chamber that for international humanitarian law to apply, 'it is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict'.<sup>28</sup> The conduct under consideration satisfied this requirement.<sup>29</sup>

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<sup>24</sup> See *Jelisić* Judgement.

<sup>25</sup> n.54 in Ch.1, 556. A similar view in G. H. Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia' (1996) 90 AJIL 64.

<sup>26</sup> W. J. Fenrick, 'The Application of the Geneva Conventions by the International Criminal Tribunal for the former Yugoslavia' (1999) no.834 IRRC (web version) 317.

<sup>27</sup> Separate Opinion of Judge Sidwha on the *Tadic* Decision par.121.

<sup>28</sup> *Tadic* Decision par.70.

<sup>29</sup> Unlike the ICTR, the ICTY has always found that the conduct satisfies the nexus to the armed conflict. The exception might be found in conduct that constitutes an ordinary crime. Prosecutor Carla del Ponte, when asked after the crimes committed against Serbs in Kosovo: 'we don't have jurisdiction, these are ordinary crimes. The limits of jurisdiction cannot be ignored'. *El Pais* (7 February 2000).

What did the *Tadic* Decision resolve exactly as to the object of this inquiry? The Appeals Chamber decided the following:

1. Serious violations of common Article 3 entail the individual criminal responsibility of the perpetrator in customary law. The same goes for other customary rules and principles on the protection of victims of internal armed conflict (par. 134). The ICTY has jurisdiction over these offences under **Article 3** (violations of the laws and customs of war) of the Statute (par. 89).
2. Breaches in internal conflict of some customary law principles and rules concerning the means and methods of combat entail individual criminal responsibility (par. 134) and come within the jurisdiction of the ICTY by virtue of **Article 3** of the Statute (par. 89).

How did the Appeals Chamber arrive at this conclusion? The answer lies in the finding by the Appeals Chamber concerning its jurisdiction under **Article 3**. Much turned on its reasoning to this effect and thus I will make a detailed analysis. The Chamber made two observations with respect to **Article 3**. 'A literal interpretation of **Article 3** shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in **Article 3** is merely illustrative, not exhaustive.'<sup>30</sup>

The first observation conveyed that **Article 3** is not merely an incorporation of the 1907 Regulations annexed to the IV Hague Convention on Land Warfare, and which apply to international conflicts.<sup>31</sup> It is broader in content. **Article 3** employs the expression 'laws and customs of war':

The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law

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<sup>30</sup> *Tadic* Decision par.87.

<sup>31</sup> Hague Convention Respecting the Laws and Customs of War on Land of 1907 (IV Hague Convention) and Annexed Regulations.

of armed conflict”, or the more recent and comprehensive notion of “international humanitarian law”.<sup>32</sup>

The Appeals Chamber found that the Secretary-General’s Report warranted this conclusion.<sup>33</sup> In addition, the Chamber went on to clarify that ‘the more recent and comprehensive’ notion of international humanitarian law ‘governs the conduct of both internal and international armed conflicts’.<sup>34</sup> Moreover, it argued that international humanitarian law covers both Hague and Geneva law.

The latter conclusion is confirmed by the second observation made by the Appeals Chamber in respect to the scope of **Article 3**. **Article 3** is not an exhaustive enumeration of crimes, but is merely illustrative; it ‘shall include, but shall not be limited to’ the enumerated offences. Thus though **Article 3** only expressly includes Hague law, because it is not exhaustive, the Chamber suggested ‘that **Article 3** is intended to cover both Geneva and Hague rules’.<sup>35</sup>

The final reasoning on the scope of **Article 3** results from the previous observations. Bearing in mind that the term ‘violations of the laws and customs of war’ refers to the broader notion of international humanitarian law, and taking into consideration that **Article 3** is not exhaustive, the Chamber concluded that the list in **Article 3** ‘may be construed to include other infringements of international humanitarian law’.<sup>36</sup> We shall see below what these infringements are, but given the all-embracing notion of international humanitarian law, they will include violations of the law applicable to internal and to international conflicts, and breaches of both Geneva and Hague law.

Yet the two observations on **Article 3** were not of themselves sufficient to arrive at the *ratio decidendi* described earlier. In order to reach this conclusion, the Appeals Chamber first employed a systematic interpretation of the Statute. Such interpretation emphasised ‘the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to “serious violations” of “international humanitarian law”’. It is therefore appropriate to take the expression “violations of the laws or customs of war” to

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<sup>32</sup> *Tadic* Decision par. 87.

<sup>33</sup> Report of the Secretary-General n.38 in Ch.1 par.41.

<sup>34</sup> *Tadic* Decision par.67.

<sup>35</sup> *ibid* par.87.

cover serious violations of international humanitarian law'.<sup>37</sup> Secondly, it adopted a teleological approach to the Statute; it found that 'the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia'.<sup>38</sup> Taking this to be the Security Council's aim, 'if correctly interpreted, **Article 3** fully realises the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed'. The systematic and the teleological interpretation of the Statute further sustained the Chamber's view of **Article 3** 'as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal'.<sup>39</sup>

The sole limitation as to the otherwise very broad scope of **Article 3** is that violations contained therein must not already be covered by other Articles of the Statute. Hence violations of **Article 3** must not already be covered by the provisions on grave breaches, crimes against humanity and genocide.<sup>40</sup> Thus the Chamber reasoned that **Article 3** included: i) violations to the Hague Conventions in international conflicts, ii) infringements of non- grave breaches provisions of the Geneva Conventions, iii) violations of common Article 3 and other customary rules on internal conflicts and iv) violations of agreements between parties to the conflict considered qua treaty law.<sup>41</sup>

The residual character of **Article 3**, and the ability of the Tribunal to exercise jurisdiction over a broad range of offences by virtue of it, has since been confirmed by decisions of the Trial Chambers. This is not surprising inasmuch as the Trial Chambers are bound by decisions from the Appeals Chamber. Of particular interest on the other hand is the Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction in the *Kordic and Cerce* case, for even though it confirms the nature of **Article 3** as a residual clause, it adopts a slightly different approach.<sup>42</sup> The Trial Chamber in this case

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<sup>36</sup> *ibid* par.87.

<sup>37</sup> *ibid* par.90.

<sup>38</sup> *ibid* par.72.

<sup>39</sup> *ibid* par.91.

<sup>40</sup> *ibid* par.89.

<sup>41</sup> *ibid* par.89.

<sup>42</sup> *Kordic and Cerce* Decision par.22.

was of the opinion that violations of the laws and customs of war constitute war crimes. 'Violations of the laws or customs of war encompass what is called "war crimes" in contemporary customary law. It follows that the term "Violations of the laws or customs of war" cannot be limited to "Hague Law". It is encompassed in the larger "generic" term of "war crimes".<sup>43</sup>

In determining that violations of the laws and customs of war are war crimes, the *Kordic and Cerceez* Decision took the further step that the *Tadic* Decision did not, though it was the logical conclusion to be inferred from the reasoning in the *Tadic* Decision. If 'laws and customs of war' is the traditional term for international humanitarian law, then violations of laws and customs of war are violations of international humanitarian law; the latter are known as 'war crimes'.<sup>44</sup> The reason the *Tadic* Decision did not take this step is that the Statute of the Tribunal does not at any point mention war crimes. Yet Article 85 of Additional Protocol I explicitly makes the connection between grave breaches of the Geneva Conventions and war crimes. However, the *Tadic* Decision does not mention Additional Protocol I. On the other hand, it is not until Article 8 of the Statute of the ICC that the term 'war crimes' is used with reference to violations of international humanitarian law.

Notwithstanding its character as a residual clause, the Appeals Chamber in the *Tadic* Decision posed the conditions that must be met for a violation to be subject to Article 3.<sup>45</sup> They are the following four conditions:

1. the violation must constitute an infringement of a rule of international humanitarian law
2. the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met
3. the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim
4. The violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

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<sup>43</sup> *ibid* par.22.

<sup>44</sup> *ibid* par.22.

The Tribunal further decided that 'it follows that it does not matter whether the 'serious violation' has occurred within the context of an international or an internal armed conflict as long as these requirements are met'.

However this reasoning is not entirely satisfactory for two reasons. First, there is a strong suspicion of circular reasoning. Secondly, it seems to take away the requisite for **Article 3** of determining whether the conflict in question is an internal or an international conflict. This will not be the case if the required conditions mentioned in (ii) are the existence of an international conflict, or the existence of an internal conflict. I will indicate in the following chapters how common **Article 3** has been interpreted by the Tribunal to apply irrespective of the character of the conflict. I will also mention that, when rooting charges in mirror provisions of the Additional Protocols (as subsequently understood to come under **Article 3**) determining the character of the conflict will mean that one applies, but not the other. So whilst on the face of it the Chamber is suggesting that, in respect to **Article 3**, the substantive laws that apply to both internal and to international conflict are the same, this has to be understood in the context of the Statute as a whole; international conflicts will be dealt with under **Article 2**, the grave breaches provision. There is also a need to bear in mind the two limitations mentioned earlier in relation to the application to internal conflicts of standards applicable to international conflicts.

Of the four conditions to be met, two involve questions of fact and must be resolved at the trial stage. These are the requisites that the violation must be of a rule of international humanitarian law rule and that the violation has to be serious. The former requisite derives from **Article 1** of the Statute, which sets out the jurisdiction (temporal, geographical and material) of the ICTY. The latter is a problematic requisite, for determining what constitutes a 'serious' violation is bound to face questions of legal certainty.

An example will illustrate how the requisite of a 'serious violation' works in practice. In the *Celebici* case, the accused were charged with plunder, a violation of the laws and customs of war under **Article 3(e)** of the Statute, for the appropriation of money and other valuables belonging to detainees. The Trial Chamber decided that the conduct in question constituted plunder, which was

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<sup>45</sup> *Tadic* Decision par.94.

an offence under the jurisdiction of the Tribunal by virtue of **Article 3**. Yet the alleged conduct did not satisfy the 'serious violation' requisite of **Article 1**. The *Tadic* Decision sets out the test that needs to be satisfied for a violation to be serious.<sup>46</sup> The *Celebici* Judgement followed this test: for a violation to be serious it has to 1. breach a rule that protects important values and 2. have grave consequences for the victims. The Chamber decided that the conduct in question satisfied the first condition but not the second one.<sup>47</sup> It is interesting to compare this to the *Kunarac* Decision where the conduct was also charged as plunder by the Prosecutor, but was considered an ordinary crime by the Chamber.<sup>48</sup> The importance (and the difficulty) of distinguishing war crimes from ordinary crimes has already been mentioned. Yet both the *Celebici* Judgement and the *Kunarac* Decision arrived at the same conclusion: that the conduct in question did not fall within the jurisdiction of the Tribunal (in the first case because it was not a serious violation, although it constituted the war crime of plunder, in the second case because it was an ordinary crime, not a war crime). The different outcome can be justified in that the charge of plunder in the *Kunarac* Decision concerned a single instance, whilst the conduct in the *Celebici* case was a recurrent practice.

The other two requirements for a violation to be subject to **Article 3**, however, can be used in general to find out which violations of international humanitarian law applicable to internal armed conflict have been criminalised in customary law. Carrying out a test on the basis of these two requirements has become subsequently known as the *Tadic* test. It is significant that the ICTR used this test in its first contentious case to find out whether the offences contained in **Article 4** of its Statute satisfied the principle of legality or whether they actually constituted retrospective application of criminal law.<sup>49</sup> This test was also applied by the Chamber in the *Kordic and Cerceez* Decision, when the Chamber found 'that the relevant main issue as to the scope of **Article 3** of the Statute at this stage, is, as stated in the Appeals Chamber Decision on Jurisdiction, whether the relevant norms are customary in nature, and whether they entail individual criminal responsibility'.<sup>50</sup>

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<sup>46</sup> *ibid* par.94.

<sup>47</sup> *Celebici* Judgement par.1154.

<sup>48</sup> 'It is inappropriate to include within that term (plunder) a theft from only one person or from only a few persons in the one building'. *Kunarac* Decision par.16.

<sup>49</sup> The *Akayeshu* Judgement is discussed in section 3.3.

<sup>50</sup> *Kordic and Cerceez* Decision par.17.

In the *Tadic* Decision, the Appeals Chamber exposed common Article 3 to this test. It also looked at whether principles on the limitation of means and method of warfare applicable to internal conflicts satisfied this test too. The obstacles for these were different than those for common Article 3. The main difficulty concerning common Article 3 was whether it entailed individual criminal responsibility for breaches of its provisions, whilst the hurdle on rules of means and methods of warfare was proving that these (which apply by treaty and by custom to international conflicts) had been extended through customary law to cover internal conflicts. Yet the Chamber found that both categories of offences satisfied the successive tests and were thus subject to **Article 3**.

The difficulty with the *Tadic* test resides in the relationship between customary law and the principle of legality, which encompasses a possible defence of mistake of law. Though in this connection there is a need to take into account that the *Tadic* Decision did not explore the full range of **Article 3** of the Statute, but rather the Appeals Chamber confined itself to findings on the **Article 3** charges against Tadic. Even so, the first objection to be poised to the reasoning in the *Tadic* Decision is its consequences for the principle of legality. Though it is an impeccable exercise in legal reasoning, the *Tadic* test may not have much to commend it for legal certainty.

The tension between the principle of legality and customary law is further exacerbated in the Judgement by the 'factors relevant to deciding that authors of particular prohibitions incur individual responsibility'.<sup>51</sup> These are 1) the clear and unequivocal recognition of the rule of warfare in international law and 2) state practice indicating an **intention** to criminalise the prohibition.<sup>52</sup> It then goes on to find evidence for this intention in statements of government officials and punishment of violations by national courts and military tribunals. Thus, in striving to discover the present state of customary law, the Appeals Chamber emphasised the *opinio juris* rather than relying on state practice. The argument that the Appeals Chamber violated the principle of legality by relying overtly on *opinio juris* has already been raised by the Defence in another case.<sup>53</sup>

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<sup>51</sup> *Tadic* Decision par.128.

<sup>52</sup> My emphasis.

Though the Statute was drafted by the Secretary-General, it was adopted by the Security Council. Statements were made in the Security Council as to its precise interpretation. Much turned on the statement interpreting **Article 3** made by Madeleine Albright in the Security Council and the fact that other states did not oppose it. They did not affirm it either; another objection to the reasoning in the *Tadic* Decision is that if in effect the Appeals Chamber interpretation of **Article 3** is what states meant, then why did they not make this meaning appear explicitly in the Statute. 'By nominating the offences which do fall within the authority of the tribunals, the members of the Security Council provide evidence of what they conceive to be the present state of international criminal law'.<sup>54</sup> In addition relying too much on statements, even if they are statements in the Security Council, highlights again the objection to over reliance on *opinio juris* to the detriment of actual state practice.

The tension between customary law and the principle of legality, and the uncertainty derived from relying too on *opinio juris* for evidence of the state of the law must not take our eyes off the ball, though. The main issue is whether the Appeals Chamber in this judgement decided 'to the extent possible under existing international law'.<sup>55</sup> It is difficult to say.<sup>56</sup> To reinforce its case against any possible claim of retrospective application of the law, the Chamber decided that requirements of 'substantive justice and equity' were satisfied because the crimes contained in the Statute also appeared in the Criminal Code of the SFRY and of Bosnia- Herzegovina.<sup>57</sup> Justice was thus being rendered to the individual defendant, who as a national was aware, or should have been aware, that he was amenable to the jurisdiction of the national criminal courts for these violations.<sup>58</sup> Another device to reinforce the case against retrospectivity was offered by the Chamber under the guise of the agreements between the parties to apply international humanitarian law to the conflict. This might have been enough to answer an argument on retrospective application of the law, yet both the *Tadic* Decision and the *Akayeshu* Judgement felt compelled to look at the

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<sup>53</sup> *Kordic and Cerceez* Decision, par.7.

<sup>54</sup> n.15, 468.

<sup>55</sup> *Tadic* Decision par.77.

<sup>56</sup> The Defence in the *Kordic and Cerceez* case maintained that 'the conclusion of the Appeals Chamber as to the residual character of **Article 3**, and its broad interpretation of the scope of **Article 3**, based on its interpretation of the term "international humanitarian law", is in violation of the principle of legality'. *Kordic and Cerceez* Decision par.7.

<sup>57</sup> *Tadic* Decision par.135.

customary nature of these provisions of international humanitarian law, and at whether their breach entailed criminal responsibility.

Hence, notwithstanding the existence of national criminal law and agreements between the warring parties, the Appeals Chamber was intent on clarifying the state of customary law, and applying it. Total reliance on customary law is a direct consequence of the Report of the Secretary-General and the decisions by the Security Council. The Secretary-General justified reliance on customary law in the need to bind all parties, some of whom might not be parties to the relevant agreements.<sup>58</sup> Yet why did the Security Council choose to rely on law that was beyond any doubt customary at the time? This is an important question.

Because the Security Council made it clear that it wanted to set up a Court. This decision was no more or less political than any other decision taken by the Security Council under Chapter VII. But once it took the decision, if it wanted to establish a court to try criminal charges, there were some criteria that had to be met. The requirements make up the core of what it constitutes an independent court. Some of these requirements are objective, such as the need for independent judges. Other requirements concern the substantive law to be applied; the Court may try only offences that were established in law at the time they were committed. For the requirement of defined crimes it decided to employ existing ones in customary law. The Security Council was prompted by the wish to avoid been seen as legislating. If it hadn't complied with requirements such as pre-existing law or independent judges, it would not have been creating a court. Though as will be noted in the next chapter, the Statutes are not conclusive, for the Tribunals still have to determine that the provisions contained therein satisfy the principle of legality.

If the Appeals Chamber was bound to apply existing law that was undoubtedly part of customary law, then a more rationalised interpretation of the Statute could have prevailed. After all, most of the legal consequences in *Tadic* stem from a premise that is open to question: that **Article 3** of the ICTY Statute covers all serious violations of international humanitarian law not already covered by the other articles. '**Article 3** may be taken to cover all violations of

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<sup>58</sup> *ibid* par.135.

<sup>59</sup> Report of the Secretary-General n.38 in Ch.1 par.34.

international humanitarian law other than the “grave breaches” of the four Geneva Conventions falling under **Article 2** (or, for that matter, the violations covered by **Articles 4** and **5**, to the extent that **Articles 3, 4** and **5** overlap).<sup>60</sup> The Chamber itself admitted that stemming from this interpretation **Article 3** of the Statute would cover most of the conduct that the Tribunal would have to adjudicate on.<sup>61</sup>

The alternative interpretation would have kept **Articles 2** and **3** applicable only to international conflicts, whilst **Article 5** on crimes against humanity would deal also with internal armed conflicts, and **Article 4** with situations in international armed conflict, internal armed conflict and peacetime. This interpretation was put forward by the Defence in the *Kordic and Cerceez* Decision.<sup>62</sup> The Defence attacked the residual clause character of **Article 3**. ‘The Security Council did not intend to criminalise through **Article 3** of the statute all violations of international humanitarian law not covered by other subject-matter Articles of the statute’.<sup>63</sup> If it had, it would have said so. ‘**Article 3** is based on “Hague law” and does not mention the type of conflict it is applicable to: if the intention of the drafters of the Statute was to render it applicable also to internal armed conflicts, it would have been specifically mentioned, since “Hague law” is traditionally only applicable to international conflicts’.<sup>64</sup> The Defence was challenging the application of **Article 3** to internal conflicts.<sup>65</sup> The Defence arguments were dismissed by the Chamber.

The main consequence of the *Tadic* Decision is the confirmation that offences committed in internal conflicts are criminal in international law. Though the previous alternative interpretation of the Statute has a number of advantages, it is also ‘reasonable to presume that these courts will endeavour to find legally acceptable means to apply similar rules to similar conduct’.<sup>66</sup> Tribunals will want to apply similar law to similar offence regardless of the context in which they were committed. The underlying logic, is the following: ‘there is no moral justification, and no truly persuasive legal reason, for treating perpetrators of

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<sup>60</sup> *Tadic* Decision par.87.

<sup>61</sup> n.10 in Ch.1, 259.

<sup>62</sup> *Kordic and Cerceez* Decision par.1.

<sup>63</sup> *ibid* par.7.

<sup>64</sup> *ibid* par.7.

<sup>65</sup> *ibid* par.1.

<sup>66</sup> n.26.

atrocities in internal conflicts more leniently than those engaged in international wars'.<sup>67</sup> Notwithstanding this, as will be noted below, far from annulling the distinction between internal and international conflicts, the *Tadic* Decision confirmed the character of the conflict as an element of the crimes.

Though similar rules should apply to similar conduct, it will still be necessary to go through conflict classification, at least when charges on grave breaches are put forward. There seem to be few ways of avoiding characterising the conflict as internal or international in every individual case unless the Chamber had decided from the start that it was an international conflict.<sup>68</sup> The issue of the character of the conflict was not as crucial to the case in *Tadic* because the Prosecutor had placed the charges in the alternative. In the present state of affairs, it remains a mixed question of law and fact that will have to be evaluated at every instance it comes up. Thus, the practice of putting charges in the alternative will all but cease.

A further consequence of the *Tadic* Decision has been a measure of legal uncertainty: there have been a considerable number of Defence Motions as regards subject-matter jurisdiction under **Article 3**. The full scope of **Article 3** has not been decided authoritatively. In addition, the only limitation that violations have to be 'serious' seems unsatisfactory.

Finally, a possible conclusion based on the preceding analysis is that the decision in *Tadic* can be regarded as an instance of 'progressive development of the law rather than of crystallisation of the law'.<sup>69</sup> Rather the case seems to have been one of extracting the maximum reach from the Statute in order to ascertain jurisdiction. For, if one were to accept that violations of international humanitarian law in internal conflicts have been criminalised, and bearing in mind the alternative interpretation suggested above, the question remains whether these offences come under the jurisdiction of the Tribunal at all. In addition, the Appeals Chamber was deciding more than the case at hand. The Appeals Chamber's interpretation of **Article 3** bound the Tribunal.<sup>70</sup> This

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<sup>67</sup> n.54 in Ch.1, 561.

<sup>68</sup> Unless it had decided that grave breaches apply to internal conflicts. Section 3.2.

<sup>69</sup> n.10 in Ch.1, 260.

<sup>70</sup> *Kordic and Cerkez* Decision, par.12.

application of judicial method to claim jurisdiction over offences remains a possibility when you create an independent body.

## PART TWO: THE CONSEQUENCES OF THE PROCESS

### Chapter 3: Consequences for the Substantive Law Applicable by the International Tribunals (I)

#### 3.1 Introduction to Part Two

It has been illustrated in the previous chapter how the Appeals Chamber in the *Tadic* Decision dispelled some of the doubt surrounding the criminalisation in customary law of violations of international humanitarian law in internal conflicts. Yet the pervasive influence of the Decision did not stop at this; the Appeals Chamber might not have anticipated some of the consequences of the *Tadic* Decision. This Part will illustrate the implications of the *Tadic* Decision for the law of war crimes. It will do so by looking at the consequences for the substantive law of war crimes, and at the consequences for determining the culpability of an accused of war crimes. In this manner it will attempt to elucidate at least part of the legal regime of war crimes. Chapters 3 and 4 of this Part intend to demonstrate the consequences of the *Tadic* Decision for the application by the ICTY and ICTR of the substantive law contained in their Statutes, as well as the consequences for the substantive law within the subject-matter jurisdiction of the Statute of the ICC.

The *Tadic* Decision established how the ICTY was to understand the offences within its subject-matter jurisdiction (except for **Article 4**). I will be looking in particular at how, by rejecting the notion that grave breaches of the Geneva Conventions were applicable to internal conflicts, and by the Appeals Chamber's refusal to characterise the conflict as either internal or international, the Tribunal found itself in the need to engage in conflict classification at every instance that grave breaches were charged. In addition, the consequences for the substantive law within the jurisdiction of the ICTY of the *Tadic* Decision encompassed the notion of violations of the laws and customs of war. The result of the *Tadic* Decision's interpretation of **Article 3** as a residual clause applicable to internal and international conflicts was that the Office of the Prosecutor sought to utilise this Article as a means to avoid engaging in conflict

classification. The strategies it adopted towards this end will be illustrated in the next Chapter.

Moreover, the consequences of the *Tadic* Decision did not exhaust themselves in the practice of the ICTY, but affected the way the ICTR understood its own jurisdiction. To illustrate this premise, the treatment by the ICTR of violations of common Article 3 and Additional Protocol II will be analysed below. In most of the cases the ICTR felt compelled to apply the *Tadic* test to these offences, in particular to Protocol II.

Finally, the influence of the *Tadic* Decision regarding the criminality of violations of international humanitarian law committed in internal conflicts was felt when devising up the subject-matter jurisdiction of the ICC. Article 8 on "War Crimes" could represent the final confirmation of the process that crystallised in the *Tadic* Decision, as explained in the next chapter. Thus, not only the concentration of diplomatic effort, but also the existence of international jurisprudence confirming their criminality under international law, encouraged the inclusion of violations of international humanitarian law committed in internal conflicts within the jurisdiction of the ICC.

### 3.2 Grave breaches of the Geneva Conventions

The ambit of application of grave breaches is confined to international armed conflicts whilst the major emphasis of this thesis is on offences committed in internal conflicts. However it is important to analyse the treatment of grave breaches in the *Tadic* Decision. First, it is important to understand why the Appeals Chamber rejected the suggestion that grave breaches ought to be applied to internal conflicts. The notion of protected persons played a significant part in this decision. The direct consequence of this decision was that, in determining that grave breaches were the stuff of international conflicts, the Appeals Chamber instituted the trend whereupon every time that grave breaches were charged, the character of the conflict in the particular case had to be determined. Hence the character (internal or international) of the conflict remained an element of the crime.

Second, it is necessary to analyse how the *Tadic* Decision treated non- grave breaches, so as to determine whether they constitute a basis for trying offences in internal conflicts, and if they are within the jurisdiction of the Tribunal. No less important is to have regard for what the *Tadic* Decision did not take into consideration as a basis for the prosecution of offenders; I am referring to Additional Protocol I.

#### A) Grave breaches

The Appeals Chamber departed from the decision under appeal on the issue of the ambit of application of grave breaches.<sup>1</sup> The Appeals Chamber decided that grave breaches were only applicable to offences committed during international conflicts despite admitting being faced with substantial indications to the contrary. Also despite acknowledging that its decision might constitute an anachronism for it perpetuated the 'two- box' approach to international humanitarian law.<sup>2</sup>

Amongst these indications was Judge Abi Saab's Separate Opinion, which supported the applicability of grave breaches to offences committed in internal conflicts and is analysed below. In addition and at a later date, the Trial Chamber in the *Celebici* Judgement expressed its support for the opinion that grave breaches are applicable in internal conflicts.<sup>3</sup> However, once it reached the conclusion as to the existence of an international conflict, the Chamber in *Celebici* made 'no finding on the question of whether **Article 2** of the Statute can only be applied in a situation of international armed conflict, or whether this provision is also applicable in internal armed conflicts'.<sup>4</sup> Yet it is interesting to note that Judge Abi Saab and *Celebici* agreed on the applicability of grave breaches to internal conflicts, and coincided in the manner that this ought to be done: under **Article 2**. Abi Saab considered the "division of labour" between the two Articles of the Statute in the Decision rather artificial. 'Instead of reaching, as the Decision does, for the acts expressly mentioned in **Article 2** via **Article 3** when they are committed in the course of an internal armed conflict (...) a strong

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<sup>1</sup> The decision under appeal was the *Tadic* Decision on Jurisdiction (Trial Chamber).

<sup>2</sup> *Tadic* Decision par.83.

<sup>3</sup> *Celebici* Judgement par.202.

<sup>4</sup> *ibid* par.235.

case can be made for the application of **Article 2**, even when the incriminated act takes place in an internal conflict.<sup>5</sup>

The most compelling arguments supporting the extension of grave breaches to violations in internal conflict were found in the Decision under Appeal. In order to understand the Trial Chamber's conclusion it is essential to have regard for the distinction between grave breaches as the description of the conduct that is criminal, and grave breaches as the regime that states assume to prevent and punish the aforesaid criminal conduct. It is necessary to keep these two meanings of grave breaches separate and to appreciate that the Tribunal is only interested in the description of criminal conduct.

The Trial Chamber decided that grave breaches were applicable to international and to internal conflicts. In addressing **Article 2** of the Statute the Trial Chamber arrived at the conclusion that, notwithstanding the term 'grave breaches of the Geneva Conventions', the Article was self-contained rather than referential, with the exception of reference to protected persons; the latter had to be sought in the Geneva Conventions. It argued that 'the requirement of international conflict does not appear on the face of **Article 2**. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of **Article 1** are met'.<sup>6</sup> Yet the Trial Chamber's conclusion on the self-contained nature of **Article 2** stemmed from its understanding of the law that the Tribunal was entitled to apply; it rightly believed it was empowered to apply customary law.<sup>7</sup> Like Judge Abi Saab, it understood that the core of grave breaches, the description of the criminal conduct, was under customary law also applicable to internal conflicts.

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<sup>5</sup> Separate Opinion of Judge Abi Saab on the *Tadic* Decision. Yet *Celebici* went a step further and also suggested that violations of CA3 ought to be included under **Article 2**. *Celebici* Judgement par.317. This constituted a different assertion altogether, for it meant applying a non-grave breach –CA3– under **Article 2**. Though this conclusion may seem perplexing, the correct interpretation is that the Chamber in *Celebici* was prepared to apply grave breaches to internal conflicts **and** to include CA3 under **Article 2**. It is a significant assertion in that it points at a degree of arbitrariness when ascribing offences to particular Articles in the Statute.

<sup>6</sup> *Tadic* Decision on Jurisdiction (Trial Chamber) par.50.

<sup>7</sup> *ibid* par.52.

At present it is necessary to determine to what extent the Appeals Chamber corrected the Trial Chamber's approach to **Article 2**. There is a good case for maintaining that the Appeals Chamber too admitted the customary character of grave breaches.<sup>8</sup> It explained that grave breaches constitute a specific regime of the Geneva Conventions, applicable **expressly** only to international conflicts and carrying a detailed enforcement regime. Unlike the Trial Chamber, the Appeals Chamber considered that **Article 2** imported from the definition of grave breaches in the Geneva Conventions the requisite of the existence of an international armed conflict. In turn, reference in the Geneva Conventions to international conflicts imported the concept of 'protected persons' with the offences. It is possible to talk in terms of a 'general *renvoi*' to the Geneva Conventions. That the Statute imported these two elements together is coherent because the category of protected persons makes little sense for internal conflicts. I will explain below the full reasoning behind the Appeals Chamber's contention that grave breaches were only applicable to international conflicts. The Chamber also decided that grave breaches could only be found in **Article 2**. For the moment it is sufficient to note that the application of **Article 2** comprised two conditions: the existence of an international conflict and the character of the victims as protected persons within the terms of the Conventions.<sup>9</sup> It is significant that the Appeals Chamber dismissed the notion that grave breaches could be applied to internal conflicts before going on to decide what was the content of the subject-matter jurisdiction of the Tribunal under **Article 3** of the Statute.<sup>10</sup>

#### B) Protected persons

Though the Trial Chamber's approach was subsequently corrected by the Appeals Chamber, it remains somewhat perplexing that the former supported the application of grave breaches to internal conflicts, notwithstanding admitting that victims of grave breaches had to possess the character of protected persons under the terms of the Convention.<sup>11</sup> Crucially, though, the Trial Chamber avoided elaborating further: 'in the present case it is not contended that the alleged victims in the several charges were not protected persons; in any event

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<sup>8</sup> Implicit in the *Tadic* Decision paras.77- 85.

<sup>9</sup> The status of the victims as protected persons is therefore also an element of the offence for grave breaches. n.1 in Ch.5.

<sup>10</sup> *Tadic* Decision par.81.

<sup>11</sup> It was all the 'more surprising, since the Prosecutor had not advanced such an argument'. n.42 in Ch.1, 268.

that will be a matter for evidence in due course'.<sup>12</sup> It remains to be seen how it would in practice have reconciled the two propositions: that grave breaches can be applied to internal conflicts, yet face the requirement that they must be committed against protected persons. For 'the Conventions link the concept of grave breaches to that of protected persons, a concept which they define in such a way that it can exist only in an international armed conflict'.<sup>13</sup>

The given wisdom is that grave breaches represent an instrument of little use for internal conflicts precisely because of the requirement that they have to be committed against protected persons. The conditions that protected persons have to satisfy under the First, Second and Third Geneva Conventions make grave breaches of these Conventions inapplicable to internal conflicts. For example, as regards the Third Geneva Convention, 'for internal conflicts, as the concept of prisoner of war has no legal significance, the victim groups are "persons taking no active part in the hostilities, including member of the armed forces who have laid down their arms and those placed hors de combat" and "all persons who do not take a direct part or who have ceased to take part in hostilities".<sup>14</sup> The requirements in the First, Second and Third Geneva Conventions assume the existence of regular armed forces, with open arm-bearing, and a discernible chain of command; thus practically ruling out the possibility that grave breaches could be applied to internal conflicts.<sup>15</sup> In practice rebels fighting governmental forces (or each other) cannot comply with these requirements and to an extent, might not want to. However, it is necessary to point out that the cases so far before the ICTY have dealt with violence against civilians, in one form or another (some under Hague law provisions –means and methods of warfare).<sup>16</sup> That terrorising civilians has become a novel method of warfare underscores the overlap between war crimes and crimes against humanity found in armed conflicts such as the conflict in the former Yugoslavia. The Fourth Geneva Convention has been the most invoked

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<sup>12</sup> *Tadic* Decision on Jurisdiction (Trial Chamber) par.49.

<sup>13</sup> C. Greenwood, 'The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia' (1998) 2 *Max Planck Yearbook of United Nations Law* 97, 113.

<sup>14</sup> Text of CA3 and Article 4 of APII respectively. n.8 in Ch. 2, 772.

<sup>15</sup> Eg Article 4(A) of the Third Geneva Convention.

<sup>16</sup> In the *Blaskic* case the Prosecution contended that it had brought some charges of using POWs as human shields. The Chamber rejected this because the Indictment only contained charges against civilians. *Blaskic* Judgement par.147.

so far in proceedings before the ICTY; for this reason, particular attention will be paid to the notion of protected persons found in the Fourth Geneva Convention.

Under the Fourth Geneva Convention relative to the protection of civilian persons in time of war, protected persons are those civilians who find themselves in the hands of a Party to the conflict of which they are not nationals (Article 4). The nationality requirement in practice annuls any possibility of applying grave breaches to internal conflicts; internal conflicts take place within the boundaries of a single state, hence civilians share the same nationality as those in whose hands they find themselves. An example will illustrate the difficulties encountered in the application of grave breaches of the Fourth Geneva Convention.

The Trial Chamber in the *Tadic* Judgement (Trial on Merits) held that Bosnian Muslims were not protected persons within the terms of the Fourth Geneva Convention because they shared the nationality of the Bosnian Serbs, in whose hands they found themselves. Thus, of the two conditions for the application of grave breaches mentioned earlier, (that there was an international conflict, and that the breaches were committed against persons protected by the Conventions), the Chamber decided that the case in point failed to satisfy the second.<sup>17</sup> Grave breaches were considered inapplicable. The conclusion was the target of much criticism and of a particularly strong dissent from the Presiding Judge, Judge McDonald.<sup>18</sup> It has subsequently been corrected by the *Tadic* Judgement (Appeal on Merits).

To an extent the Appeals Chamber itself had prompted this unsatisfactory result in the *Tadic* Decision, where it made some unwarranted assertions as to the character of protected persons of Bosnian Serbs.<sup>19</sup> It commented that Bosnian Serbs who found themselves in the hands of the Bosnian Government forces would not be protected persons because the two shared the same nationality. Yet the case in *Celebici* dealt precisely with this scenario. The accused were members of the Bosnian Government's armed forces who mistreated Bosnian Serbs in a detention camp.

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<sup>17</sup> And did not go on to rule whether it satisfied the requirement of an international conflict. *Tadic* Judgement (Trial on Merits) par.569, 605-607.

<sup>18</sup> Separate and Dissenting Opinion of Judge McDonald on the *Tadic* Judgement (Trial on Merits) paras.5-34.

The Chamber in the *Celebici* Judgement affirmed from the start the international character of the conflict, hence satisfying one of the requisites for the application of grave breaches. Faced with the question as to whether the victims were protected persons under the Fourth Geneva Convention, the Chamber adopted a more progressive view than the Trial Chamber in the *Tadic* Judgement (Trial Chamber) had done. The *Celebici* Judgement estimated that the strict determination of nationality was misleading in certain types of modern conflicts; there was need for a more flexible approach to the nationality of the victims. To support this view in law, the Chamber cited the developing *opinio juris* in favour of the right of individuals to have the nationality of their choosing in the case of 'State succession'. In particular it looked at the *Badinter* Commission that had been dealing with the question of nationality to the successor states of the SFRY.<sup>20</sup> It arrived at the conclusion that this option was not yet established in international law. The Chamber chose to maintain the customary character of the effective link doctrine as found in the *Nottebohn* case.<sup>21</sup> *Celebici* thus established that in complex conflicts determining nationality was not straightforward. It concluded that the victims 'must be considered to have been 'protected persons' within the meaning of the Fourth Geneva Convention, as they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict'.<sup>22</sup>

In the *Celebici* Judgement, therefore, the two requirements for the application of grave breaches were met.<sup>23</sup> *Celebici* might not have been the most indicative case since it was controversial and is currently under appeal.<sup>24</sup> Still it adopted a progressive approach to the nationality requirement under the Fourth Geneva Convention and was in this connection followed by the *Tadic* Judgement (Appeal on Merits) and *Blaskic* Judgement.<sup>25</sup> These Judgements adopted the suggestion that in complex conflicts determining nationality was not straightforward, and both sought to find better indicators than nationality; they

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<sup>19</sup> See *Tadic* Decision par.76

<sup>20</sup> *Celebici* Judgement par.256.

<sup>21</sup> *ibid* par.257.

<sup>22</sup> *ibid* par.265.

<sup>23</sup> The question remains as to the relationship between the two requirements, ie whether the finding that there was an international armed conflict prompts the conclusion that the civilian victims are protected persons or vice versa -or even whether they are two different findings. The question was identified in *Celebici* Judgement paras.210, 245.

<sup>24</sup> IWPR, Tribunal Update: Last Week in The Hague no.179 (5-10 June 2000).

opted for ethnicity. Adopting ethnicity to determine the protected status of the victims may have proved useful for the case at hand, in the particular context of the conflict in the former Yugoslavia. However the Tribunal could be deciding more than the case in point, and ethnicity might not be relevant in other conflicts. Nevertheless, the question is: what conclusions can be drawn from the more lenient approach to determining whether the victims were protected civilians?

If the application of grave breaches to internal conflict faced the obstacle of protected persons for civilian victims, this has been the case too for some international conflicts (*Celebici* Judgement). The first conclusion to be drawn is that an instrument such as the Fourth Geneva Convention, devised to cope with strictly international conflicts (except for common Article 3), might not prove useful when dealing with complex conflicts unless there is a receptive judiciary ready to interpret it in a way that will fit modern conflicts. In the language employed by the Tribunal it is possible to identify a trend whereupon the worst consequences of a literal reading of the instruments are avoided by an approach based on a teleological interpretation.

Secondly, the Fourth Geneva Convention can be interpreted alternatively in order not to render absurd results in modern conflicts. In light of this development, the contention that grave breaches can only be applied to international conflicts because of the nationality requirement for the determination of protected civilians needs to be evaluated afresh. There is no apparent reason why the same accommodation could not be effected so that grave breaches would apply to civilians sharing the same nationality in an internal, rather than an international, conflict. 'The Tribunal's enlightened vision of such customary law as is pertinent to both international and noninternational armed conflicts certainly could have encompassed grave breaches of the Geneva Conventions'.<sup>26</sup>

Judge Abi Saab's Separate Opinion becomes relevant at this point. Judge Abi Saab introduced additional arguments for the application of grave breaches to offences in internal conflicts. He agreed with the Chamber that Hague Law had experienced a customary development in order to encompass violations

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<sup>25</sup> *Tadic* Judgement (Appeal on Merits) par.166 and *Blaskic* Judgement par.124.

<sup>26</sup> T. Meron, 'Classification of Armed Conflict in the former Yugoslavia: Nicaragua's

committed in internal conflicts but argued that Geneva Law had not been indifferent to a similar customary development. He thus argued that grave breaches of the Geneva Conventions were to be applied also to internal conflicts and indicated two ways in which customary law could have effected this change to grave breaches. 'As a result of the "subsequent practice" and *opinio juris* of the States parties: a teleological interpretation of the Conventions in the light of their object and purpose to the effect of including internal conflicts within the regime of "grave breaches". The other possibility consisted of 'a new customary rule ancillary to the Conventions, whereby the regime of "grave breaches" is extended to internal conflicts'.<sup>27</sup>

In my view, the importance of Abi Saab's opinion resides in that it placed the right emphasis; if the definition of grave breaches has been transformed to include violations occurring in internal conflicts, then this had come about, necessarily, by means of customary law. His argument is not only logically feasible, but it is also in accordance with the reasoning in the *Tadic* Decision with respect to **Article 3**. The *Tadic* Decision asserted amongst other things the extension to internal conflicts of Hague law rules and the criminality for their infringement. It did so by relying on a teleological interpretation of the Statute, and by determining that the words of the Statute were neither conclusive nor determinative. It is not farfetched to maintain that the Appeals Chamber could have concurred with the Trial Chamber and with Judge Abi Saab concerning grave breaches. In light of the reasoning in the *Tadic* Decision, it could have concluded that the core of the grave breaches (the description of the criminal conduct) had been extended to cover internal conflicts, whilst at the same time adopting a more lenient determination of the character of the victims as protected persons.<sup>28</sup> The question remains as to how close this would come to resembling common law crimes, ie Judges legislating.

The most compelling reason why grave breaches do not apply to internal armed conflicts was illustrated by the Appeals Chamber in the *Tadic* Decision; there is not sufficient state practice to sustain the notion that they are applicable to

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Fallout' (1998) 92 AJIL 236, 239.

<sup>27</sup> Separate Opinion of Judge Abi Saab on the *Tadic* Decision.

<sup>28</sup> In addition, if we take the need to alter the basis on which civilians are characterised as protected persons one step further, the argument for abandoning the distinction between internal and international conflict seems to carry substantial strength.

internal conflicts.<sup>29</sup> There is no sufficient practice because states don't want to.<sup>30</sup> They wish to be less constrained in their conduct during internal armed conflicts. Thus, it comes back to the 'two-box' approach: 'as long as humanitarian law remains in two boxes, courts which address criminal responsibility in complex modern conflicts will be compelled to undergo similar analytical contortions'.<sup>31</sup>

Yet the contention by the Appeals Chamber that states are not prepared to subject violations committed in internal conflict to the obligations found in the grave breaches regime fails to maintain the distinction mentioned above between the description of the criminal conduct and the enforcement regime.<sup>32</sup> In this sense it fails to take into consideration that what is argued is that the core of grave breaches has become customary law and applicable to internal conflicts; not the enforcement regime. In a way the Appeals Chamber accepts this reasoning obliquely when admitting that the Statute in itself constitutes an instrument for the enforcement of international humanitarian law.<sup>33</sup> The grave breaches' enforcement regime is analysed below.

The argument that it constitutes the will states to keep grave breaches confined to international conflicts was strongly opposed by Judge Rodrigues in his Dissenting Opinion on the *Aleksovski* Judgement (Trial Chamber). Essentially, Judge Rodrigues supported the application of grave breaches to internal armed conflicts. Alluding to the lack of jurisdiction of the International Tribunal over juridical persons, he argued that 'if the principle is to prosecute natural persons individually responsible for serious violations of international humanitarian law irrespective of their membership in groups, how can one accept the notion that the interests of a State's sovereignty limit the individual responsibility of any citizen?'<sup>34</sup> However, if with Judge Rodrigues we admit that the change effected to the Geneva Conventions to allow the application of grave breaches to internal conflicts has come about by customary law then one of the preconditions is state

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<sup>29</sup> *Tadic* Decision par.84.

<sup>30</sup> *ibid* par.80.

<sup>31</sup> n.26 in Ch.2.

<sup>32</sup> *Tadic* Decision par.80.

<sup>33</sup> *ibid* par.81.

<sup>34</sup> Dissenting Opinion of Judge Rodrigues on the *Aleksovski* Judgment (Trial Chamber), par.31. That the power defined in the Statute 'might be applied as such, irrespective of issues of State sovereignty, **protected under the Geneva Conventions by the international character condition**'. *ibid* par.32 (emphasis in the original).

practice. State practice is lacking. And though this obstacle could be circumvented by relying on *opinio juris* (as the Appeals Chamber did for **Article 3**), the Appeals Chamber in the *Tadic* Decision was of the view that *opinio juris* did not support the extension of grave breaches to internal conflicts.

The next objection to Judge Rodrigues' views is the question as to where the line can be drawn; in particular with respect to protected persons. Judge Shahabundeen illustrated the difficulty in drawing the line in the Declaration he appended to the *Blaskic* Judgement. Judge Shahabundeen addressed the confusion mentioned above; in the *Tadic* Decision the Appeals Chamber asserted that in an international conflicts the Bosnian Serbs would not be regarded as protected persons for they shared the nationality of their captors, the Bosnian government, whilst on the other hand the victims of Bosnian Serbs' atrocities would be regarded as protected persons. The same Appeals Chamber branded this result absurd. Judge Shahabundeen, on the contrary, found nothing formally absurd about it: if a party wishes to expose itself to such dangers (that his troops not considered protected persons) then it is up to it. 'The lack of symmetry is superficial and does not attract an absurdity argument. In one case, the captors would have been acting as agents of a foreign state; not so in the other. The law itself is symmetrical. If a party puts itself within the reach of its sanctions for a reason which does not apply to another, there can be no complaint on the ground of inequality in the operation of the law'.<sup>35</sup>

I agree that a line might be drawn and it is possible that the law, as it exists now, cannot be stretched further. If a commander, during an international armed conflict, faced with mutiny by a group of soldiers from his own troop, tortures and kills the soldiers: would this conduct constitute a crime within the jurisdiction of the Tribunal under **Article 2**? It seems unlikely, for, notwithstanding the existence of an international armed conflict, the victims would not be protected persons under any of the Geneva Conventions. The conduct is generally regarded as worthy of punishment, and the Tribunal might attempt to assert

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<sup>35</sup>The full reasoning is that the difficulty spotted by the Appeals Chamber in *Tadic* Decision can be overcome in the way done by the *Tadic* Judgement (Appeal on Merits) and the *Blaskic* (Judgement), 'recourse being had to the broad objects of the relevant provisions. But it is right to recognise that those possibilities have a limit beyond which the victims indisputably have the same nationality as that of the state in whose hands they find themselves. What then, when that limit is reached?' Declaration of Judge Shahabundeen on the *Blaskic* Judgement.

jurisdiction over it. In doing so, there is the danger of employing a 'bad man definition' rather than following established criminal categories for trying the accused. In relation to the previous example, the question that needs to be answered, and it is not straightforward, is whether states want to use grave breaches to punish the torturing and attack on dignity, or only the torturing and attack on dignity of protected persons. The difference between international humanitarian law and human rights law is thus highlighted.

### C) Non-grave breaches

The Geneva Conventions, notwithstanding their customary character, are treaty-law with a self-enforcing regime. There is a need to determine in more detail what the grave breaches' enforcement regime actually consists of. The regime that grave breaches attach will become clear when compared to the regime of non-grave breaches. The Appeals Chamber estimated that grave breaches came under the jurisdiction of the ICTY under **Article 3** of the Statute. Under **Article 3**, one of the requisites that non-grave breaches have to satisfy (aside from being customary law) is that they must attach individual criminal responsibility.

There are two competing views on the criminality of non-grave breaches. One view asserts that non-grave breaches are to be distinguished from grave breaches, precisely on the basis that the non-grave breaches do not entail individual criminal responsibility.<sup>36</sup> An elaboration on this view maintains that non-grave breaches entail the responsibility of the state, and not of the individual.<sup>37</sup> Yet the better view is that which ascribes individual criminal responsibility to violations of non-grave breaches, but distinguishes them from grave breaches on the basis of the jurisdiction and enforcement regime that they attach.

The Appeals Chamber in the *Tadic* Decision contrasts two legal regimes within the Geneva Conventions: grave breaches and non-grave breaches.<sup>38</sup> For grave breaches states are under an obligation to make these criminal in their national law. In addition, there is universal jurisdiction for these offences and, as

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<sup>36</sup> n.13 in Ch.1, 410.

<sup>37</sup> E. Kussbach, 'The International Humanitarian Fact-Finding Commission' 43 (1994) ICLQ 174, 177.

<sup>38</sup> *Tadic* Decision par.80.

concerns the enforcement regime, an obligation to try or extradite. For non-grave breaches the Geneva Conventions create a different regime. States have a criminal power (not an obligation) to enact them in their national criminal law. They arguably also entail universal jurisdiction, though the enforcement obligations are not compulsory. Meron argues as well that in respect to non-grave breaches there is not merely a power on states to make them criminal in their national law, but ultimately these breaches are also criminal in international law.<sup>39</sup> This seems to be the approach envisaged by the Appeals Chamber in the *Tadic* Decision, where it confirmed that non-grave breaches entail individual criminal responsibility, and come within the jurisdiction of the Tribunal.

I suspect the suggestion that non-grave breaches did come within the jurisdiction of the ICTY was initially floated with respect to common Article 3 of the Geneva Conventions, the violations of which are not considered grave breaches of the Geneva Conventions. Yet the *Tadic* Decision specifically envisaged the Tribunal's jurisdiction over violations of common Article 3. However, even after explicitly including common Article 3 within the Tribunal's jurisdiction, the Appeals Chamber asserted the Tribunal's jurisdiction under **Article 3** for other violations of the Geneva Conventions other than violations of common Article 3.<sup>40</sup> So till we can determine what other violations the Appeals Chamber had in mind, the discussion remains largely theoretical. Whatever violations we are talking about, if they have to come under the Tribunal's jurisdiction by virtue of **Article 3**, they will still have to satisfy the 4 conditions established by the *Tadic* Decision.

#### D) Additional Protocol I

Could it be that by non-grave breaches the Appeals Chamber was alluding to violations of Additional Protocol? This is dubious for violations of Additional Protocol I constitute grave breaches, and attach the same enforcement regime. Nevertheless, it is noticeable that the grave breaches in Additional Protocol I were not included in **Article 2** of the Statute. In addition, it is even more remarkable that the Appeals Chamber did not at any point allude to the jurisdiction of the Tribunal for violations of Additional Protocol I. The reasoning behind this exclusion is that Additional Protocol I is not regarded as customary

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<sup>39</sup> n.54 in Ch.1, 566.

<sup>40</sup> *Tadic* Decision par.89.

law in some quarters. In the next chapter, however, it will be demonstrated that the Tribunal has regarded some of the Protocol's provisions as customary law.

As grave breaches, violations of Additional Protocol I should be included within **Article 2**. However, Additional Protocol I charges have subsequently been brought under **Article 3**. Basically, there is an argument to say that there is no good reason to prosecute violations of grave breaches of Additional Protocol I under **Article 3** instead of under **Article 2**. Either the ICTY has no jurisdiction over these offences at all, or it has under **Article 2** on grave breaches, notwithstanding the residual character of **Article 3**.

Has the inclusion of violations of Additional Protocol I within **Article 3** really been arbitrary? The inclusion makes sense if the reasoning in the *Blaskic* Judgement is followed. It starts from the premise that the Appeals Chamber in the *Tadic* Decision decided that agreements between the parties came within the jurisdiction of the ICTY under **Article 3**, *qua* treaty law.<sup>41</sup> In *Blaskic*, the Prosecutor asserted that the governments of Croatia and Bosnia- Herzegovina had signed an agreement to apply provisions of the Additional Protocols between themselves. The Trial Chamber remarked that 'the two parties were bound by the provisions of the two Protocols, whatever their status within customary international law'.<sup>42</sup> It referred to the Secretary-General's Report, that the law applied by the Tribunal must be customary international law so that 'the problem of adherence of some but not all States to specific conventions does not arise'.<sup>43</sup> 'In line with this reasoning, the Trial Chamber is also empowered to apply any agreement that incontestably bound the parties at the date the crime was perpetrated. Thus, the risk would not be run of infringing the principle of *nullum crimen sine lege* where a belligerent did not adhere to a particular treaty'.<sup>44</sup> In addition, in the *Blaskic* Judgement the Chamber decided that once it is established that Additional Protocol I applies (ie that an international armed conflict exists) then Additional Protocol II does not apply.<sup>45</sup>

Hence at first sight the Trial Chamber asserted the ICTY's jurisdiction over violations of Additional Protocol I, on the strength of the agreements between

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<sup>41</sup> *Blaskic* Judgement par.172. Cites *Tadic* Decision par.144.

<sup>42</sup> *Blaskic* Judgement par.172.

<sup>43</sup> Report of the Secretary-General n.38 in Ch.1 par.34.

<sup>44</sup> *Blaskic* Judgement par.169.

the parties. However it fell short of doing so. It arrived at the conclusion that the conduct in question was constitutive of an offence under **Article 3** on its own terms. A possible reason why it did not apply agreements between the parties is because it would not have answered whether violations of these agreements incur individual criminal responsibility, for the binding character of the agreements is not determinative. Hence the *Blaskic* Judgement, like the *Tadic* Decision had done, left open the possibility of applying agreements between the parties. To date, no accused has been convicted on the basis of these agreements. This reflects the Tribunal's belief that it is entitled to apply customary law. The manner the charges had been brought in the Indictment reflects this belief, take Count 4: 'Violation of the laws and customs of war: unlawful attack on civilian objects, **Article 3 and customary law** and Article 52(1) of Additional Protocol I'.<sup>46</sup>

Hence the objection to violations of Additional Protocol I been included under **Article 3** and not under **Article 2** remains unanswered. It is this author's suggestion that **Article 3** is expressly non-exhaustive whilst there can be a strong argument that **Article 2** is exhaustive. If violations of Additional Protocol I were allowed into **Article 2** with the argument that the Article was non-exhaustive, then the way for applying grave breaches to internal conflicts (in a similar reasoning to the *Tadic* Decision with respect to **Article 3**) would have been paved. In addition, the reason why violations of Additional Protocol I were not originally included in the Statute can be sought in the views of two Permanent Members of the Security Council; US and France have yet to ratify it.

Hence, for both grave breaches and violations of Additional Protocol I it has been illustrated how the Tribunal is trying to get at the presented conduct without being accused of retrospective application of the law. The grave breaches requirement of protected persons has posed particular problems in this respect. **Article 2** also requires the existence of an international armed conflict. Grave breaches are applicable only to violations of international humanitarian law committed in international conflicts; this means that every time they are charged, the character of the conflict must be determined.

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<sup>45</sup> *ibid* par.173.

<sup>46</sup> *The Prosecutor v Tihomir Blaskic*, Second Amended Indictment, Case No IT-95-14

### 3.3 Serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

**Article 4** of the ICTR Statute contains a non-exhaustive list of violations of Additional Protocol II and of common Article 3 to the Geneva Conventions.<sup>47</sup> This section will emphasise the consequences of the *Tadic* Decision for these offences, in particular as regards proceedings before the ICTR. In addition it will focus on how the Rwanda Tribunal dealt with claims of retrospective application of the law as far as common Article 3 and Additional Protocol II were concerned.

The remarkable fact remains that the Appeals Chamber in the *Tadic* Decision, in all its efforts to include within the jurisdiction of the ICTY offences committed in internal conflicts, did not once mention the ICTR Statute, even though the Tribunal for Rwanda was established a year before the Decision was rendered. The ICTR Statute in turn confirms the criminality of these offences in international law. One wonders why it was not mentioned in the *Tadic* Decision.

The reasons can be many. The Chamber in the *Tadic* Decision faced an appeal on grounds other than subject-matter jurisdiction. It also faced an appeal on the legality of the establishment of the International Tribunal and its primacy over national courts. In this manner, to cite the ICTR Statute as evidence would only have referred back to the objection on the legality of Ad Hoc International Tribunals. In addition, the Appeals Chamber foresaw that claims of retrospective application of the law could also come up in the context of the ICTR and therefore did not wish to anticipate any arguments.

Finally, the last possible reason is sceptical; the ICTR Statute contains no provision dealing with the laws and customs of war, and instead of using the term 'war crimes' it speaks in terms of 'violations of common Article 3 and Additional Protocol II'. So it could in fact have been proving quite the contrary: yes, offences committed in internal conflicts have been criminalised in international law, but they do not appear to come within the jurisdiction of the

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(25 April 1997). Cited as *Blaskic* Indictment.

<sup>47</sup> **Article 4** of the ICTR Statute is a transcript of Article 4(2) of APII, with the exception of slavery and slave trade, and on the other hand includes the passing of sentences and

ICTY under any of its guises. The Defence before the Trial Chamber in the *Celebici* Judgement argued this; had the Security Council wanted to include common Article 3 within the jurisdiction of the ICTY, it would have done so explicitly, like in the Statute of the ICTR.<sup>48</sup> The Trial Chamber in *Celebici* rejected this reasoning. The fact remains that the *Tadic* Decision still had to evaluate and defend the customary law and criminality of violations of common Article 3 and Additional Protocol II. At least with regards to Additional Protocol II, it gave an ambiguous answer. I will look at common Article 3 and Additional Protocol II in turn.

Common Article 3 is a non-grave breach of the Geneva Conventions. Yet as discussed earlier, it was taken into consideration in the *Tadic* Decision in its own right. The *Tadic* Decision confirmed its customary law character by reference to the ICJ's Decision in *Nicaragua*, which in turn estimated that common Article 3 was a mini-convention, a list of basic considerations of humanity. The difficulty as regards common Article 3 did not concern its character as customary law, but whether the violation of its provisions entailed individual criminal responsibility in international law. It has been noted previously how the Appeals Chamber suggested that this was the case for non-grave breaches of the Geneva Conventions. But the *Tadic* Decision also dealt with the question of the criminality of common Article 3 separately.

The *Tadic* Decision dismissed straightaway that the development of criminality for breaches of common Article 3 had come about by treaty.<sup>49</sup> This is the correct approach since none of the conventional instruments applicable to international humanitarian law in internal armed conflicts include criminal provisions, or have been amended to that effect. It is rather the case that customary law has developed to make criminal the violation of provisions of common Article 3. The precedent is found in the International Military Tribunal Charter and its treatment of the 1907 Hague Regulations. The Judgement at Nuremberg determined that the Hague Regulations are a) customary law<sup>50</sup> and b) entail individual criminal responsibility for their violation. The reasoning in Nuremberg, as cited by the Appeals Chamber in *Tadic*, is thus appropriate: 'a

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carrying out of executions, a provision from CA3.

<sup>48</sup> *Celebici* Judgement par.290.

<sup>49</sup> *Tadic* Decision par.102.

<sup>50</sup> The IV Hague Convention had a *si omnes* clause, which meant that it could only bind

finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches',<sup>51</sup> because there might always be a customary rule envisaging criminal responsibility.

To an extent there also remains question as to the ambit of application of common Article 3. The *Tadic* Decision, by placing it within the jurisdiction of the Yugoslav Tribunal under **Article 3** implied that it applied irrespective of the internal or international character of the conflict.<sup>52</sup> It will be submitted in the next chapter that bringing charges based on common Article 3 has been one of the strategies employed by the Prosecutor to avoid engaging in conflict classification. Hence at least with respect to the ICTY, common Article 3 applies irrespective of the classification of the conflict as internal or international.

This approach to the ambit of application of common Article 3 differed from the view adopted by the ICTR in the *Kayishema* case, where it implied that common Article 3 was restricted to internal conflicts.<sup>53</sup> I believe the Chamber was in this case confusing the ambit of application of common Article 3 with the threshold of applicability of **Article 4** of the ICTR Statute. Whilst in the *Akayeshu* Judgement the ICTR admitted that the thresholds of common Article 3 and Additional Protocol II ought to be taken separately and analysed individually, the *Kayishema* Judgement began a trend, followed by *Rutaganda*, whereupon both thresholds need to be applied concurrently. The burden to prove that the conflict in question satisfied **both** thresholds **simultaneously** rested with the Prosecutor. Following this reasoning, because the threshold in Additional Protocol II is very high, it is true that in this sense **Article 4** of the ICTR Statute could only make reference to internal conflicts. But this does not limit the ambit of application of common Article 3. On the other hand, the concern as to the ambit of application of common Article 3 is legitimate because Article 8(2)(c) of the ICC Statute effectively confines violations of common Article 3 to noninternational conflicts. I believe the correct approach as to the scope of common Article 3 was expressed by the ICRC and submitted by Trial Chamber in the *Blaskic* Judgement: 'with common Article 3 representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms

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all contenders *per* customary law, as the Soviet Union was not a party to it.

<sup>51</sup> *Tadic* Decision par.128.

<sup>52</sup> *ibid* par.94.

<sup>53</sup> *Kayishema* Judgement par.165.

must a fortiori be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable'.<sup>54</sup>

The position concerning Additional Protocol II is more complex, because the *Tadic* Decision was ambiguous in this respect. It had to decide on its customary character and on the criminality attached to violations of its provisions (the *Tadic* test). Customary character first: the *Tadic* Decision resolved that the core of Additional Protocol II was part of customary international law, yet it did not specify what it meant by the core. As will be noted below, the Secretary General's Report on the ICTR held a similar view, and submitted that the ICTR Statute was innovative concerning its approach to internal armed conflict. The Trial Chamber in *Akayeshu* had to deal with this obstacle: 'Additional protocol II as a whole was not deemed by the Secretary-General to have been universally recognised as part of customary international law. The Appeals Chamber concurred with this view inasmuch as "many provisions of this Protocol (II) can now be regarded as declaratory of existing rules or as having crystallised in emerging rules of customary law", but not all.'<sup>55</sup>

It is necessary to anticipate one of the arguments employed by the ICTR to estimate the customary character of Additional Protocol II. In *Akayeshu* the Chamber sought to argue that some of the provisions contained in Additional Protocol II are customary, and that these coincide with the provisions in **Article 4** of the Statute (for it is a transcript of Article 4(2) of the Protocol, 'Fundamental Guarantees'), inasmuch as Protocol II develops and supplements the basic provisions of common Article 3.<sup>56</sup> As the customary character of common Article 3 was recognised, so was the customary nature of the fundamental guarantees in Additional Protocol II. It constituted customary law at the time of the commission of the offence.<sup>57</sup>

In addition it is necessary to note that the *Tadic* Decision did not only leave ambiguous the scope of Additional Protocol II that formed part of customary law. As to its criminality, the *Tadic* Decision did not specifically include the Protocol under the reach of **Article 3** of the ICTY Statute. It just mentioned 'other

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<sup>54</sup> *Blaskic* Judgement footnote 322.

<sup>55</sup> *Akayeshu* Judgement par.609, my emphasis.

<sup>56</sup> Article 1 of APII.

<sup>57</sup> *Akayeshu* Judgement par.610.

general principles and rules on the protection of victims of internal armed conflict'.<sup>58</sup> The ICTY did eventually recognise that some provisions of Additional Protocol II entailed individual criminal responsibility in international law, placing them under **Article 3**.<sup>59</sup>

The ICTR thus was faced with the ambiguous legacy of the *Tadic* Decision with respect to Additional Protocol II. These difficulties were compounded by the more expansive approach taken by the Secretary-General and the Security Council as regards the choice of law applicable by the ICTR. The more expansive approach is reasonable in that the nature of the conflict was clearly internal, and no other provisions would do. The choice of law is not surprising; within the limits of existing international law, the Security Council when establishing Ad Hoc International Tribunals has the discretion of determining what provisions will most closely fit the facts. If the Security Council does not empower the Tribunals in this way, the consequence is the *Tadic* Decision - styled contortion to exercise jurisdiction. What proved disturbing was the Secretary-General Report on the ICTR. In respect of violations of common Article 3 and Additional Protocol II:

The Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. **Article 4** of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognised as part of customary international law, for the first time criminalises common Article 3 of the four Geneva Conventions.<sup>60</sup>

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<sup>58</sup> *Tadic* Decision par.134.

<sup>59</sup> Section 4.1.

<sup>60</sup> Secretary General's 'Report on Practical Arrangements for the Effective Functioning of the International Tribunal for Rwanda, Recommending Arusha as the Seat of the Tribunal', UN Doc. S/1995/134 (13 February 1995), paras.11-12. Cited in *Akayeshu* Judgement par. 604.

Though the passage acknowledged that it was as a whole that Additional Protocol II had not been recognised as customary law, and though it did not categorically deny the customary or criminal character of the provisions in question, it did more harm than good. It could have prompted claims of retroactive application of the law concerning common Article 3 and Additional Protocol II. The ICTR attempted to overcome these obstacles. However, why did the ICTR have to elicit that common Article 3 and Additional Protocol II constituted offences under customary law when it was empowered to apply them by the terms of the Statute? I have previously approached this question with respect to the ICTY. But, whilst the Secretary-General had made clear that the choice of law in the ICTY Statute was restrictive and only included provisions that were without doubt criminal in customary law, the case of the ICTR, as noted, was different.

To pre-empt claims on retrospective application of the law, International Tribunals can only apply 'existing customary international law and this is not dependent upon an express recognition in the Statute of the content of that custom'.<sup>61</sup> Thus, though the choice of law favoured by the Secretary-General and the Security Council may have been expansive, it ultimately rests with the International Tribunal to apply only law that was customary law, and that entailed individual criminal responsibility in customary law, at the time of the offence. To this end, at least concerning the ICTR, the Statute is not conclusive.<sup>62</sup> The Chamber in the *Rutaganda* Judgement explained this in clear terms, and also illustrated the difference between the two Tribunals. 'In establishing the ICTY, the Secretary-General dealt with this issue by asserting that in the application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. However, in the case of this Tribunal, it was incumbent on the Chambers to decide whether or not the said principle had been adhered to, and whether individuals incurred individual criminal responsibility for violations of these international instruments'.<sup>63</sup> The ICTR sustained this view throughout.<sup>64</sup> The exception is found in the *Kayishema* Judgement, where the Chamber did not feel compelled to look into the

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<sup>61</sup> *Celebici* Judgement par.310.

<sup>62</sup> As it was not conclusive for the ICTY either, as illustrated by the reasoning regarding **Article 3** in the *Tadic* Decision.

<sup>63</sup> *Rutaganda* Judgement par.86.

customary nature of provisions in **Article 4**. It adopted an approach that has not been followed so far: it deemed sufficient that Rwanda was a party to Additional Protocol II and that the offences had been incorporated into the Criminal Code of Rwanda law.

Thus I will demonstrate how the ICTR has successfully managed to assert the customary and criminal character of the provisions in **Article 4** of the Statute even in the face of these obstacles. In this sense *Akayeshu* remains the most convincing case with respect to **Article 4**. It was the first contentious case argued before the ICTR (*Kambanda* lodged a guilty plea). In *Akayeshu* the influence of the *Tadic* Decision became obvious: it had to dispel the doubts introduced by the Appeals Chamber with respect to Additional Protocol II, and in order to do so it applied the *Tadic* test. It also applied this test to common Article 3, but in this respect the ICTR relied heavily on what the *Tadic* Decision had decided.<sup>65</sup> As for Additional Protocol II, we have seen already the answer to its customary character: Additional Protocol II essentially develops common Article 3, therefore Article 4 (fundamental guarantees) is regarded as customary law. Similarly, because of their character as fundamental guarantees, they involved the criminal responsibility of offenders. Finally, respect for the principle of *nullum crimen sine lege* was further assured by the qualification found in **Article 4** of the ICTR Statute: the Tribunals shall have jurisdiction over **serious** violations.<sup>66</sup> Because **Article 4** violations derive from common Article 3 and Additional Protocol II they are indeed serious.<sup>67</sup> Hence *Akayeshu*, like the *Tadic* Decision, placed the right emphasis. 'It properly puts the emphasis on *State* practice: what the rebels do or do not do becomes less significant'.<sup>68</sup> State practice is the formal source of law; rebels might find themselves bound by customary law without realising it, as they don't participate in the process.

To further support the criminality of Additional Protocol II *Akayeshu* argued that Rwanda was, at the time the conduct took place, a Party to the Geneva

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<sup>64</sup> Eg *Akayeshu* Judgement par.605.

<sup>65</sup> *ibid* par.608.

<sup>66</sup> *ibid* par.616.

<sup>67</sup> *ibid* par.616. The description of what constitutes a serious violation was identical to the *Tadic* Decision par.94.

<sup>68</sup> n.10 in Ch.1, 258. The exception is to be found in the *Kayishema* Judgement, where the Chamber emphasised that the rebels, the RPF, had accepted to apply the provisions of APII. However the aim in this Judgement was to prove that the parties were bound by agreements. As noted above it was not the aim of this Judgement to prove the

Conventions and to Additional Protocol II.<sup>69</sup> 'Moreover, all the offences enumerated under **Article 4** of the statute constituted crimes under Rwandan law in 1994', so nationals should have been aware.<sup>70</sup> This last argument, however, may constitute an argument rooted on equity and fairness, as the Appeals Chamber remarked in the *Tadic* Decision. For, though individuals are presumed not to ignore their national law, it cannot be presumed to have knowledge of international criminal law. The typical example is that they may know they are committing murder, but will be ignorant to the fact that they are committing genocide.

Despite the choice of law in the ICTR Statute, no accused has yet been convicted before the ICTR of serious violations of common Article 3 and Additional Protocol II. The main finding of fact has not concerned the character of the conflict, but rather evidence of genocide. The fighting alongside the genocide clearly corresponded to an internal armed conflict. Hence the character of the conflict is clear, and in this manner it is easier to prove that violations of common Article 3 and Additional Protocol II were committed. However it is necessary to have regard for the other face of the problem: in most cases charges on the basis of these violations will not apply. Even though the requisite of an internal armed conflict is satisfied, and even though the alleged conduct might fit the material element of the offence (*actus reus*), still the Tribunal has found the accused not guilty of violations of common Article 3 and Additional Protocol II. The reason is the absence of nexus between the conflict and the imputed criminal conduct. 'Thus the term "nexus" should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established factually (...) It is incumbent upon the Prosecution to present those facts and to prove, beyond a reasonable doubt, that such a nexus exists'.<sup>71</sup>

Thus the ICTR determined in the *Akayeshu* Judgement that 'genocide did indeed take place against the Tutsi group alongside the conflict. The execution of this genocide was probably facilitated by the conflict'.<sup>72</sup> Yet the ICTR was

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customary character of the provisions applicable.

<sup>69</sup> *Akayeshu* Judgement par.617. Accordingly these are violations 'as a matter of custom and convention.' *Rutaganda* Judgement par.90.

<sup>70</sup> *Akayeshu* Judgement par.617. Applies to non-nationals too. *Riggiu* Judgement.

<sup>71</sup> *Kayishema* Judgement par.188

<sup>72</sup> *Akayeshu* Judgement par.127

categorical in maintaining that ‘the fact that the genocide took place while the RAF was in conflict with the RPF, can in no way be considered as an extenuating circumstance for it.’<sup>73</sup> To this end it kept them separate: ‘although the genocide occurred concomitantly (...) it was, fundamentally different from the conflict (...) The genocide was organised and planned not only by the members of the RAF, but also by the political forces who were behind the ‘Hutu-power’, and it was executed essentially by civilians (...), and above all, that the majority of the Tutsi victims were non-combatants, including thousands of women and children.’<sup>74</sup> The Chamber found that it had not been sufficiently proved that the acts perpetrated by *Akayeshu* ‘were committed in conjunction with the armed conflict.’<sup>75</sup> He was instead found guilty of genocide and crimes against humanity. There is finally a finding that demonstrates that genocide and crimes against humanity can occur irrespective of the existence of an armed conflict, and further, that they can occur alongside an armed conflict yet independently from it. The ICTR’s intent to dismiss any potential justification for the genocide also appears obvious in the *Rutaganda* case.

In *Rutaganda* the defendant was a top official of the *Interahamwe*, the government’s militia. In addition, the defendant actually committed a crime himself: he murdered a man. This man was linked to the political arm of the contending party, the RPF. With respect to this murder, in the *Rutaganda* Judgement the defendant was found guilty of genocide and crimes against humanity (murder and extermination) and not guilty of violations of common Article 3 and Additional Protocol II.<sup>76</sup> It is submitted that the Tribunal was rightly trying to pre-empt this murder being justified as the killing a contender within the context of an internal armed conflict. To support its conclusions, the Chamber moreover determined that the *Interahamwe* served a double role: ‘on the one hand, they supported the RAF war effort against the RPF, and on the other hand, they killed Tutsi and Hutu opponents.’<sup>77</sup> ‘Nexus between the culpable acts committed by the accused and the armed conflict’ was absent.<sup>78</sup>

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<sup>73</sup> *ibid* par.128.

<sup>74</sup> *ibid* par.128.

<sup>75</sup> *ibid* par.643.

<sup>76</sup> The murder was also included in the considerations that brought him a conviction for genocide. However he was found not guilty for violations of CA3 (murder). He was acquitted on all other charges brought under **Article 4** of the Statute, but for lack of evidence (he was not convicted either for the crimes against humanity equivalents).

<sup>77</sup> *Rutaganda* Judgement par.439.

<sup>78</sup> *ibid* par.442-444.

If the defendant was not convicted of violations of common Article 3 and Additional Protocol II in *Rutaganda*, it is difficult to see any defendant being convicted. Yet if genocide and crimes against humanity best described his conduct, however, it was because his conduct was not directed against a contending rebel party. Rather, it was directed towards an unarmed, civilian population. It will therefore be interesting to see how many of the Indictments' charges under **Article 4** of the ICTR Statute do give way to actual convictions on these charges. For the moment it does not look like many. Though there have been no convictions so far, the conditions for the applicability of **Article 4** of the ICTR Statute have been spelt out. As expressed by the *Akayeshu* and *Rutaganda* Judgements these are:

- a) the unlawful acts were committed in connection with an internal armed conflict (nexus requirement and requirement of the existence of an internal armed conflict)
- b) the perpetrator was connected to one side involved in the internal armed conflict (class of perpetrator)<sup>79</sup>
- c) the victims were persons taking no active part in the hostilities (class of victims)<sup>80</sup>
- d) an act listed in **Article 4** of the ICTR Statute was committed (*actus reus*).

The lack of nexus between the criminal conduct and the armed conflict was thus the main reason why there was no finding on **Article 4** of the ICTR Statute in *Akayeshu* and *Rutaganda*. Yet there might be connected questions, particularly as one requirement for its application is the existence of an internal armed conflict satisfying the thresholds of common Article 3 and/or Additional Protocol II. It is possible to envisage circumstances when the violence of genocide might not make it to the internal conflict threshold (like Cambodia under the Khmer Rouge). This was confirmed obliquely in *Rutaganda*: 'the Prosecutor cannot merely rely on a finding of Genocide and consider that, as such, serious violations of common Article 3 and Additional Protocol II are thereby automatically established. Rather, the Prosecutor must discharge her burden by

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<sup>79</sup> Includes paramilitary officials like *Rutaganda* and civilian government officials like *Akayeshu*.

<sup>80</sup> 'Persons taking no active part in the hostilities, including member of the armed forces who have laid down their arms and those placed hors de combat' (CA3) and 'all persons

establishing that each material requirement of offences under **Article 4** of the statute are met'.<sup>81</sup> Despite the choice of law by the Security Council in the Statute, where it appears to establish the existence of an internal armed conflict, it rests with the Prosecutor to prove the conditions of application of **Article 4**. Amongst these is the requisite of an internal conflict satisfying the minimum threshold.<sup>82</sup>

Before the ICTR there have been charges but no convictions with respect to violations of common Article 3 and Additional Protocol II.<sup>83</sup> It is submitted that what the ICTR has so far been attempting to do is to prove that these offences come within the jurisdiction of the Tribunal. Furthermore, it is expected that these offences will be of little relevance in the Rwandan context. What was the rationale behind their inclusion in the first place? To condemn atrocities committed in the conduct of combat between the RAF and RPF, notwithstanding that the bulk of the offences occurred with respect to the civilian population. In this connection, '**Article 4** of the Statute provides a safety net'.<sup>84</sup> An additional reason could be to deal with the death of peacekeepers of UNAMIR. It is challenging to look at how the deaths of the Belgian peacekeepers have been charged: there have been suggestions on violations of the Geneva Conventions and on crimes against humanity.<sup>85</sup> Violations of common Article 3 and Additional Protocol II first: the Belgians had guns, though on the other hand they were taking no active part in the hostilities.<sup>86</sup> Finally it has to be remembered that crimes against humanity in the ICTR Statute require discriminatory intent, on one of the discriminatory grounds envisaged by the Statute (**Article 3**). The ICC Statute, on the other hand, contains the offence of intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations for noninternational armed conflicts (Article 8(2)(e)(iii)).

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who do not take a direct part or who have ceased to take part in hostilities' (APII).

<sup>81</sup> Rutaganda Judgement par.462

<sup>82</sup> The material requirements for the existence of an internal conflict (the minimum threshold) can be found in Article 1 of APII. n.38 in Ch.5.

<sup>83</sup> Eg the *Musema* Judgement does not find a nexus between the criminal conduct and the armed conflict.

<sup>84</sup> n.54 in Ch.1, 558.

<sup>85</sup> Press Release of Major Nzuwonemeye ICTR/INFO-9-2-234En (25 May 2000).

<sup>86</sup> Article 8(2)(e)(iii) of the ICC Statute protects peacekeepers 'as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.'

Finally, by establishing that it does have jurisdiction over violations of common Article 3 and Additional Protocol II, the ICTR has successfully demonstrated that they exist, ie that they entail individual criminal responsibility under customary law. The Security Council adopted the ICTR Statute, which might have been driven by events but still categorises this conduct as crimes and thus constitutes proof of states' *opinio juris*. The development has been confirmed further in proceedings before the ICTY; they have been included under **Article 3** violations of the laws and customs of war. Violations of common Article 3 and, to a point, of Additional Protocol II are found in the ICC Statute, which can also be regarded as proof of states' *opinio juris*. So even if the extreme view was taken that the *Tadic* Decision constituted an instance of progressive development, at least with regard to violations of common Article 3 and of Additional Protocol II practice has demonstrated the existence of these offences.<sup>87</sup>

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<sup>87</sup> That these offences figure in the ICTR Statute and in the ICC Statute might still prove insufficient for proceedings before the ICTY. The *Celebici* Judgement notes this, 'while recognising that these instruments were drawn up after the acts alleged in the Indictment', par.209.

## Chapter 4: Consequences for the Substantive Law Applicable by the International Tribunals (II)

### 4.1 Violations of the laws and customs of war

The previous chapter on grave breaches and on violations of common Article 3 and Additional Protocol II gave evidence as to the 'two-box' approach to international humanitarian law, in particular to violations of international humanitarian law. The 'two-box' approach to international humanitarian law has resulted in a corresponding two-fold approach to culpability: it depends on whether the offences were committed in an international or an internal armed conflict. As will be noted in Chapter 5, this approach resulted in the character of the conflict constituting an element of the offences. The result in practice was that conflict classification became inevitable. Chapter 5 will also illustrate the drawbacks of conflict classification: it takes up a significant amount of time and effort in the conduct of proceedings and endangers the accused right to a trial without undue delay.

Conscious of the problems posed by conflict classification, there is still a need to emphasise its significance, in particular for the ICTY. 'As many modern conflicts involve a mix of international and internal aspects, the issue of conflict classification, an issue which is irrelevant to moral fault, but important to determination of legal culpability for some international crimes, may be of particular importance to contemporary war crimes trials'.<sup>1</sup> Thus, conflict classification can affect individual culpability; an accused may be acquitted of charges depending on the character of the conflict in which the crimes were committed. Hence it became a matter to take into consideration by the Office of the Prosecutor (OTP). To speed up proceedings and to ensure prosecution, officials of the Tribunal sought ways to circumvent conflict classification.

I have already noted the division of labour in the Statute between different Articles that define the crimes within the jurisdiction of the Tribunal. Genocide (**Article 4**) applies irrespective of conflict, whereas crimes against humanity

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<sup>1</sup> n.8 in Ch.2, 769.

cover internal and international armed conflicts (**Article 5**). Grave breaches (**Article 2**) apply only to international armed conflicts. Stemming from the *Tadic* Decision, **Article 3** functions as a residual clause that covers all other violations of international humanitarian law not already provided for by other Articles.

In this section I will analyse means of getting round the process of conflict classification, including ways of preventing a classification of the conflict unfavourable to the Prosecution. I will have particular regard to **Article 3** of the Statute and to how it has been argued to apply irrespective of the character of the conflict. I will also comment on the use of crimes against humanity as a tool to circumvent having to determine the character of the conflict. In addition, I will analyse the contention that successfully avoiding conflict classification demonstrates that there exists a single body of law applicable irrespective of the character of the conflict, ie one *corpus* of criminal law that covers both internal and international armed conflicts.

Under **Article 3**, the ICTY has the power to prosecute individuals for violations of the laws and customs of war. The language in **Article 3** has its origins in the 1907 IV Hague Convention and Annexed Regulations. These texts were originally designed to apply to international armed conflict. The IMT at Nuremberg resolved that the rules contained therein were customary law and their breach entailed criminal responsibility, but this was only decided with respect to the Second World War, an international armed conflict.

I will not repeat the reasoning on **Article 3** put forward by the Appeals Chamber in the *Tadic* Decision. Suffice it to say that international humanitarian law, the modern term for laws and customs of war, applies to international and internal armed conflicts. In addition, international humanitarian law encompasses Hague and Geneva law. For the purposes of violations in internal armed conflicts, Geneva law is less of a problem because it embodies standards explicitly applicable to internal armed conflicts: these standards are found in common Article 3 and Additional Protocol II. Hague law, on the other hand, remains silent about internal armed conflicts, with the exception of Article 19 of the 1954 Hague Convention on the Protection of Cultural Property.

Moreover, the *Tadic* Decision determined that those Hague provisions in the actual text of **Article 3** only applied to international conflicts. 'It can be held that

**Article 3** is a general clause covering all violations of humanitarian law not falling under **Article 2** or covered by **Articles 4** or **5**, more specifically: (i) violations of the Hague law on international conflicts' etc.<sup>2</sup> Yet the *Tadic* Decision also concluded that Hague law was applicable to internal armed conflict (within limitations i) and ii) observed earlier)<sup>3</sup> and would come within the scope of **Article 3**. In addition to come within the jurisdiction of the Tribunal under **Article 3**, violations of international humanitarian law have to satisfy four conditions.<sup>4</sup> Hence there exists a measure of uncertainty as to what Hague law standards have been extended to cover internal conflicts and which of the standards entail criminal responsibility for their breach. Article 8 of the ICC Statute can provide some guidance in this respect, though it remains far from conclusive, in particular with respect to the jurisdiction of the ICTY.

The first means of avoiding conflict classification under **Article 3** involves constructing charges that rely on mirror provisions for internal and international conflicts. 'One device (put into practice by the OTP) is to rely on what may be regarded as "common core" offences which are prohibited in both international and internal conflicts (...) 'We prefer to root **Article 3** charges in analogous provisions of separate treaties applicable to both international and internal conflicts...A charge rooted in both of these provisions applies regardless of conflict classification'.<sup>5</sup>

Fenrick, Senior Legal Adviser to the OTP, gives the Indictment in *Blaskic* as an example. *Blaskic* was the commander of the HVO in Central Bosnia. He was charged cumulatively with grave breaches of the Geneva Conventions, crimes against humanity and violations of the laws and customs of war.<sup>6</sup> As to the last, he was also accused of violations of the laws and customs of war for conduct in breach of provisions on the protection of victims of armed conflict (Geneva law). For the time being, I am interested in the **Article 3** charges concerning the use of proscribed methods of warfare (and therefore Hague law, segments of which

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<sup>2</sup> *Tadic* Decision par.89.

<sup>3</sup> Section 2.2.

<sup>4</sup> Section 2.3.

<sup>5</sup> n.8 in Ch.2, 785.

<sup>6</sup> *Blaskic* Indictment n.46 in Ch.3.

can be found in the Additional Protocols). Two of these counts were:

-Count 3: Violation of the laws and customs of war: unlawful attack on civilians, **Article 3** and customary law, Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II.

-Count 4: Violation of the laws and customs of war: unlawful attack on civilian objects, **Article 3** and customary law and Article 52(1) of Additional Protocol I.

In the *Blaskic* Judgement the Trial Chamber decided that the alleged crimes were committed in an international armed conflict. Blaskic was found guilty on all counts. Kordic and Cerceze, Blaskic's associates in the attack on Ahmici, have been served with a very similar Indictment. In the *Kordic and Cerceze* Decision the Trial Chamber sanctioned the inclusion, with a view to applying irrespective of conflict classification, of mirror provisions from the two Additional Protocols. It stated that 'to the extent that these provisions of the Additional Protocols echo the Hague Regulations, they can be considered as reflecting customary law. It is indisputable that the general prohibition of attacks against the civilian population and the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations. As a consequence, there is no possible doubt as to the customary status of these specific provisions as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts'.<sup>7</sup>

Therefore the *Blaskic* Indictment is subtly constructed; it makes sure that the accused will not be acquitted of charges by a classification of the conflict unfavourable to the Prosecution. However this does not mean that in this case the character of the conflict can be excluded altogether, for as long as there are grave breaches charges, there will be a need to decide on whether the conflict was international.

It is interesting to look at a similar strategy that was relied on in the *Celebici* case. Bosnian Muslims and Bosnian Croats were accused of violence against

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<sup>7</sup> *Kordic and Cerceze* Decision par.31. It also implied that these provisions of the Additional Protocols entailed individual criminal responsibility. *ibid* par.32.

Bosnian Serb detainees. No crimes against humanity charges were sought, even though these would have applied irrespective of the character of the conflict. The exclusion of crimes against humanity in the Indictment responds to the circumstance that, as regards Bosnian Muslims, the OTP 'has not sought Indictments on crimes against humanity charges precisely because, to date, it has not found evidence of the policy factor sufficient to substantiate such charges. It has, of course, obtained Indictments against accused from other groups on crimes against humanity charges'.<sup>8</sup>

The *Celebici* Indictment contained grave breaches charges concurrently with charges of violations of the laws and customs of war rooted in **Article 3** 'and recognised by common Article 3'.<sup>9</sup> The accused were found guilty of grave breaches and of violations of the laws and customs of war. In the *Celebici* Judgement, not only did the Trial Chamber find that common Article 3 applied to internal and to international conflicts, but it also confirmed that common Article 3 came within the scope of **Article 3**. In addition, because the Tribunal was only dealing with counts 'recognised by common Article 3', **Article 3** itself applied irrespective of whether the conflict was internal or international. 'While common article 3 of the Geneva Conventions was formulated to apply to internal armed conflicts, it is also clear (...) that its substantive prohibitions apply equally in situations of international armed conflict. Similarly, and as stated by the Appeals Chamber, the crimes falling under Article 3 of the Statute of the International Tribunal may be committed in either kind of conflict. The Trial Chamber's finding that the conflict in Bosnia and Herzegovina in 1992 was of an international nature does not, therefore, impact upon the application of **Article 3**'.<sup>10</sup> Thus it was only necessary to prove that a conflict existed 'and that the alleged violations were related to this conflict'.<sup>11</sup> Yet as argued below under the speciality doctrine, this strategy may still not be sufficient to allow the Prosecutor to avoid charging grave breaches.

So far I have noted that because grave breaches were argued in both of these cases, it was ultimately necessary to decide on the character, whether internal

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<sup>8</sup> n.8 in Ch.2, 779.

<sup>9</sup> *The Prosecutor v Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Indictment, Case No IT-96-21 (19 March 1996).

<sup>10</sup> *Celebici* Judgement par.14. It is important to remember that violations of the laws and customs of war were charged concurrently to grave breaches.

<sup>11</sup> *Celebici* Judgement par.285.

or international, of the conflict. Both Trial Chambers established that the conflict was international. In the *Celebici* Judgement, the Chamber arrived at this decision by adopting a more liberal approach to the character of the conflict than that held in the *Tadic* Judgement (Trial on the Merits). In the *Blaskic* Judgement, the determination of the international character of the conflict stemmed from the Appeals Chamber's finding against the initial decision by the Trial Chamber in the *Tadic* Judgement (Trial on the Merits). The question remains as to why does the OTP insist on seeking grave breaches charges? I will attempt to answer this question below.

At present, however, I will introduce two additional means of properly circumventing conflict classification (rather than just trying to pin one or the other Article on the accused) found in two cases that did not rely on grave breaches charges. The first, the *Kupreskic* Judgement, dealt with crimes against humanity; these apply irrespective of conflict classification. In addition the choice of charge illustrates that some crimes remain to an extent unrelated to the conflict. The *Kupreskic* case involved six Bosnian Croats who participated in the attack on Ahmici. The case is relevant to the present discussion because the Prosecution amended the Indictment.

Initially the Indictment encompassed grave breaches and violations of the laws and customs of war.<sup>12</sup> Grave breaches ensued the need to embark on conflict classification. The OTP decided to amend the Indictment by substituting grave breaches charges for crimes against humanity charges. I don't have the reasoning behind this decision, but I believe it is not too farfetched to suppose that it lies in connection with the troublesome *Tadic* Judgement (Trial on the Merits). The initial Indictment for *Kupreskic* was filed and kept secret upon confirmation by the Judge on November 1995. The *Tadic* Judgement (Trial on the Merits) was rendered on May 1997. Between this date and the next Judgement, the *Celebici* Judgement (November 1998), where the Trial Chamber held that the conflict was international by adopting a less restrictive approach, there was only the *Erdemovic* Judgement (Appeals Chamber).<sup>13</sup>

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<sup>12</sup> The Prosecutor v Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Vladimir Snatic, Stipo Alilovic, Drago Josipovic, Marinko Katara, Dragan Papic, Indictment, Case No IT-95-16 (November 1995).

<sup>13</sup> *Erdemovic* had initially pleaded guilty to crimes against humanity. *Erdemovic* Judgement (Appeals Chamber). The *Furundzija* Judgement (Trial Chamber) was not decided until 10 December 1998 and dealt with violations of the laws and customs of

On the other hand, the Amended Indictment (approved by the Judge on March 1998) charged the accused with crimes against humanity and violations of the laws and customs of war punishable by **Article 3** and recognised by common Article 3.<sup>14</sup> Except for persecution (clearly and only a crime against humanity) the rest of the counts were brought concurrently. All charges applied irrespective of the character of the conflict. Therefore I arrive at the conclusion that the Prosecution amended the Indictment in order to pre-empt any finding that the conflict was internal, a finding that would have rendered grave breaches charges inapplicable. Finding the internal nature of the conflict would have been consistent with the *Tadic* Judgement (Trial on the Merits). The consequence of excluding grave breaches charges was endorsed by the Chamber: 'as regards the nature of the armed conflict, it is not necessary for the purposes of this trial to determine whether the armed conflict was international or internal, since the Indictment contains no counts relating to grave breaches of the Geneva Conventions'.<sup>15</sup>

The amendment of the Indictment should be read together with of the rest of the *Kupreskic* Judgement. 'The Trial Chamber is satisfied, on the evidence before it in this case, that this was not a combat operation. Rather, it was a well- planned and well- organised killing of civilian members of an ethnic group, the Muslims, by the military of another ethnic group, the Croats'.<sup>16</sup> For the purposes of the Tribunal's jurisdiction, the Judgement confirmed the existence of an armed conflict,<sup>17</sup> yet it emphasised that this was not a military operation designed to pre-empt an attack by the Muslims, and that the Defence was painting the wrong picture.<sup>18</sup> This case highlighted how, in order to circumvent conflict classification, the OTP 'have used crimes against humanity charges whenever it has been practicable to do so, including in connection with combat incidents'.<sup>19</sup> Though in the present case the Trial Chamber dispelled all doubt on this issue: this was not a combat operation.<sup>20</sup>

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war.

<sup>14</sup> The Prosecutor v Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Amended Indictment, Case No IT-95-16 (9 February 1998).

<sup>15</sup> *Kupreskic* Judgement par.53

<sup>16</sup> *ibid* par.749.

<sup>17</sup> *ibid* par.760.

<sup>18</sup> *ibid* par.762.

<sup>19</sup> n.8 in Ch.2, 785.

<sup>20</sup> The attack was directed at the civilian population. The ICTY may have encountered

Stemming from the previous characterisation of the facts, the accused in *Kupreskic* were found guilty of crimes against humanity.<sup>21</sup> There were no findings of violations of the laws and customs of war; the Kupreskic brothers and cousin were found not guilty on the basis of insufficient evidence. The superiors, on the other hand, were found not guilty of violations of the laws and customs of war (murder and cruel treatment), *for reasons of law*.<sup>22</sup> What the Chamber (Cassese) meant by this was that even though there was sufficient evidence to find them guilty, they had been improperly charged cumulatively for violations of the laws and customs of war (murder and cruel treatment) and for crimes against humanity (murder and inhumane acts). **Article 3** charges were dismissed for having being charged erroneously. So in the end characterising the crimes as unrelated to a combat operation was confirmed on the grounds of improper cumulative charges, rather than through more substantive reasoning.

Finally, another technique for averting conflict classification is found in *Furundzija*. A pre-trial decision for this case also offers some clues as to why the Prosecutor will insist on including grave breaches charges. The accused was a commander of the Jokers (an HVO unit) who had been present at the rape and torture of a Bosnian Muslim woman.

Also in *Furundzija* the Indictment was amended. The initial Indictment contained three counts: a grave breach (torture and inhumane treatment), a violation of the laws and customs of war (torture) and a violation of the laws and customs of war (outrages upon personal dignity including rape).<sup>23</sup> The Defence filed a motion concerning the non-application of the grave breach charge because the Indictment didn't argue as a general allegation the existence of an international conflict. Whilst maintaining the international character of the conflict, 'the Prosecution declared that it would not pursue Count 12 of the Indictment **in the interests of a fair and expeditious trial and the judicial economy of the**

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difficulties in this case because crimes against humanity were committed irrespective of combat, yet the ICTY Statute requires the nexus between crimes against humanity and armed conflict. The case emphasises the overlap between war crimes and crimes against humanity in the Yugoslav context.

<sup>21</sup> (Persecution). The superiors were also found guilty of crimes against humanity (murder and inhumane acts). One of the accused was acquitted of all charges. Disposition, *Kupreskic* Judgement.

<sup>22</sup> *ibid.*

<sup>23</sup> *The Prosecutor v Anto Furundzija*, Indictment, Case No IT-95-17/1-PT (2 November

**Trial Chamber**.<sup>24</sup> Hence what remained of the Indictment alleged **Article 3** charges, violations of the laws and customs of war.<sup>25</sup>

For the purposes of this case, it was not necessary to prove the character of the conflict. During trial, the Defence alleged that there was no armed conflict 'in terms of front- lines and military objectives, but only that there was an attack by the HVO on civilians'.<sup>26</sup> This is a particularly interesting claim in the light of what I have noted from the *Kupreskic* case. It is difficult to explain this obscure statement: the Defence might have been hinting at crimes against humanity charges. This would leave the Prosecutor with the burden of proving that the single event (and he is a co-perpetrator as well) was part of a systematic or widespread attack.<sup>27</sup> Though the widespread or systematic nature of the attack has been demonstrated for rape in proceedings before the ICTR (*Akayeshu*), for the ICTY we will have to wait and see the decision in *Kunarac and Kovac* ('*Foca*').<sup>28</sup> The Chamber thus decided that 'it is immaterial whether the breach (of **Article 3**) occurs within the context of an international or internal armed conflict'. It further explained the nature of Article 3: 'more than the other substantive provisions of the Statute, **Article 3** constitutes an "umbrella rule".<sup>29</sup>

Though in this case **Article 3** charges were rooted in common Article 3, and, specifically for rape also in Article 4 of Additional Protocol II, the Chamber did not look at these provisions. The Chamber looked at the prohibitions on rape and torture in general, without reference to international or internal armed conflict. It decided that these prohibitions covered all conflicts. It found that for rape and torture the prohibition had been adopted into customary law irrespective of conflict classification or even of the existence of conflict, though for the sake of jurisdiction of the Tribunal it found the existence of an armed

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1995).

<sup>24</sup> *Furundzija* Judgement (Trial Chamber) par.7, my emphasis. Count 12 was a grave breach (torture or inhumane treatment) recognised by **Article 2(b)** of the Tribunal Statute.

<sup>25</sup> *The Prosecutor v Anto Furundzija*, Amended Indictment, Case No IT-95-17/1 (2 June 1998).

<sup>26</sup> *Furundzija* Judgement (Trial Chamber) par.58.

<sup>27</sup> Though the terms 'widespread or systematic' are not present in the text of **Article 5**, the ICTY has taken the 'widespread and systematic' nature of the attack to be a requisite for crimes against humanity found in customary law.

<sup>28</sup> *The Prosecutor v Dragoljub Kunarac and Radomir Kovac*, Third Amended Indictment, Case No. IT-96-23 (8 November 1999).

<sup>29</sup> *Furundzija* Judgement (Trial Chamber) par.133.

conflict.<sup>30</sup> The Judgement has been upheld on Appeal. Visibly satisfied, Deputy Prosecutor Graham Blewitt commented: 'this was the first case involving a rape **committed in the course of a war**. The case established that rape can constitute a war crime of torture. So the trial chamber's original ruling was important not only for the Tribunal, but also for the development of international criminal law.... Another important element is that Furundzija did not actually commit the rape himself, but was present aiding and abetting those who did'.<sup>31</sup>

To an extent, the same approach was followed in *Martic* (Rule 61 Procedure), which involved Croatian Serbs bombing Zagreb with cluster bombs. In this case, though, the Chamber limited itself to analysing the law applicable to internal and international armed conflict. On finding that it prohibited targeting civilians and civilian objects in both contexts, it did not bother to go into conflict classification. It decided that it was unlawful whatever categorisation of the conflict.<sup>32</sup>

In *Furundzija* (Trial on Merits), the Defence filed a pre-trial motion alleging that the International Tribunal had no subject-matter jurisdiction on the remaining counts of the Indictment. The motion was dismissed, but it is worth looking at the Decision of the Tribunal, because it tackled some relevant issues. It clarified the relation between **Article 3** and other Articles. 'The norms prohibiting conduct such as rape and torture of protected persons which are incorporated into **Article 2** of the Statute, are of a specialised nature and only apply upon satisfaction of the criteria set out in the Geneva Conventions 1949. The norms prohibiting such conduct in armed conflict, irrelevant of whether international or internal, are encompassed in **Article 3**. **Article 3** contains the prohibitions of those serious violations of international humanitarian law which do not fall within the specialised provisions contained in **Articles 2, 4 or 5**'.<sup>33</sup> It also dealt with the Defence contention that torture and outrages upon personal dignity including rape were not covered by **Article 3** of the Statute: 'Such acts are prohibited

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<sup>30</sup> *Furundzija* Judgement (Trial Chamber) par.258. In addition, it resolved that rape falls within the jurisdiction of the Tribunal explicitly as regards **Article 5** on crimes against humanity, and implicitly for grave breaches, violations of the laws and customs of war and genocide.

<sup>31</sup> IWPR, *Tribunal Update: Last week in The Hague* no.185 (July 17-22 2000). My emphasis.

<sup>32</sup> *Martic* (Rule 61 Procedure)

<sup>33</sup> *Furundzija* Decision, par.10.

under customary international law at all times'.<sup>34</sup> As I have explained, the Judgement subsequently followed this line of reasoning.

Finally, because the Prosecution continued to maintain that the conflict was international, the Chamber had to clarify the ambit of application of **Article 3** when it was faced with the Defence's contention that torture and rape in an international armed conflict can only be prosecuted under **Article 2** of the Statute.<sup>35</sup> 'The Defence assertion that torture and rape in an international armed conflict (...) are grave breaches or nothing at all in an international armed conflict, is wrong. Rape and torture committed in circumstances which do not amount to grave breaches under **Article 2** may fall under **Article 3**'.<sup>36</sup>

In putting forward such arguments, however, the Defence might have been doing little more than following the reasoning by the Chamber on the relationship between grave breaches and violations of the laws and customs of war. 'There are also acts amounting to serious violations of international humanitarian law which do not fall into the specialised categories: these are the violations of the laws or customs of war under **Article 3**. The relationship between **Article 2** and **3** can be described as one of concentric circles: grave breaches are a species of violation of the laws or customs of war. The Appeals Chamber held that when an act meets the criteria of a grave breach under **Article 2** and therefore also **Article 3**, it falls within the subject matter jurisdiction of the more specific clause, namely **Article 2**'.<sup>37</sup> 'All grave breaches are violations of the laws and customs of war. Theoretically, they can be charged as both if the criteria are satisfied. However, there is a general principle of international law (the doctrine of speciality/*lex specialis derogat generali*) which provides that in a choice between two provisions where one has a broader scope and completely encompasses the other, the more specific charge should be chosen'.<sup>38</sup>

Were this line of reasoning to be followed, rape in an international armed conflict, committed against a person protected by the Fourth Geneva

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<sup>34</sup> Ibid, par.13.

<sup>35</sup> 'If rape is a grave breach of the Geneva Conventions, then, the Defence argues, under the Appeals Chamber Decision, it cannot be prosecuted under Article 3 of the Statute because grave breaches can be prosecuted only under Article 2'. *Furundzija Decision* par.15.

<sup>36</sup> Ibid par.16.

<sup>37</sup> Ibid par.11.

Convention (if following the *Celebici* interpretation of the nationality requirement) would necessarily have to be brought under the more special provision, a grave breach. The Chamber avoided confirming or denying the argument: 'whilst it is theoretically possible that the offences in this case may have been committed in circumstances such as to amount to grave breaches, the Prosecution has chosen to go to trial on the **Article 3** charges. That choice between two provisions having been made, it is not the role of the Trial Chamber to intrude upon the Prosecution's discretion'.<sup>39</sup> It played with the amendment of the Indictment whereby the Prosecution had dropped the grave breaches charge.

In this sense it is easy to see why the Prosecution might insist on alleging grave breaches notwithstanding having to trawl through conflict classification. Following the Judges' (Cassese's) *lex specialis* approach as explained above, the Prosecution may have no other choice. There will be cases that involve international conflicts and protected persons, and the conduct will have to be prosecuted as a grave breach.<sup>40</sup> Hence there will be limits to the Prosecution's discretion. On the other hand, there might be a number of advantages in alleging grave breaches charges. First, grave breaches appear explicitly in the Statute, unlike violations of common Article 3 and Additional Protocols I and II. The latter come within the ambit of **Article 3**, which means that their character as customary law, together with individual criminality for their violation has to be demonstrated. In the second place, conduct defined in the grave breaches provisions is more specific in nature and also more specific as to the kinds of victims and perpetrators involved. This is why grave breaches are considered *lex specialis*. By looking at the *Celebici* Indictment it is easy to illustrate this advantage of grave breaches. All grave breaches charges there were brought concurrently with **Article 3** charges (violations of the laws and customs of war recognised by common Article 3). Yet there is one charge that remained without its **Article 3** equivalent. This is a grave breach charge of 'unlawful confinement of civilians'. This crime, which is more specific, does not appear in either

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<sup>38</sup> *ibid* par.12.

<sup>39</sup> 'Nevertheless, the situation at hand is not one where the Trial Chamber is faced with different charges under separate articles of the Statute. The Prosecution has already made a choice'. *Furundzija* Decision par.16.

<sup>40</sup> Judges of the ICTY have been known to encourage the Prosecutor to charge genocide when the Prosecutor was 'taking the easy way out' by charging crimes against humanity. This was the case in *Karadzic and Mladic* (Rule 61 Procedure). There is no reason why they could not adopt this same attitude to encourage the Prosecutor to charge grave breaches in cases where the Prosecutor had been content in charging

**Article 3** or in common Article 3 or Additional Protocol II. So it either had to be brought as grave breach charge or not charged at all.<sup>41</sup>

But do the advantages of grave breaches still pose enough incentive for the Prosecutor to have to prove an additional element, the international character of the conflict? As described above, the Prosecutor may have no other choice and may be encouraged by the Judges not to opt for the easy way out. Yet in the ICTY there is still a feeling that grave breaches, a very useful instrument for the prosecution of offenders is being depreciated in view of the possibility of applying charges under **Article 3** irrespective of the character of the conflict.<sup>42</sup> That such an instrument should not be lost is of some importance; one can understand why the Security Council referred to grave breaches provisions in the ICTY Statute because to an extent they resemble an internationally accepted criminal code. In addition, and though this is outside the scope of this thesis, grave breaches could involve the responsibility of the state. In any case, and finally, the Prosecutor might nowadays feel happier about alleging grave breaches after the Appeals Chamber adopted a more liberal approach as to the international character of the conflict in the *Tadic* Judgement (Appeal on the Merits).

It has been demonstrated that there are numerous mechanisms available to avert bothersome conflict classification. In this sense it is possible to speak in terms of the OTP's 'accommodation techniques'. The OTP can rely on **Article 3** charges rooted in mirror provisions of treaties that cover internal and international conflicts respectively, or rooted in common Article 3, or in other principles of Hague law applicable to internal conflicts as fixed by *Tadic* and confirmed (to an extent, as we shall see below) by Article 8 of the Statute of the

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violations of the laws and customs of war based on CA3.

<sup>41</sup> There are additional examples of this, such as deportation. Count 2 and count 3, *The Prosecutor v Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic and Simo Zaric*, Second Amended Indictment (redacted version), Case No IT-95-9 (25 March 1999). On the other hand there might be violations of the laws and customs of war that have no grave breach equivalent, such as bombing civilian targets, charged on the *Martic* ('Zagreb') Indictment as a violation of the laws and customs of war. *The Prosecutor v Milan Martić*, Indictment, Case No IT-95-11 (25 July 1995).

<sup>42</sup> The Prosecution may decide to charge serious violations of the laws and customs of war instead of grave breaches when it believes that convictions on grave breaches might be too hard to come by because of the contested nature of the conflict or of the victims as protected persons. The Indictments drawn up during 1998, between the *Tadic* Judgement (Trial on Merits) and the *Tadic* Judgement (Appeal on Merits) reflect this preference.

International Criminal Court. The key to circumventing this requirement is not to seek grave breaches charges: and there is an argument that this is not desirable in the long run.

Equally, other alternatives are to use crimes against humanity charges when the conduct is part of a broader pattern, or to argue that the prohibition of the conduct in question applies in all circumstances, like in *Furundzija*. The advantage as to the latter approach is that the Defence is bound to argue (once it has argued that there was not an international armed conflict, but that it was internal, to pre-empt prosecution for grave breaches) that there was no armed conflict (*Tadic* Decision and *Kupreskic* Judgement). On the other hand, opposing that argument (moreover as the threshold for the offence to be linked to the armed conflict is quite low) is going to be easier than determining the nature of a complex conflict.

The Chamber's assertion in the *Furundzija* Judgement (Trial Chamber) that under customary law prohibitions on rape and torture apply in all circumstances could represent an instance of criminalisation of human rights violations. In connection to this, (and also because he decided the *Furundzija* Judgement (Trial Chamber) and the *Kupreskic* Judgement), Cassese maintains that there is one single corpus of law applicable to both international and internal conflicts.<sup>43</sup> Does the attempt by the OTP to circumvent conflict classification confirm his view? I concede that there could be some indication of a single body of law. However when questioning whether this contention is sustained by practice, the answer is no. The ICC Statute provides no evidence of a single body of law, as it divides Article 8 (War Crimes) in sections depending on whether they apply to internal or international conflict. In answer, Cassese maintains that Article 8 is a *retrograde* provision.<sup>44</sup> Whether this is so will be analysed in the following section.

There is in my view not enough evidence for a single body of law, precisely because states don't want one. 'Treaty-based international humanitarian law has evolved on two tracks as a result of the preferences of states'.<sup>45</sup> Customary

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<sup>43</sup> A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 EJIL 144, 150.

<sup>44</sup> *ibid* 150.

<sup>45</sup> n.8 in Ch.2, 784.

law (confirmed by judicial decisions such as *Nicaragua* and *Tadic*) does apply irrespective of the character of the armed conflict only to a very limited extent, probably only as far as common Article 3 is concerned. And, as will be noted below, the possibility of eluding conflict classification by relying on charges brought under common Article 3 will not be open for the International Criminal Court.

## 4.2 War crimes in the Statute of the International Criminal Court

The ICC will have jurisdiction over aggression, genocide, and crimes against humanity and war crimes. The Article on aggression is at present an empty provision: states need yet to agree on a definition. The incapacity of the Court to try aggressors affects the ambit of enquiry of this thesis: planners of aggression will not be tried whilst the subordinates could stand accused of war crimes.

In this section I will examine two questions on Article 8 of the Statute of the International Criminal Court, which is entitled 'War Crimes'. The first question is whether violations of international humanitarian law in internal conflicts have been included within Article 8. I will also analyse to what extent their inclusion confirms the *Tadic* Decision. The second question concerns war crimes in general: whether Article 8 of the Statute reflects current international law. The answer to this second question will indicate whether states at the Rome Conference were intent in codifying customary law or just wished to create a regime between states parties to the Statute.

Article 8 consists of a very long list of crimes. 'The development of penal aspects of international humanitarian law has shifted back and forth between a preference for more or less comprehensive lists of crimes and brief references to the laws and customs of war'.<sup>46</sup> Two of its sections comprise provisions that apply to international conflict; the remaining sections apply to noninternational conflicts.<sup>47</sup> The inclusion of two different thresholds (Article 8(2)(d) and Article

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<sup>46</sup> n.54 in Ch.1, 563.

<sup>47</sup> Article 8(2)(a) and (2)(b), and Article 8(2)(c) and (2)(e) respectively. Article 8(1) applies to all war crimes.

8(2)(f)) of states' safeguards for crimes in internal conflicts confirms the Tribunal's characterisation of conflicts in *Akayeshu*. In international humanitarian law, a 'clear distinction as to the thresholds of application has been made between: 1. situations of international armed conflicts, in which the law of armed conflict is applicable as a whole, 2. situations of noninternational (internal) armed conflicts, where common Article 3 and Additional Protocol II are applicable and 3. noninternational armed conflicts where only common Article 3 is applicable'...'Situations of internal disturbances are not covered by international humanitarian law'.<sup>48</sup>

Article 8 is an exhaustive list of crimes: there is no possibility of including further war crimes except by amending the Statute. It does not contain a generic formula 'giving the Court the possibility of exercising jurisdiction over other crimes that may emerge as crimes under customary law in the future'.<sup>49</sup> Another characteristic worth noting is that the sections on the laws and customs of war<sup>50</sup> make no distinction between Hague and Geneva law. This has been understood as 'a completely novel approach, which has no basis in customary law'.<sup>51</sup> Finally, as regards the content of the provisions in Article 8, these 'vary in specificity, some enunciating very detailed actions which constitute war crimes and others containing rather vague descriptions of justiciable conduct'.<sup>52</sup>

For the purposes of this thesis, the most significant development is that Article 8 confirms that the class of war crimes has been extended to cover violations of international humanitarian law committed in the context of an internal conflict. Where do the provisions on internal conflicts have their origin? Article 8(2)(c) is taken straight from common Article 3 of the Geneva Conventions.

The origin of Article 8(2)(e) is less clear. The category of 'other violations of the laws and customs of war applicable in armed conflicts not of an international character' 'is largely derived from the Second Protocol Additional to the Geneva Conventions of 1949, which specifically protects victims of non-international

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<sup>48</sup> *Akayeshu* Judgement par.601. The exclusion of these situations from the jurisdiction of the ICC is also envisaged in Article 8(2)(d) and 8(2)(f). Article 8(3), on the other hand, is similar to Article 3(2) of APII.

<sup>49</sup> Human Rights Watch, 'Summary of the Key Provisions of the ICC Statute' (September 1998).

<sup>50</sup> Article 8(2)(b) for international conflicts and 8(2)(e) for noninternational conflicts.

<sup>51</sup> Defence view *Kordic and Cercez* Decision par. 7.

conflicts'.<sup>53</sup> But it doesn't correspond exactly to the Protocol; it leaves out some of its provisions, and includes others not envisaged by Protocol II. Thus, 'violations of the laws and customs of war' applicable to noninternational armed conflict **derive** largely from Additional Protocol II **and** customary law.<sup>54</sup> Yet because most of Additional Protocol II is included, however, this provision confirms the views about Additional Protocol II held in proceedings before the ICTR.

Are the provisions for internal armed conflict identical to those applicable in international armed conflict? Clearly not. Even statistically it is possible to tell the difference: 34 provisions encompass offences in international conflicts as opposed to 16 for internal conflicts. Even though 'the Statute makes enormous progress in minimising differences in war crimes committed in conflicts of an international versus non- international character, and redressing the disparate treatment of crimes committed in internal armed conflicts',<sup>55</sup> the exclusions for internal armed conflicts are significant. The Court will be able to prosecute crimes 'such as attacks causing incidental civilian losses, starvation of civilians, or the use of prohibited weapons, only when committed in international but not in non- international armed conflict'.<sup>56</sup>

What I want to find out is whether those violations of the laws and customs of war that have been included for international conflicts but have been left out for internal conflicts belong to the principles that *Tadic* resolved apply by customary law to internal conflicts. These principles were settled in par. 127: 'it cannot be denied that customary rules have developed to govern internal strife. These rules... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities'. If in doubt as to whether the *Tadic* Decision actually decided that breaches of these principles entail criminal responsibility, it is useful to recall the following: 'all of these factors confirm that customary international law imposes criminal liability

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<sup>52</sup> n.3 in Ch.2, 50-51.

<sup>53</sup> UN Dept of Public Information May 1998 'Crimes within the Court's jurisdiction'.

<sup>54</sup> n.3 in Ch.2, 51-52.

<sup>55</sup> *ibid* 57.

for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife' (par. 134).

Article 8(2)(c) comprises the content of common Article 3. It applies only to noninternational armed conflicts. This limitation to noninternational conflicts does not reflect customary law as expressed by the ICJ in *Nicaragua* and by the ICTY in numerous rulings. However, most of the violations within common Article 3 are comprised by grave breaches in Article 8(2)(a) to apply to international conflict. A violation of common Article 3, 'humiliating and degrading treatment', is on the other hand expressly found in Article 8(2)(b)(xxi) on serious violations of the laws and customs of war in international conflicts. Common Article 3 is thus covered entirely for international conflicts, but the advantage present in avoiding conflict classification by means of this provision is lost.

As I have noted earlier, rules protecting victims of armed conflicts and rules regarding means and methods of warfare attract individual criminal responsibility according to par. 134 of the *Tadic* Decision. I will assume for the sake of argument that these rules correspond to the principles outlined in the paragraph mentioned earlier (par. 127).<sup>57</sup> Hence I will compare the *Tadic* Decision's par. 127 on the one hand. I will compare it those violations of the laws and customs of war that according to the ICC Statute do not cover internal conflict, i.e.: violations of the laws and customs of war that only apply to international conflicts (Article 8(2)(b)). By comparing these two I will demonstrate that Article 8 (2)(e) is more restrictive than *Tadic*.

Those provisions that appear in Article 8 (2)(b) (international conflicts) but do not appear in Art 8(2)(e) (internal conflicts) are the following. I have classified them under the headings of the principles enunciated in *Tadic* (i.e.: allegedly those principles that have been extended by customary law to apply to internal conflicts). (I have also put in brackets the violation of the laws and customs of

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<sup>56</sup> n.49.

<sup>57</sup> We can safely assume that if we look at UNGA Resolutions 2444 and 2675, which the *Tadic* Decision par.110-112 cites as evidence of opinio juris for the application of provisions to internal and international armed conflicts. GARes 2444, UNGAOR, 23<sup>rd</sup> Session, Supp.no.18, UNDoc.A/7218 (1968). GARes 2675, UNGAOR, 25<sup>th</sup> Session, Supp.no.28, UNDoc.A/8028 (1970).

war applicable to international conflicts that is not included in the *idem* provision for internal conflicts):

1. Protection of civilian objects, including cultural property: though protection of cultural property is included, this is not the case for attacks on civilian objects (8(2)(b)(i)).
2. Protection of civilians from hostilities (in particular from indiscriminate attacks): the provision on incidental loss of life/ principle of proportionality (8(2)(b)(iv)) and the one prohibiting the use of human shields (8(2)(b)(xxiii)) are not incorporated for internal conflicts.
3. Protection of those taking no active part in the hostilities: Killing a combatant who has surrendered (8(2)(b)(vi)) is not envisaged as a crime for internal conflicts.
4. Prohibition of means of warfare proscribed in international conflicts: In this respect there are the most serious discrepancies. The employment of poisonous weapons (8(2)(b)(xvii)), of poisonous gases (8(2)(b)(xviii)), of dum dum bullets (8(2)(b)(xix)), weapons that cause superfluous and unnecessary injury (8(2)(b)(xx)) are not embodied in the rules on internal conflict. As to the ban on certain methods conducting hostilities, also not included are attacks and bombardment of villages (8(2)(b)(v)).

Therefore the *Tadic* Decision is broader in scope than the violations of the laws and customs of war applicable to internal conflicts envisaged by the ICC Statute.<sup>58</sup> The contention that for internal conflicts Article 8 by-passed Protocol II to include *Tadic* cannot be maintained. However, it is true that the ICC's violations of the laws and customs of war in internal conflicts are broader in scope than Additional Protocol II, though only slightly so.<sup>59</sup> Some commentators

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<sup>58</sup> For more lenient views see Darryl Robinson and Herman von Hebel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute' (1999) 2 YIHL 193.

<sup>59</sup> What about APII, though, is it very different from Article 8(2)(e)? The ICC Article 8(2)(e) is broader than APII (provisions that are not found in APII but appear in Article 8(2)(e), are (ii), (iii), (ix), (x), (xii)). Whereas in the negative the difference is not so obvious because all of APII can be found in Articles 8(2)(c) (as far as APII develops the rules in CA3) and 8(2)(e). The exceptions are: 'slavery', 'collective punishments', 'dangerous forces' 'terrorism' and 'starvation of civilians'. Of these however, none are present in the equivalent provisions for international conflicts (Article 8(2)(a) and (2)(b)),

have remarked that this provision starts to resemble Additional Protocol I more than it resembles Additional Protocol II, but this is probably an exaggeration. From the contrary perspective, most of Additional Protocol II is contained within the sections of Article 8 that cover internal conflicts. The most notable exception is starvation as a method of warfare (included for international conflicts). In short, therefore, the rules on internal armed conflicts embodied in Article 8 of the Statute are broader than Additional Protocol II. They are however more restrictive than the ones enumerated by the *Tadic* Decision in its determination that some norms have been extended by customary law to cover internal conflicts that carry the individual responsibility of the perpetrators. Therefore it is necessary to have regard for the following reasoning; customary law since the *Tadic* Decision has not changed, or at least, has not diminished. So if Article 8 of the ICC Statute is narrower than the law established in the *Tadic* Decision, and if Article 8 reflects customary law, the question must be addressed whether the *Tadic* Decision represented an exercise in judicial discretion. In other words, was the *Tadic* Decision wrong? The other possibility, to be addressed below, is that the ICC Statute does not represent customary law, or at least does not cover customary law in its entirety.

In Article 8 the 'two- box' approach is perpetuated. The consequence of perpetuating this approach is that conflict classification appears inevitable. Yet, if Article 8 confirms that violations of international humanitarian law in internal armed conflict are war crimes, would it have been possible to write only one provision for both types of conflicts?

Insofar as Article 8 separates the law applicable to international armed conflict from that applicable to internal armed conflict, it is somewhat *retrograde*, as the current trend has been to abolish this distinction and to have simply one *corpus* of law applicable to *all* conflicts. It can be confusing –and unjust- to have one law for international armed conflict and another for internal armed conflict<sup>60</sup>

I believe that this step has not yet taken place. The reasons have been explained previously. A number of obstacles stand in the way: the notion of

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except for starvation of civilians as a method of conducting warfare.

<sup>60</sup> n.43, 150.

protected persons for grave breaches, and also that principles of Hague Law have not been directly adapted to internal armed conflict, but suffer from the two limitations established by the *Tadic* Decision.<sup>61</sup> For this reason adopting a single identical provision to deal with the two types of conflict risks toning down the protection afforded by provisions in international armed conflicts by adopting a common denominator. It becomes clear in the Statute that states are still of the opinion that the two types of conflict should be treated differently; moreover, states are also less willing to accept restrictions on the conduct of internal conflicts. As a consequence, more daring provisions might have proved unacceptable to states. In this sense Wedgewood, identifies the problem in Rome in terms of 'the conflict between establishing broad jurisdiction and developing the law'.<sup>62</sup>

Finally, a jurisdictional aspect that affects the prosecution of crimes in internal conflicts is third party jurisdiction. 'Thus, the final text gives undue shelter to the very civil wars... Instead, third-party jurisdiction is reserved for international wars, where the state in whose territory the offence occurred is likely to consent...it will leave third- party nationals vulnerable only in one kind of conflict'.<sup>63</sup>

The second question to take into consideration is whether Article 8 is declaratory of current international law, or it is more restrictive or even constitutes an instance of progressive development. To determine this I will be looking at war crimes committed in international and internal conflicts. The first issue is resolving if the Statute includes all violations. 'The statute is far from comprehensive, having omitted various provisions of Hague and Geneva law'.<sup>64</sup> In addition, because the Statute is concerned with the most serious violations of international concern it is not comprehensive by definition. I will focus on particular offences to find out whether, as Human Rights Watch maintains, 'in several places the ICC formulations are different from and more restrictive than the established definitions on which they are based'.<sup>65</sup>

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<sup>61</sup> *Tadic* Decision par.94.

<sup>62</sup> n.12 in Ch.2, 98.

<sup>63</sup> *ibid* 101.

<sup>64</sup> n.49.

<sup>65</sup> *ibid*.

There are definitions that do not correspond to existing international law. Some are more restrictive than current international law. Of these, two stand out because of their particular significance; the definition of the principle of proportionality in relation to incidental civilian losses and the provisions on prohibited weapons. None of them apply to internal armed conflicts, which makes their definition and application even more restrictive, in comparison to what I have remarked about the *Tadic* Decision and the rest of the ICTY's jurisprudence.

For attacks that cause incidental civilian losses, there has been a reformulation of the principle of proportionality. Roth explains the process in the following terms: 'of special concern was the so-called rule of proportionality under international law, which prohibits a military attack causing an incidental loss of civilian life that is "excessive" compared to the military advantage gained (...) To avoid prosecutions in such borderline situations, US negotiators successfully redefined the proportionality rule to prohibit attacks that injure civilians only when such injury is "clearly excessive" in relation to the military advantage'.<sup>66</sup> The US worries concerning war crimes did not stop at this. The main objection stemmed from the fact that, whilst genocide and crimes against humanity are by nature widespread or systematic, a single act can constitute a war crime.<sup>67</sup> A compromise was reached with the inclusion of Article 8(1).

Article 8(1) places the requirement that prosecution of war crimes will be directed in particular against those acts 'as part of a plan or policy or as part of a large-scale commission of such crimes.' Yet it is not a limitation because it is not exclusive: the text uses the expression 'in particular'. It has to be seen in conjunction with Article 1 of the Statute, which specifies that the ICC has jurisdiction over 'the most serious crimes of international concern'. The reasoning behind Article 1 is the regime of complementarity; the Court is intended to be complementary to national criminal justice systems. In addition, the 'policy/large-scale' requisite of Article 8(1) is also not a requirement for prosecutions outside the ICC.

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<sup>66</sup> K. Roth, 'The Court the US Doesn't Want' *The New York Review* (19 November 1998), 46.

<sup>67</sup> 'Because genocide and crimes against humanity involve by their very nature widespread or systematic atrocities, the United States today is unlikely to commit them.'

The provisions on proscribed weapons are also restrictive. The inclusion of nuclear attacks was contested by the nuclear powers: it was then that less developed states opposed the inclusion of chemical and biological weapons (poor man's weapons). 'It seems inconsistent not only with human rights norms, but also with the purposes of the Statute (...) for use of poisonous arrows or dummy bullets to be justiciable, but use of nuclear weapons and other weapons of mass destruction deemed outside the scope of the Court'.<sup>68</sup> In addition, the prohibited weapons provisions have no effective catch-all clause on means of warfare that cause superfluous injury and unnecessary suffering, or which are inherently indiscriminate. However, even the use of those prohibited categories of weapons that were finally included (poisonous gases, dum-dum bullets and poisoned weapons) does not cover internal armed conflicts. The reason behind this exclusion might be because these are crimes that can also be committed against enemy **combatants**. In the case of rebels, governments want to be able to deal with them through all available means.

The so-called innovative provisions also cover internal conflicts. These include provisions that explicitly envisage crimes of sexual violence. As a result of the inclusion of crimes of sexual and gender violence 'no longer will these crimes have to be defined only as crimes against honour or as part of some other category'.<sup>69</sup> Also innovative is the crime of 'conscripting or enlisting' children under 15. The language was changed from the initial 'recruiting' at US insistence. It is limited in international armed conflicts to "national" armed forces.<sup>70</sup> It also applies to internal armed conflicts, for conscription in 'armed forces' or 'groups'. Finally, attacks on UN personnel are also comprised by Article 8, and therefore considered war crimes. Attacks on UN personnel had already appeared in a conventional instrument, but their character as war crimes was unclear.<sup>71</sup>

The Statute of the ICC 'may be considered from the viewpoint of treaty law, *qua* a multilateral international treaty, or it can be viewed from the perspective of its contribution to international criminal law, both substantive and procedural'.<sup>72</sup>

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But the United States might commit a war crime'. n.66, 46.

<sup>68</sup> n.3 in Ch. 2, 54.

<sup>69</sup> n.49.

<sup>70</sup> n.49.

<sup>71</sup> n.53.

<sup>72</sup> n.43, 145.

The exclusion of some norms of international humanitarian law, the adoption of more restrictive definitions and of innovative norms might indicate that states were not so keen in codifying customary law, but wished instead to establish a regime between the parties to the Statute.

Further, to find out if the Rome Statute is declaratory of customary law it is convenient to look at other provisions of the Statute, at some that relate specifically to war crimes. Articles 8(2)(b) and 8(2)(e) contain the expression 'within the framework of international law'. What does this mean, and why was this provision included? Though obscure, I believe that this clause allows recourse to be had to other, more specific provisions of international humanitarian law that are uncontested customary law, such as the 1925 Gas Protocol, in order to aid interpretation of Article 8 should some of its provisions prove unclear.

Another issue that affects war crimes directly is the option that states have of declaring that the Court has no jurisdiction over war crimes for 7 years after the coming into force of the Statute (Article 124). Though this issue concerns jurisdiction, it is an important provision because it distinguishes war crimes from the other crimes under the jurisdiction of the Court. The opt-out clause 'appears to send the message that war crimes are not as serious as the other core crimes mentioned in the Statute'.<sup>73</sup> Some commentators view the opt-out clause as a reservation.<sup>74</sup> What was the reason behind the inclusion of this clause? Roth proves enlightening: 'the United States, joined by France, also proposed that governments be allowed to join the ICC while specifying that their citizens would be exempted from war crimes prosecutions (...) the Rome delegates rejected it. But as a compromise, the treaty allows governments to exempt their citizens from the court's war crimes jurisdiction for a period of seven years'.<sup>75</sup> This is yet another example of governments trying to shield their servicemen from standing trial for war crimes.<sup>76</sup>

In each of the Articles that determine the subject-matter jurisdiction of the Court there appears the expression 'for the purposes of this Statute'. This expression

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<sup>73</sup> M. C. Roberge, 'The New International Criminal Court: a Preliminary Assessment' no.325 (1998) IJRC (web version) 671.

<sup>74</sup> n.43, 146.

<sup>75</sup> n.66, 46.

supports the notion that the Statute does not seek to codify existing customary law. This notion is further confirmed by the 'saving clause', Article 10. It confirms that customary law will not be affected by the definitions in the Statute.<sup>77</sup> As noted, though, it could only affect it by making it more restrictive. However, there is the question of reconciling this with the principle of legality, recognised in the Statute in Article 22. Closely related is the question as to whether provisions more **restrictive** than customary law violate or not the principle of *nullum crimen sine lege*. If the conclusion is reached that the Rome Conference was more preoccupied about securing membership to the Statute than about codifying customary law, it will still be necessary to look at whether this satisfies the principle of legality. What cannot be overlooked is that offences in the Rome Statute entail the criminal responsibility of individuals.

Hence the Statute itself seems to support the existence of '*two possible regimes of corpora of international criminal law*, one established by the Statute and the other laid down in general international criminal law. The Statute also seems to presuppose the *partial coincidence* of these two bodies of law: they will probably be (...) identical (...) but there will be areas of discrepancy'.<sup>78</sup> Clark is of similar opinion: '(the Statute) is essentially an instrument giving jurisdiction to a court over selected crimes that are already well –established in general customary law' and Article 10 is a savings clause that tries to preempt 'backsliding on current achievements or freezing efforts in other forums to engage in progressive development of the rules'.<sup>79</sup> For Clark, the Statute consists of a 'particular jurisdictional statement'. Once the Court is running, however, there is the possibility of customary law falling into line with the Statute, as is normally the case in the interplay between multilateral treaties and customary law, because state practice, the source of custom, tends to follow the treaty.

In any event, Article 8 of the Statute confirms that violations of international humanitarian law in internal conflicts are war crimes. So even though the Statute might not reflect all of customary law, and is regarded as a jurisdictional statement, the ICC Statute could still be viewed as evidence of states' *opinio juris*. States for the most part will be estopped from denying the criminality of

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<sup>76</sup> n.43, 171.

<sup>77</sup> The ICRC and Human Rights Watch agree on the importance of the 'saving clause', n.73 and n.49.

<sup>78</sup> n.43, 157.

violations in internal conflicts. Though this might be a somehow optimistic conclusion, for current events show that these crimes are not being prosecuted, as in Sierra Leone. Following on from this, there might still be –marginally– some attacks on the premise that internal atrocities have been criminalised. That is 1. There might still be some more motions in the ICTY and 2. There might be some attacks from outside because not every state a) is party to the Statute, and b) some states will not have implemented this trend in their national law, though recourse may be had to custom for these situations.

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<sup>79</sup> Cited in n.3 in Ch.2, 58.

## Chapter 5: The Implications for Culpability

### 5.1 The 'two-box' approach to culpability

The customary process of criminalising violations of international humanitarian law committed in internal conflicts began before the Decision in *Tadic*. Yet this Decision was fundamental to dispelling the doubt that surrounded war crimes committed in internal conflicts; as a decision by an International Tribunal, it established these violations as offences in international law. The Statute of the ICTR already reflected this development. Subsequent proceedings before the Ad Hoc Tribunals both confirmed and fleshed this development. It found its ultimate confirmation in the inclusion in Article 8 "War Crimes" of the ICC Statute of violations of international humanitarian law committed in internal conflicts.

The by-product of this process was that, though there was an approximation between law applicable to international and to internal conflicts (because violations were now criminal in both contexts), this did not mean the surge of a single *corpus* of law applicable to violations of the law of armed conflict in general. Quite the contrary, the character of the conflict became (or remained) an element of war crimes, which needs to be proved. In this sense, what the *Tadic* Decision established concerning grave breaches was as important as its determination of jurisdiction, under **Article 3** of the Statute, over offences committed in internal conflicts. That grave breaches cannot be applied to internal conflicts constituted part of the package deal that obliges the ICTY to consider the character of the conflict an element of the crimes. In this sense the status of protected persons of the victims is another element of grave breaches.<sup>1</sup>

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<sup>1</sup>This element of grave breaches has been analysed in section 3.2. To an extent, the notion of protected person is also an element of CA3. But in the latter case the test is a factual one, ie were the victims not taking active part in the hostilities, whilst for grave breaches it also constitutes a legal test, eg were the victims nationals of the party in whose hands they found themselves. I have chosen to focus only on the character of the conflict as an element of the crimes, rather than look also at the notion of protected persons as an element of the crimes. I have chosen to focus on the character of the conflict because it is an element of the crimes for all war crimes found in Article 8 of the ICC Statute, whilst protected persons are only an element of the crimes as far as grave breaches (Article 8(2)(a)) and, to the extent mentioned, CA3 (Article 8(2)(b)) are concerned.

It is submitted that the 'two-box' approach to international humanitarian law resulted in the 'two-box' approach to culpability. The latter resulted in having to prove the international (or internal) character of the conflict as an element of the offence. This meant that there would be conduct that was criminal or not depending on the context in which it was committed. Thus, the accused could be deemed guilty or not guilty of an offence depending on whether it was committed in an international or an internal conflict. To an extent the character of the conflict as an element of the crimes is but a function of the 'two-box' approach to international humanitarian law.

Many practical questions arise from this 'two-box' approach to culpability, not least the possibility of inconsistent treatment for the accused. This chapter will be looking at these issues and at whether this approach to culpability is desirable, or whether it raises questions that are indifferent to moral fault and thus awkward to consider under the heading of culpability. This chapter will also comment on whether such approach is actually feasible. To this end I will mention the thresholds of applicability that distinguish international from internal conflicts, and internal conflicts from civil strife or unrest.

## 5.2 The character of the conflict as an element of war crimes.

There is ample evidence that the character of the conflict became, if it was not already (before, conduct committed in internal conflicts was not criminal in international law), an element of war crimes. The evidence provided by the ICTY Statute consists of a division of labour between the different Articles; in particular one of the conditions that need to be satisfied to apply **Article 2** on grave breaches is the existence of an international conflict. On the other hand, **Article 3** on violations of the laws and customs of war applies, in principle, to internal and to international conflicts. In fact, it applies irrespective of the character of the conflict,<sup>2</sup> with one exception. One of the strategies adopted by the Prosecutor in drawing up charges consisted of relying on the provisions of the Additional Protocols. **Article 3** does not apply irrespective of the character of the conflict when charges are rooted in the provisions of the Additional Protocols. In this case the Tribunal needs to determine if either of the two



Protocols applies attending to the character of the conflict. In any case we have yet to see an example of this charge because, notwithstanding the disposition in the *Blaskic* Judgement,<sup>3</sup> the Chamber decided that it need not apply Additional Protocol I because the conduct in question was already covered by **Article 3**.<sup>4</sup> Despite the devices employed by the Prosecutor to avoid engaging in conflict classification, it was still necessary to determine the character of the conflict (or, what is the same thing, whether there was an international conflict) when charges on grave breaches were brought against the accused.

There is less evidence in proceedings before the ICTR of the character of the conflict constituting an element of the crime because the choice of law in the ICTR Statute pointed to the internal character of the conflict. Also because the ICTR has been more concerned with finding evidence of genocide and crimes against humanity. Nevertheless, the ICTR has had to demonstrate the existence of an internal armed conflict as a condition for **Article 4** of the ICTR Statute. It has done so by finding that the conflict satisfied the material requirements of **Article 4** (the requirements for the application of Additional Protocol II, as common Article 3 was subsumed within it), which constitute the minimum threshold between internal conflict and civil strife.

Finally, the last piece of evidence submitted and which at the same time constitutes the confirmation of the character of the conflict as an element of the crimes is the Final Draft Text of the Elements of the Crimes of the Preparatory Commission for the International Criminal Court.<sup>5</sup> All the crimes contained in Article 8(2)(a) (grave breaches of the Geneva Conventions) have as an element of the crimes that 'the conduct took place in the context and was associated with an international armed conflict'. Likewise for the crimes found in Article 8(2)(b) (other serious violations of the laws and customs applicable in international armed conflict). Article 8(2)(c) (serious violations of Article 3 common to the four Geneva Conventions), on the other hand, requires that 'the conduct took place

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<sup>2</sup>eg CA3. The contention still needs to be proved for violations of Hague law

<sup>3</sup> The Trial Chamber 'finds Tihomir *Blaskic* guilty of (...): a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 51(2) of API: unlawful attacks on civilians (count 3); a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 52(1) of API: unlawful attacks on civilian objects (count 4)'. Disposition, *Blaskic* Judgement.

<sup>4</sup> *Blaskic* Judgement, par.170.

<sup>5</sup> Report of the Preparatory Commission for the International Criminal Court 'Addendum: Finalised draft text of the Elements of the Crimes', PCNICC/ 2000/INF/3/Add.2 (6 July

in the context of and was associated with an armed conflict not of an international character'. The crimes contained in Article 8(2)(e) (other serious violations of the laws and customs applicable in noninternational armed conflict) do too.<sup>6</sup>

Thus, the two box approach to international humanitarian law had as a result a 'two-box' approach to culpability that was adopted by the ICC Statute. The Final Draft Text of the Elements of the Crimes is yet to be accepted by the Assembly of States Parties once the ICC Statute comes into force. Yet the Final Draft Text only reflects the 'two-box' approach preferred by states at the Rome Diplomatic Conference. The Conference would have been the best occasion to get rid of this approach and institute a single *corpus* of law for violations in internal and international conflicts; still states' preferences prevailed. The Final Draft Text also confirms that under Article 8 of the ICC Statute it is not possible to apply common Article 3 irrespective of the characterisation of the armed conflict. The Judges and Prosecutor of the ICC will not have recourse to this strategy to avoid engaging in conflict classification. Yet the Statute contains assurances that nothing therein will affect existing customary law. It is outside the scope of this thesis to determine whether the applicability of common Article 3 to internal and to international conflicts belongs to customary law, though the ICTY seems to believe it does. In any case, if the ICC Statute is regarded as proof of states' *opinio juris*, then it is necessary to conclude that states decided to keep the distinction between crimes committed in international conflicts and crimes committed in internal conflicts.<sup>7</sup>

I have yet to deliver the argument that the character of the conflict is an issue independent to moral fault and as such should not be considered when deciding culpability. At present it is appropriate to focus on the process. In procedural terms the direct consequence of having the character of the conflict as an element of war crimes is the need to engage in the process of conflict classification. It is premature to speculate on how the ICC will deal with this need. However, experience before the ICTY demonstrates that the process of

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2000). Cited as Final Draft Text.

<sup>6</sup> The previous Report, the Report by the Preparatory Commission for the International Criminal Court on 'Elements of Crimes', PCNICC/1999/L.5/Rev.1/Add.2 (22 December 1999) also employed this approach.

<sup>7</sup> Equally, states decided to keep the distinction between crimes committed against protected persons and crimes committed against persons not covered by this protection.

conflict classification is lengthy and taxing, and that the character of the conflict has to be decided anew in every case. I will deal with each of these aspects in turn.

There have been instances where, in the 'interests of justice', the Prosecutor for the ICTY dropped grave breaches charges to avoid engaging in conflict classification with a view to expedite trial proceedings.<sup>8</sup> Determining the character of the conflict takes an inordinate amount of time, and heaps of documentary and expert evidence. 'Indeed, the production of evidence related to conflict classification may take up a greater percentage of trial time than the presentation of evidence related to the moral fault of the accused'.<sup>9</sup> In addition obtaining this evidence may prove an obstacle for the ICC, as it will have to rely on the co-operation of states. The ICTY has experienced difficulties in this area, and for the ICC things will be harder rather than easier.

The length of proceedings before the ICTY was a matter that preoccupied former Tribunal's President Judge McDonald. Their length was 'in part a result of the fact that the legal norms that are to be applied require development, with many rulings of first impression (...) Moreover, the trials involve factually complex and difficult issues, requiring numerous witnesses as well as extensive documentary evidence. And yet the Tribunal's Statute, like the ICC Statute, guarantees the accused the right to not only a fair trial but also to an expeditious trial. Expeditious trials are important not only for the accused, who is generally in detention, but also for other accused in detention awaiting trial'.<sup>10</sup> She was 'concerned about the effect it has on the people in custody. They are presumed to be innocent'.<sup>11</sup>

The difficulties for the ICTY do not stop here. The length of proceedings caused by the need to engage in conflict classification is exacerbated by the fact that the character of the conflict needs to be decided for every case where grave breaches were put forward. That it has to be decided anew for every case supports the submission that the character of the conflict constitutes an element

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<sup>8</sup> Section 4.1.

<sup>9</sup> n.8 in Ch.2, 769.

<sup>10</sup> 'Remarks made by Judge Gabrielle Kirk McDonald, President of the ICTY, to the Preparatory Commission for the International Criminal Court New York', ICTY Press Release, JL/P.I.S./425-E (30 July 1999).

<sup>11</sup> IWPR, *Tribunal Update: Last Week in The Hague* no.152 (November 15- 20, 1999).

of war crimes. It also means that the accused has a right for his evidence to be heard. We have already seen the strategies adopted by the Office of the Prosecutor to avoid conflict classification relying on **Article 3**. In addition, a number of procedural suggestions were put forward by the OTP to enable the ICTY to take note of the character of the conflict and thus avoid having to determine it for every case. Amongst this was the notion of *res judicata*. There also appeared the possibility of taking judicial notice.<sup>12</sup> Finally, another possibility is found in the doctrine of precedent (*stare decisis*); I will investigate whether it has been used as a tool to decide the character of the conflict.

The notion of the character of the conflict as *res judicata* was first raised by the Defence in the *Celebici* case. The Defence affirmed that the Prosecutor could not argue the international character of the conflict, as the *Tadic* Judgement (Trial on Merits) had already decided that the conflict was not international.<sup>13</sup> Yet *res judicata* only binds parties to the proceedings in question: its justification is the need for finality in litigation. In *Celebici*, therefore, the Defence sought to argue that the Prosecutor had been a party to the proceedings in the *Tadic* Judgement (Trial on Merits).<sup>14</sup> The Chamber in the *Celebici* Judgement dismissed this reasoning. It correctly interpreted the notion of *res judicata* as being 'limited, in criminal cases, to the question of whether, when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated'.<sup>15</sup> In addition, the Prosecutor would, in the case of the Tribunal and other judicial systems, always be a party to the criminal proceedings: it was clear the doctrine is 'not applied so as to prevent the prosecutor from disputing a matter which the prosecutor has argued in a previous, different case'.<sup>16</sup> Most importantly, the Chamber established that it was 'certainly not bound by the Decisions of other Trial Chambers in past cases and must make its findings based on the evidence presented to it (...) Even should the Prosecution bring evidence which is largely similar to that presented in a previous case, the Trial Chamber's assessment of it may lead to

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<sup>12</sup> Though closely related (in the sense that it is possible to take judicial notice of an aspect that has been decided conclusively for the parties), they are not the same thing; it will become clear below.

<sup>13</sup> It derived this conclusion from the determination that Article 2 on grave breaches was inapplicable because the victims did not have the character of protected persons. 'The Defence asserts that this was partly on the basis that they did not find there to have been an international armed conflict at the relevant time'. *Celebici* Judgement par.205.

<sup>14</sup> *ibid* par.205.

<sup>15</sup> *ibid* par.228.

entirely different results', as it did for the present case.<sup>17</sup> I will look at the doctrine of binding precedent below. It is worth noting that the Chamber decided, in particularly strong terms, that the character of the conflict was not *res judicata*.

A motion for taking judicial notice of the international character of the conflict was raised by the Prosecution in the *Simic* Decision. The Prosecutor requested the Trial Chamber to take judicial notice of the international character of the conflict, as a fact of common knowledge under Rule 94(A), or as an adjudicated fact under Rule 94(B) of the Rules of Procedure and Evidence. It must be remembered that the motion in *Simic* was decided prior to the *Tadic* Judgement (Appeal on Merits), though after the *Celebici* Judgement. Remarkably, the Prosecution wished the Chamber to take judicial notice of the international character of the conflict as an adjudicated fact, basing itself on the same evidence that had been alleged by the Defence in *Celebici* to allege quite the contrary: that the conflict was internal. The purpose of taking judicial notice is 'judicial economy', and in the particular case, the request was 'aimed at permitting the application of the counts of the Indictment based on the grave breaches of the Geneva Conventions'.<sup>18</sup> The Defence contested the proposal, alleging that the international character of the conflict was not an adjudicated fact and that taking judicial notice of it 'would jeopardise the rights of the accused (...), in particular their right to a fair trial and right to examine or have examined the evidence presented by the Prosecutor'. The Chamber admitted as much, 'that a balance should be struck between judicial economy and the right of the accused to a fair trial'. It subsequently dismissed the motion. The Chamber established that the character of the conflict remained a contentious issue: the accused had the right to have the evidence heard. Thus judicial notice was out of the question. The Chamber also decided that Rule 94 (A and B), which envisages the possibility of taking judicial notice, 'is intended to cover facts and not legal consequences inferred from them, that the Trial Chamber can only take judicial notice of factual findings but not of a legal characterisation as such' and that the decision on the character of the conflict was a legal consequence inferred from facts. Accordingly, the Chamber took judicial notice

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<sup>16</sup> *ibid* par.228.

<sup>17</sup> *ibid* par.228.

<sup>18</sup> *Simic* Decision. This and the *Kvočka* Decision do not indicate paras.

*proprio motu* of the date when Bosnia-Herzegovina proclaimed its independence and the date it was recognised by the EC.

It is interesting to contrast the previous outcome with the Decision on Judicial Notice in the *Kvočka* case.<sup>19</sup> In this motion the Prosecution and the Defence had agreed on taking judicial notice of a number of issues that figured in an annex,<sup>20</sup> amongst these was the widespread nature of the attack on a civilian population. The agreement was aimed at expediting proceedings. The difficulty was getting all the accused to agree because 'if judicial notice is taken of the facts from *Tadic*, such decision should apply to all accused.' Though they did finally agree, an argument put forward by some of the accused was that admission and judicial notice of these issues, which according to the Prosecution constituted the elements for the applicability of **Article 3** and **5**, amounted to a guilty plea. The Chamber dismissed the argument because it considered that the Prosecutor still had to discharge the burden of proof to find the accused criminally responsible. Notwithstanding the *Simic* Decision, the Chamber in the *Kvočka* Decision accepted the possibility of taking judicial notice of legal consequences. It decided that 'even if Rule 94 is concerned only with judicial notice of facts and documentary evidence, no provision in the Statute and the Rules forbids the Trial Chamber, having taken account of the rights of the accused, from drawing legal conclusions based on facts thereby established beyond a reasonable doubt'. The Chamber then did two things: it took judicial notice of the agreed-upon facts and 'decided that at the times and places alleged in the Indictment, there existed an armed conflict; that this conflict included a widespread and systematic attack against notably the Muslim and Croat civilian population; and that there was a nexus between this armed conflict and the widespread and systematic attack on the civilian population and the existence of the Omarska, Keraterm and Trnopolje camps and the mistreatment of the prisoners therein'.<sup>21</sup> In this case the Chamber did not face the question of having to take judicial notice of the character of the conflict, because the accused were charged with crimes against humanity and violations of the laws

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<sup>19</sup> *Kvočka* Decision.

<sup>20</sup> Initially by reference to the *Tadic* Judgement (Trial Chamber), and already granted in Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts, *Prosecutor v Miroslav Kvočka, Milošica Kos, Mlado Radic and Zoran Zigic*, Case no IT-98-30 (19 March 1999). After the *Tadic* Judgement (Appeal on Merits), with reference to the Appeal.

<sup>21</sup> These are the constitutive elements of **Article 5** (crimes against humanity), except for

and customs of war.<sup>22</sup> Thus, we cannot conclusively say on the evidence provided by this decision that there exists the possibility of taking judicial notice of the character of the armed conflict, as it was not an issue. However, if judicial notice can be taken of the widespread and systematic nature of the attack for crimes against humanity, there is no reason why the same cannot be done for the character of the conflict.

Differences between the *Simic* and *Kvocka* Decisions exist that guaranteed different outcomes. First, in the *Simic* Decision the Defence contested the motion, whilst in the *Kvocka* Decision the Prosecution and the Defence had agreed as to what facts the Tribunal should take judicial notice of. Secondly, the *Kvocka* Decision dealt with the same time period and geographical area of *Tadic* case: the Indictment ‘charges the accused with violations of the laws and customs of war and crimes against humanity in Bosnia-Herzegovina in the Prijedor municipality and in particular in the Omarska, Keraterm and Trnopolje camps between 26 May and 30 August 1992; and (...) the accused Dusko Tadic was convicted of crimes committed in the same places between 23 May and 31 December 1992, and his appeal is completed and his conviction has now become final’. The existence of a completed appeal is significant.<sup>23</sup> Also, that two cases concern a very similar period (in time and geographical location) is not unusual for the ICTY. Accused turn up in the Tribunal when proceedings have already started for others in the same Indictment: there is the possibility to defer proceedings temporarily and join trials. But when cases are at an advanced stage, trials will not be joined and different trials will deal with the same set of facts.<sup>24</sup> Third, the *Kvocka* Decision was decided on June 2000. The idea of taking judicial notice to expedite trials had been floated previously, as evidenced by the *Simic* Decision. Nevertheless, on February 2000 a group of experts appointed by UN Secretary-General issued a report suggesting scope for improvement in the Tribunal’s conduction of trials. The Report suggested that in order to expedite trials ‘the defence and prosecution parties should attempt to resolve contested issues between themselves rather than resorting to the usual procedure of presenting a motion before the court (...) Judges could require the parties to rule on undisputed issues to eliminate the need for the

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the *actus reus*.

<sup>22</sup> The Prosecutor v Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic, Amended Indictment, Case No IT-98-30-PT (31 May 1999).

<sup>23</sup> The *Simic* Decision was rendered before the *Tadic* Judgement (Appeal on Merits).

introduction of a potentially massive amount of evidence. Also the parties could reduce the time needed for clarifying background information already established in another trial'.<sup>25</sup>

So far it has been noted that the character of the conflict cannot be considered *res judicata* and that to date no judicial notice has been taken thereof. However, one can only wonder whether the outcome in these instances would have been different if there had been, as there is now, a conclusive decision on the issue by the Appeal Chamber. As explained, the existence of a concluded appeal was of significance in the *Kvočka* Decision. This hypothesis introduces the possibility of applying the doctrine of binding precedent to the determination of the character of the conflict. The approach was adopted in the *Aleksovski* Judgement (Appeal Chamber), which followed the decision on the international character of the conflict in the *Tadic* Judgement (Appeal on Merits). In the *Aleksovski* Judgement the Appeals Chamber in decided that because the facts concerned a similar time frame to the *Tadic* case, then the conflict was international unless a separate internal conflict could be proved. In applying *stare decisis* the Chamber in the *Aleksovski* Judgement (Appeal Chamber) had regard for various different possibilities: if the decisions of a Trial Chamber bind another Trial Chamber (the *Celebici* Judgement left very clear that it was not the case and the Appeals Chamber in the *Aleksovski* Judgement concurred), if the Trial Chamber must follow decisions of the Appeals Chambers decisions (yes), and whether the Appeals Chamber is bound to follow it's own decisions. As to the last, it decided that the Appeals Chamber would follow its own decisions unless it would render an unjust outcome for the individual defendant.<sup>26</sup> Judge Hunt (concurring) rightly viewed the issue in the following terms: 'there has always been a special need for certainty in the criminal law. There is, however, a tension existing between that special need and another special need in the criminal law: the need for flexibility where adherence to a previous decision will create injustice. Both of these special needs apply equally to international criminal law as well'.<sup>27</sup>

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<sup>24</sup>Eg *Blaskic* and *Kordic and Cerceez* cases.

<sup>25</sup> IWPR, *Tribunal Update: Last Week in The Hague* no.163 (February 7- 12 2000).

<sup>26</sup> Declaration of Judge Hunt on the *Aleksovski* Judgement (Appeals Chamber) par.8-9.

<sup>27</sup> *ibid* 4.

Having demonstrated that the character of the conflict is an element of the crimes, that the process of conflict classification is lengthy and has to be undertaken in every case where charges of grave breaches are brought, it is necessary to enquire whether it makes any difference to the individual accused to be charged of crimes in an internal or in an international conflict. Theoretically, the potential for inconsistent treatment appears obvious: an accused is charged with a grave breach, the conflict is found by the Tribunal to be internal, and the accused walks free.

This scenario tends to disturb commentators because they regard the character of the conflict as an external element indifferent to moral fault that should have no incidence in the culpability of the accused. What it is that we want to punish perpetrators for? Criminal lawyers would answer that we wish to punish them for the criminal conduct (and not for the context within which it was committed). Perhaps the most vehemently held views were those expressed by Judge Rodrigues in the *Aleksovski* Judgement (Trial Chamber). I have already commented that in his opinion restricting grave breaches to international conflicts represented unacceptable means of respecting the sovereignty of states. In addition he objects to the character of the conflict as an element of the crime, for he concludes that it is not a factor that the accused takes into consideration when deciding whether or not to commit a war crime. He thus indicates that it is an element independent to moral fault. 'The characterisation of the conflict is not a consideration in the mind of a person, be it a man or woman, who is preparing to commit a crime which might be characterised as a grave breach of the Geneva Conventions'.<sup>28</sup>

At first impression, the international or internal nature of the conflict does not manifestly drive an individual towards refraining or not from committing a war crime. However, though it does not answer Judge Rodrigues' objections, the element of the crime is the character of the conflict and not the accused knowledge of it. It may impose an additional hurdle on the Prosecutor, namely, to prove the international character of the conflict, but the additional element is by no means a mental element. Thus, though lengthy, it may be easier to prove with the aid of documentary and expert evidence. This view is confirmed by the

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<sup>28</sup> Dissenting Opinion of Judge Rodrigues on the *Aleksovski* Judgement (Trial Chamber) par.48.

Final Draft Text of the Elements of the Crimes. In stating the elements of war crimes, it says by way of introduction: '-There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or noninternational. -In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or noninternational'. On the other hand, this may not be strictly true concerning Article 8(2)(a) and 8(2)(c). For these the Final Draft Text requires that the accused have knowledge that the crime was committed against protected persons. For 8(2)(a) grave breaches, not only is it required that 'such person or persons -the victims- were protected under one or more of the Geneva Conventions of 1949', but also that 'the perpetrator was aware of the factual circumstances that established that protected status.' As for 8(2)(c) the requirement that 'such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities' is compounded by the requirement that 'the perpetrator was aware of the factual circumstances that established this status'.

An additional argument in support of the view that it is undesirable to consider the character of the conflict as an element of the crimes is the consequences it entails for legal certainty. There are two angles to this. First, the character of the conflict might not be authoritatively adjudicated till after the criminal conduct takes place: it remains uncertain until a Tribunal decides upon it. Secondly, there is a need to consider the principle of legality for the individual accused. The development of the law of criminality of acts in internal armed conflicts has reduced the problem but, to the extent that there is a difference of substantive standards, might not a commander say, 'because this is an internal armed conflict, we may fight this way (which we could not if it were an international armed conflict)? The difficulty is increased if, after the commander makes this evaluation of the law he can apply, the Tribunal decided in proceedings against him that those acts were criminal also when committed in internal conflicts. This could constitute an unfair outcome for the commander, quite separate from the possibility that the Tribunal could decide *a posteriori*, and contrary to the evaluation made by the commander, that the conflict was international and not internal.

On the contrary, the counterarguments to Judge Rodrigues' view are scarce. Keeping the character of the conflict as an element of the crimes appears

cumbersome and unnecessary, derived from the normative immaturity of international criminal law. Yet irrespective of these objections we might be facing a limit that cannot be trespassed, as illustrated in Judge Shahabundeen's Declaration on the *Blaskic* Judgement concerning protected persons.<sup>29</sup> Why have states chosen to retain in the ICC Statute the character of the conflict as an element of the crimes when it is contended that it is morally indifferent? A possible answer is that perhaps they don't believe it is morally indifferent. States may have reserved themselves the possibility of behaving more harshly towards their own nationals than they would towards protected persons in an international armed conflict. They want to have less limitation in dealing with conflicts within their territories.<sup>30</sup> Perhaps they are willing to admit the criminality of violations in internal conflicts, but not to the point of equating them to international conflicts. Evidence can be sought in the ICC Statute as reflecting *opinio juris* of states.

In practice, there is little evidence of inconsistent treatment. The theoretical arguments tend to fade into oblivion and the scenario previously described remains unlikely. The first practical issue to consider is whether the potential for inconsistent application is reflected on sentencing. The question is whether it makes a difference to sentencing if the accused is charged with crimes committed in one context and not in the other. There are very few examples in the ICTY's practice and I will look at two.

The *Tadic* Second Sentencing Judgement (Trial Chamber) after the Appeals Chamber had established for *Tadic* the international character of the conflict seems at first to support the thesis that convicting on the basis of crimes depending on the context in which they were committed is reflected in sentencing. To recapitulate, *Tadic* had initially been convicted of crimes against humanity and violations of the laws and customs of war (*Tadic* Judgement (Trial on Merits)). The Trial Chamber had ruled **Article 2** (grave breaches charges) inapplicable because the victims did not have the character of protected persons. After this determination it did not go further, leaving the nature of the conflict as ambiguous. *Tadic* was sentenced to 20 years (*Tadic* First Sentencing

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<sup>29</sup> Section 3.2.

<sup>30</sup>In this way, states may claim the right to use force against their own nationals that they would not use in an international conflict. This argument highlights the distinction between human rights law and international humanitarian law. Notwithstanding a

Judgement (Trial Chamber)). Both the Defence and the Prosecutor appealed and, on appeal, the Chamber found that the character of the conflict was international, and the victims protected persons. Thus charges under **Article 2** were deemed applicable and *Tadic* was also convicted of these charges, on top of violations of the laws and customs of war (*Tadic* Judgement (Appeal on Merits)). Sentencing then returned to the Trial Chamber, which increased *Tadic's* sentence in 5 years, from 20 to 25 (*Tadic* Second Sentencing Judgement (Trial Chamber)).<sup>31</sup> To this extent it would seem that the character of the conflict does matter for sentencing. However, this fails to take into account other findings in the *Tadic* Judgement (Appeal on Merits). The Chamber found *Tadic* guilty on the evidence and applying the doctrine of common purpose of killing five men. This count had been brought as a crime against humanity (murder) and on appeal *Tadic* was found guilty. This additional count is what increased *Tadic's* sentence, moreover as it was a crime against humanity.<sup>32</sup> In addition, the conduct that was now admitted as grave breaches had already been charged –and *Tadic* convicted of it- as violations of the laws and customs of war.<sup>33</sup>

The practical evidence in the *Tadic* case for the relevance of the character of the conflict is thus slim. The case in *Aleksovski* equally offers little evidence. In much the same fashion, the grave breaches charges against *Aleksovski* were dismissed following the *Tadic* Judgement (Trial on Merits). On appeal, following the *Tadic* Judgement (Appeal on Merits), the conflict was found to be international and the victims protected persons, and thus grave breaches were applicable. The Appeals Chamber in the *Aleksovski* Judgement (Appeal Chamber), however, decided not to add this conviction for grave breaches on top of the conviction for violations of the laws and customs of war because they concerned the same facts: 'thus, even if the verdict of acquittal were to be

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degree of overlap, they protect different values and employ different methods.

<sup>31</sup> Later the *Tadic* Sentencing Judgement (Appeal Chamber) decreased the sentence to 20 years on the basis that the Second Sentencing Judgement (Trial Chamber) had not taken into consideration the place of *Tadic* in the hierarchy –he was, in the words of the Defence, 'a tadpole in a pool of sharks'. IWPR, *Tribunal Update: Last Week in The Hague* no.161 (24- 29 January 2000).

<sup>32</sup> The question as to whether crimes against humanity should receive a higher sentence than war crimes was the cause of much heated debate in the ICTY. Though it contradicted a previous ruling by the Appeals Chamber in the *Erdemovic* Judgement (Appeals Chamber), the matter has been authoritatively decided in the *Tadic* Sentencing Judgement (Appeal Chamber). It decided that they should receive the same sentence.

<sup>33</sup> Grave breaches and violations of the laws and customs of war are considered equally

reversed by a finding of guilt on these counts, it would not be appropriate to increase the Appellant's sentence'.<sup>34</sup> It is to be expected that the consideration of the principle of *non bis in idem* played a part.

Therefore it is possible to appreciate how the character of the conflict as an element of the crime does not in practice hold such determinative value. The conclusion is also supported by the strategy employed by the Prosecutor to prevent the acquittal of the accused in the event of a non-favourable classification of the conflict. This strategy constitutes the practice of concurrent/cumulate or alternative charges, where mirror provisions will be employed. The character of the conflict will not be determinative because it will always be charged in the alternative. However one cannot be sure that this method of charging will be open to the ICC, for it was a contentious issue in the ICTY. The Tribunal decided it did not violate the principle of *non bis in idem* in a number of early decisions. In the Defence Motion on the Form of the Indictment in the *Tadic* case, the Chamber understood that these considerations were relevant only in deciding the penalty, and declined to say much else. 'This is a matter that will only be at all relevant insofar as it might affect penalty (...) What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading'.<sup>35</sup> First, though it will guarantee that the accused does not escape conviction because of the character of the conflict, concurrent charging does not obviate the need to go through conflict classification. Second, in order to determine which charges are applicable we will have to be able to classify the conflict on the basis of some objective criteria: these are the thresholds of applicability.

Considering that the character of the conflict has to be determined at every stage, the question is whether it is possible to do so. Are there objective

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grave and the sentence is the same.

<sup>34</sup> *Aleksovski* Judgement (Appeals Chamber) par.153.

<sup>35</sup> Decision on Defence Motion on Form of the Indictment, *Prosecutor v Dusko Tadic*, Case No IT-94-1 (14 November 1995) par. 17. This reasoning was followed in the Decision on Motion by the Accused Zejnil Delalic Based on Defects in the Form of the Indictment, *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic, and Esad Landzo*, Case No IT-96-21 (2 October 1996) par.24. Having said this, it is necessary to remember that the commanders in the *Kupreskic* Judgement were acquitted on particular counts because they had been erroneously charged. Section 4.1.

parameters to distinguish between an international and an internal conflict? There are two thresholds to take into consideration. In the first place, the higher threshold: the threshold between international and internal conflicts, because it is with respect to this threshold that the character of the conflict becomes significant in determining the culpability of the accused. Secondly, the lower or minimum threshold, between an internal conflict and peacetime.<sup>36</sup> This threshold is important in the sense that it determines when conduct ceases to be liable to be classified as a war crime (for now violations of international humanitarian law applicable to internal conflicts are criminal in international law). The higher threshold has already been tested in proceedings before the ICTY. Though essentially a legal test, before the ICTY factual considerations loomed large; most of the issues turned on whether the evidence satisfied the test. In this manner, the upper threshold was in proceedings before the ICTY a contentious issue and the cause of heated debate. Yet even if the Judges agreed on the test to be applied to find the existence of an international conflict, they tend to disagree on the evidence, ie on whether the facts did satisfy at all the test or not.<sup>37</sup>

Whilst the upper threshold constitutes essentially a legal test, the minimum threshold is concerned with the level of violence. The intensity of the conflict is not the determinative factor in deciding whether a conflict is international or internal -it is whether the participants are two or more states or agents of those states. However, the distinction between an internal armed conflict and a mere disturbance is a matter of the material intensity of the conflict. The intensity of the conflict is reflected in the factors for Additional Protocol II to apply.<sup>38</sup> The

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<sup>36</sup>Note: peacetime is used in the sense that there is no armed conflict. This does not mean that the situation is stable, there can be violence (or even genocide) which does not make it to the minimum threshold.

<sup>37</sup> Eg Separate and Dissenting Opinion of Judge McDonald on the *Tadic* Judgement (Trial on Merits) and Dissenting Opinion of Judge Rodrigues on the *Aleksovski* Judgement (Trial Chamber). That these questions tend to revolve around questions of facts is one of the reasons why this author has declined to go into more detail.

<sup>38</sup>These requirements are found in Article 1(1) of APII. The ICTR identified them as follows: (i) an armed conflict takes place in the territory of a High Contracting Party, between its armed forces and dissident armed forces or other organised armed groups; (ii) the dissident armed forces or other organised armed groups are under responsible command; (iii) the dissident armed forces or other organised armed groups are able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and (iv) the dissident armed forces or other organised armed groups are able to implement APII. *Rutaganda* Judgement par. 95.

lower threshold, on the other hand, has not yet been authoritatively decided. It is expected that the ICC will have to deal with this issue.<sup>39</sup>

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<sup>39</sup>The ICC Statute provides for the distinction between internal violence and internal conflicts, in the sections (d) and (f) of Article 8(2). However the Final Draft Text of the Elements of the Crimes by also makes clear that these are not elements of the crimes, but states' safeguards. They indicate what level of violence is outside the scope of Article 8.

## Conclusion

This work has explained the process by which violations of international humanitarian law committed in internal armed conflict can now be regarded under customary law as entailing the criminal responsibility of the individual. As illustrated throughout, the process is the result of state practice, or even the result of the judicial determination of states' *opinio juris* in an area where *opinio juris* is understood to be as significant as state practice in finding out what the law is. Demonstrating the criminality in customary law of war crimes committed in internal conflicts, a development confirmed by the *Tadic* Decision and followed subsequently (in proceedings before the ICTR, and in the Statute of the ICC) has involved confronting claims of retrospective application of the law. In short, it has involved distinguishing what is customary law from what is not. To the extent that the Ad Hoc International Tribunals have successfully answered claims of retrospectivity, it is possible to affirm the existence of established categories of crimes against international law. Individuals are tried on the basis of these categories and not by applying a 'bad man' definition.

The question to be faced is whether the criminalisation of violations of international humanitarian law in internal conflicts by this process has maintained a degree of coherence among crimes under customary law. It is perhaps difficult to justify coherence in moral terms, such as retaining the character of the conflict as a distinguishing element of the crimes, when the morality of the conduct constituting the substance of the crime seems independent of the context in which it was committed. Thus, though violations of international humanitarian law in internal conflicts are now criminal offences, the distinction between internal and international conflicts has been kept. This distinction has been questioned throughout the thesis, but that such distinction stems from states' preferences has also been taken into consideration. Nonetheless the distinction remains important if we are to root the categories of crimes in state practice or even in *opinio juris*, rather than on what the Judges themselves believe constitutes the obnoxious behaviour that ought to be suppressed. These are the identified limits on how progressively Judges can apply the law in order to condemn the conduct presented to them. If International Tribunals were to disregard the principle of legality they would be defeating their purpose. However, short of applying a concept of common law

crimes (a device largely rejected in common law systems), it has to be understood that in the area of international criminal law the scope for judicial determination by the Tribunals, a sort of fine-tuning of the offences, remains broad. Particularly when we can appreciate how the Judges have made use of the Statutes to allow them to extract the maximum reach of the law contained therein. Perhaps the *Tadic* Decision constitutes the best example, for, even acknowledging that the customary development of international humanitarian law applicable in internal conflicts had occurred before the Yugoslav conflict, the question remains whether the Statute of the Tribunal actually guaranteed jurisdiction over these offences.

Thus, the customary development of the law of war crimes has retained a distinction based on the character of the conflict; to this extent the character of the conflict constitutes an element of war crimes. In this connection there are issues that need further clarification by the Tribunals. The thresholds of applicability need to be determined. The higher threshold of internal armed conflict, which distinguishes between internal and international conflicts, has been tested authoritatively and decided in the *Tadic* Judgement (Appeal on Merits). However in the Yugoslav context the facts of the conflict loom so large that this test might not be readily applicable to other circumstances. The minimum threshold that distinguishes internal conflicts from situations of civil unrest remains to be tested. Unlike the higher threshold, for the minimum threshold the intensity of the conflict constitutes a determinative factor. It is anticipated that drawing this line will be contentious. Rather than an instance of states delegating sovereignty to the Tribunals, however, it will be a matter of states delegating the ability to decide where sovereignty ends.

In connection with the minimum threshold it is submitted that crimes against humanity have not remained indifferent to customary development, but have developed to apply irrespective of the existence of an armed conflict (whether internal or international). The category of crimes against humanity thus applies to conduct occurring in circumstances that do not exceed the minimum threshold. It also applies when, as in Rwanda, the nexus between the imputed conduct and the armed conflict is insufficient. During armed conflict, in particular in the Yugoslav context, it has been noted that the overlap between war crimes and crimes against humanity is significant. This is nowhere better reflected than in the Prosecutor's choice of charges and in assessing the accused culpability

for sentencing before the ICTY. The rationalisation of the categories of crimes that was expected from the Tribunals might not be possible when they are faced with complex armed conflicts. Regard must also be had for the contention that crimes against humanity will be more significant than war crimes in the future. This argument points at the absence of convictions on war crimes charges before the ICTR. It is held, essentially, that the ICC will be concerned with one category of crime: crimes against humanity (genocide is a species of this category). It will be concerned with crimes committed against civilian populations fundamentally, but not only, for discriminatory reasons.

Even though crimes against humanity and war crimes do overlap in situations of conflict, crimes against humanity cannot at present replace war crimes. It would constitute a mistake to dismiss the category of war crimes before crimes against humanity. There will be instances when war crimes retain their relevance, particularly concerning means and methods of warfare, specifically in the choice and use of weapons. Yet to an extent the requirement in the ICC Statute that the crimes before it must be crimes of major international concern will mean that single acts, and thus some war crimes charges, are outside of its jurisdiction.<sup>1</sup> On the other hand crimes against humanity must be part of a widespread or systematic attack. Yet they can still comprise single acts, because that they are part of a widespread or systematic attack does not mean that each crime must be a pattern of activity: 'a single act has comprised a crime against humanity when it occurred within the necessary context'.<sup>2</sup>

In addition war crimes will remain relevant for domestic courts to try instances that do not make it to the ICC threshold, and for states to make the most of the complementarity regime embodied in the ICC Statute. In this respect, a final issue that still needs to be clarified in order to complete the determination of the legal regime of war crimes is what type of judicial jurisdiction, and even enforcement jurisdiction, applies to war crimes in internal conflicts. As war crimes in internal conflicts entail individual criminal responsibility under customary law, states other than the territorial state may have the power to try defendants, to the extent that it can be possible to argue that the crimes are crimes of universal jurisdiction. This power to prosecute does not go as far a

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<sup>1</sup> Article 8(1) of the ICC Statute is also significant in this respect.

<sup>2</sup> *Kupreskic* Judgement, par.808. 'An isolated act, however – i.e. an atrocity which did

constituting a duty to do so, as is the case for grave breaches; it does not attach either the detailed enforcement regime found for grave breaches. In this sense we can see that the criminalisation of offences in internal conflicts through customary law may have left these questions on jurisdiction unanswered. In addition, and though the main focus has been on individual criminal responsibility, questions of state responsibility could also arise for offences in internal conflicts, in particular in connection to the victims' claim for compensation if state officials are the wrongdoers.

Therefore, as illustrated throughout this work, determining that particular conduct entails individual criminal responsibility under customary law is not the end of the process, but rather the first step. The decentralised nature of the international system, compounded by the deficiency that International Tribunals do not belong in complete systems of law, results in having to subsequently discern the whole legal regime applicable to the offences. For war crimes in internal conflicts questions need to be addressed such as the thresholds of applicability of the offences and the type of jurisdiction that the offences attach.

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