1

General Remarks – The Creation and Jurisdiction of the *ad hoc* Tribunals

On 22 February 1993, the United Nations Security Council expressed its 'grave alarm at continuing reports of widespread violations of international humanitarian law' in the territory of the former Yugoslavia.[1] Determined to put an end to such crimes, to bring peace and stability back to the region and with a view to punishing those responsible, the Security Council took the unprecedented step of setting up an international criminal tribunal pursuant to Chapter VII of the Charter of the United Nations. The Tribunal thus created was given the authority to prosecute and judge serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991. Grave breaches of the Geneva Conventions of 1949, other serious violations of the laws or customs of war, genocide, and crimes against humanity were all crimes which came within its jurisdiction. The Statute of the 'International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991', or ICTY, was drafted to provide jurisdiction over any of the above categories of crimes committed anywhere on the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace, and territorial waters since 1991.[2] And although the jurisdiction of the International Tribunal and that of domestic courts were to be concurrent, the former was given primacy over the latter.[3]

At the time, it was hoped that the establishment of the Tribunal, and the punishment of such crimes, could contribute to the restoration of peace and stability in the region, all other measures having failed. Unfortunately, the establishment of the ICTY did not stem the flow of very serious violations of humanitarian law in the former Yugoslavia. Nor does it seem to have stopped it

[1] Security Council Resolution 808 (1993), UN Doc. S/RES/808 (22 February 1993); Security Council Resolution 827 (1993), UN Doc. S/RES/827 (25 May 1993).

[2] See Article 8 and Article 1 of the ICTY Statute. The argument of the Defence in the *Ojdanić* case that the jurisdiction *ratione temporis* of the ICTY did not extend to the events that took place in Kosovo in 1998 was rejected by the Trial Chamber and by the Appeals Chamber (see *Milutinović* Kosovo Jurisdiction Decision). See also *Šešelj* Vojvodina Decision, pars 15 and 17 concerning Šešelj's challenge to the *ex post facto* nature of the Tribunal in relation to the crimes charged against him.

[3] Article 9 of the ICTY Statute.

anywhere else, for that matter, least of all in Rwanda where, in 1994, atrocities on a scale not witnessed for half a century were carried out in the course of a few months.[4] On 8 November 1994, the Security Council once again seized itself of the matter and decided to establish an international tribunal for the purpose of prosecuting persons responsible for genocide and other serious violations of humanitarian law in Rwanda in 1994.[5] The Statute of the International Criminal Tribunal for Rwanda (ICTR) provides for a subject-matter jurisdiction which, apart from slight nuances, is essentially similar to that of the ICTY.[6] Its jurisdiction *ratione temporis* and *ratione loci* is concerned with crimes committed in Rwanda or neighbouring states between 1 January 1994 and 31 December 1994.[7] As had been the case with the ICTY, the Rwanda Tribunal was given primacy over domestic courts in relation to the crimes within its jurisdiction.[8]

Ratione personae, the jurisdiction of both Tribunals is limited to natural persons and excludes any official privileges or state immunities that such persons might otherwise have enjoyed before domestic courts (Articles 7(2) and 6(2) of the ICTY and ICTR Statutes). The individual criminal responsibility of any individual who was sufficiently involved in the commission of a statutory crime might be engaged if he 'directly' took part in the planning, instigating, ordering, committing, or otherwise aiding and abetting of any of those crimes (Articles 7(1) and 6(1) of the Statutes) or if he was the commander of those who committed such crimes (Articles 7(3) and 6(3) of the Statutes).[9]

[4] There is a wealth of literature on the events in Rwanda. Only a few books are mentioned here as examples of the many publications on the subject: P. Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed with Our Families* (New York: Farrar, Straus & Giroux, 2000); G. Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995); Y. Mukagasana and A. Kazinierakis, *Les Blessures du silence* (Arles: Actes Sud, 2001).

[5] Security Council Resolution 955 (1994), UN Doc. S/RES/955 (8 November 1994). The resolution expresses the Security Council's 'grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda'.

[6] The Commission of Experts for Rwanda in its *Final Report* had suggested that the ICTY should simply expand its jurisdiction to include crimes committed in Rwanda (Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994), S/1994/1405 (3 December 1993), (Final Report of the Commission of Experts for Rwanda), par 179; Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), S/1994/1125 (1 October 1994), ('Preliminary Report of the Commission of Experts for Rwanda'), par 139). Although this solution was eventually rejected, and a distinct *ad hoc* Tribunal for Rwanda was set up, the two Tribunals are closely interconnected in various manners. For instance, the judges that make up the Appeals Chamber are the same in both Tribunals and, until September 2003, the Tribunals had a common Prosecutor.

[7] Article 7 of the ICTR Statute. Concerning the scope of the jurisdiction *ratione temporis* of the ICTR, see, however, *Nahimana* Trial Judgment, par 1044, where the Trial Chamber held that acts of conspiracy (to commit genocide) which had occurred prior to 1994, but which may be shown to have resulted in the commission of genocide in 1994, would come within the Tribunal's jurisdiction.

[8] Article 7 of the ICTR Statute.

[9] See generally Part V below. For the purpose of this book, perpetrators and accused persons will generally be referred to in the masculine form. Traditionally, perpetrators of mass atrocities have been overwhelmingly male; two female accused (Biljana Plavšić at the ICTY and Pauline Nyiramasuhuko at the ICTR) have so far appeared before the *ad hoc* Tribunals.

2

Subject-Matter Jurisdiction and Applicable Law – Customary International Law and Treaty Law?

The Statutes of the *ad hoc* Tribunals contain not much more than the skeletons of the crimes that are within their jurisdictions. The definitions of those crimes and the application of the law of international crimes in general, therefore, call for further refinements to be made by the Court which has been entrusted by the Security Council with the task of applying the Statute whilst ensuring that it was not thereby legislating new international law.[1] The first problem to confront the Tribunals has related to the body of law which their Chambers must apply to determine the elements of those statutory crimes under international law as well as their very existence as international criminal offences.

2.1 ICTY

The Statute of the Yugoslav Tribunal does not expressly provide for the body of law which the court is to apply to determine the scope of its jurisdiction *ratione materiae* and to define the crimes which come within that jurisdiction. In his Report to the Security Council accompanying the proposed Statute of the Tribunal, the Secretary-General of the United Nations had made it clear, however, that the Tribunal was expected to apply 'rules of international humanitarian law which are beyond any doubt part of customary law' when making that jurisdictional determination.[2] In effect, judges in The Hague were told to satisfy

[1] Report of the Secretary-General (ICTY), par 29.

[2] Report of the Secretary-General (ICTY), par 34. See also L. D. Johnson, 'Ten Years Later: Reflections on the Drafting', 2(2) *Journal of International Criminal Justice* 368, 370 (June 2004): 'As

themselves that the crimes with which an accused had been charged were crimes under customary international law at the time when they were committed, that is, that the relevant acts were both recognized as criminal under customary international law and that they were sufficiently defined under that body of law.[3]

Consistent with that general directive, the Appeals Chamber made it clear on several occasions that the subject-matter jurisdiction of the Tribunal needed to be based 'on firm foundations of customary law'[4] and that Chambers of the ICTY were bound to apply,[5] *ratione materiae* and *ratione personae*, customary international law:[6]

> [T]he Tribunal only has jurisdiction over a listed crime [in the Statute] if that crime was recognised as such under customary international law at the time it was allegedly committed. The scope of the Tribunal's jurisdiction *ratione materiae* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.[7]

In other words, the International Tribunal for the former Yugoslavia does not have jurisdiction over violations of treaty law or violations of domestic law unless

the [Security] Council was, for the first (and as far as anyone knew, for the only) time, establishing as a binding enforcement measure a judicial organ, having the power to sentence individuals to imprisonment, it was thought prudent, in spite of temptation, not to use the occasion to advocate "progressive" interpretations, clarifications or additions, but rather to stick as much as possible to what was incontrovertibly customary international law.' At the time of the drafting of the ICTY Statute, Mr Larry Johnson was Principal Legal Officer, Office of the Legal Counsel, United Nations.

[3] See *Vasiljević* Trial Judgment, par 202 ('If customary international law does not provide for a sufficiently precise definition of a crime listed in the Statute, the Trial Chamber would have no choice but to refrain from exercising its jurisdiction over it, regardless of the fact that the crime is listed as a punishable offence in the Statute. This is so because, to borrow the language of a US military tribunal in Nuremberg, anything contained in the statute of the court in excess of existing customary international law would be a utilisation of power and not of law') and *Kordić and Čerkez* Articles 2 and 3 Jurisdiction Decision, par 20 ('The Trial Chamber agrees that the principle of legality is the underlying principle that should be relied on to assess the subject-matter jurisdiction of the International Tribunal, and that the International Tribunal only has jurisdiction over offences that constituted crimes under customary international law at the time the alleged offences were committed.'). See also R. Zacklin, 'Some Major Problems in the Drafting of the ICTY Statute', 2(2) *Journal of International Criminal Justice* 361, 363 (June 2004).

[4] See, in particular, *Hadžihasanović* Command Responsibility Appeal Decision, par 55 (see also ibid., pars 35, 44–46). See also *Ojdanić* Joint Criminal Enterprise Decision, par 9; *Blaškić* Appeal Judgement, pars 110, 139, and 141.

[5] According to the *Aleksovski* jurisprudence, Trial Chambers are bound by the decisions of the Appeals Chamber (*Aleksovski* Appeal Judgment, par 113).

[6] See, generally, *Hadžihasanović* Command Responsibility Appeal Decision, pars 12, 35, 44–46, and 55; *Ojdanić* Joint Criminal Enterprise Decision, pars 9–10; *Blaškić* Appeal Judgment, par 141. See also, concerning the definition of the crime of genocide, *Krstić* Appeal Judgment, par 224.

[7] *Ojdanić* Joint Criminal Enterprise Decision, par 9 (footnotes omitted). See also *Kordić and Čerkez* Articles 2 and 3 Jurisdiction, par 20: 'The Trial Chamber agrees that the principle of legality is the underlying principle that should be relied on to assess the subject-matter jurisdiction of the International Tribunal, and that the International Tribunal only has jurisdiction over offences that constituted crimes under customary international law at the time the alleged offences were committed.'

those conventional or national prohibitions have additionally become part of customary international law.[8] In a number of *obiter dicta*, however, Chambers of the Tribunal had hinted at – but had never actually acted upon – the possibility that it could, under certain circumstances, have recourse to treaty law (in particular, to the Geneva Conventions and their Additional Protocols) and could base a conviction upon such a conventional, rather than on a customary, basis.[9]

Only on one occasion (in the *Galić* Judgment of 5 December 2003) has a Trial Chamber relied upon a treaty to anchor its jurisdiction over a particular type of conduct. In this case, Trial Chamber I convicted Stanislav Galić for, *inter alia*, 'terror' and 'attacks on civilians', based on Additional Protocol I of the Geneva Conventions.[10] In so doing, the Trial Chamber not only set aside the direction of the Secretary-General of the United Nations that the Tribunal should only apply those rules which are beyond any doubt part of customary law, but it also discarded the binding jurisprudence of the Appeals Chamber mentioned above which requires that its jurisdiction be grounded 'on firm foundations of customary law'.[11]

Theoretically, a treaty could very well provide, explicitly or even perhaps implicitly, that a particular conduct should be regarded as criminal. The Statute of the International Criminal Court is a perfect example of the availability of such a mechanism. It is also true that a treaty provision might be self-executing and might apply not only between state parties but also directly to the individuals

[8] A good illustration of that point may be found in the *Strugar* Appeals Chamber decision of 22 November 2002 in which the Appeals Chamber made it clear that the basis upon which the accused had been charged with 'attacks on civilians', and could be convicted thereupon, was not the provisions of the Additional Protocols to the Geneva Conventions which provide for the prohibition against attacks on civilians and civilian objects, but consisted of these principles embedded in those provisions as found in customary law (*Strugar* Jurisdiction Decision, pars 10, 13, and 14). See also *Vasiljević* Trial Judgment, par 198, which provides that 'Each Trial Chamber is thus obliged to ensure that the law which it applies to a given criminal offence is indeed customary.' See also *Čelebići* Appeal, par 170, where the Appeals Chamber said that the Tribunal has jurisdiction over crimes which were already subject to individual criminal responsibility prior to its establishment. See, finally, *Blaškić* Appeal Judgment, pars 110, 139, and 141 ('while the Statute of the International Tribunal lists offences over which the International Tribunal has jurisdiction, the Tribunal may enter convictions only where it is satisfied that the offence is proscribed under customary international law at the time of its commission'), where the Appeals Chamber reiterated that its jurisdiction *ratione materiae* depends on the content of customary international law at the time when the acts in question were allegedly committed.

[9] Most famously, in an *obiter dictum*, the Appeals Chamber in *Tadić* held that 'the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law' (*Tadić* Jurisdiction Decision, par 143). It added that: 'We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute' (ibid., par 144). See also, e.g., *Blaškić* Trial Judgment, par 169; see *Semanza* Trial Judgment, par 353 and references quoted therein; *Kayishema and Ruzindana* Trial Judgment, pars 156–157, and *Rutaganda* Trial Judgment, par 89.

[10] *Galić* Trial Judgment, pars 63 et seq.

[11] *Hadžihasanović* Command Responsibility Appeal Decision, par 55.

concerned. Even more explicitly, it may be that the state parties to the treaty have enacted domestic legislation criminalizing the conduct in the relevant treaty, as has been the case in numerous state parties to the International Criminal Court.[12]

The problem as far as the *ad hoc* Tribunals are concerned is that, with the exception perhaps of the Genocide Convention, none of the instruments which they could apply in relation to their subject-matter jurisdiction may be said to provide for international crimes. First, there is no international treaty which could arguably be said to provide for the criminalization of crimes against humanity. Concerning war crimes, it must be noted that neither the Geneva Conventions, nor their Additional Protocols may serve – nor were they ever meant to serve – as a basis for a criminal conviction.[13] As noted by the International Committee of the Red Cross in its *Commentary* to the Geneva Conventions, '[a]ll international Conventions, including this one [i.e. Geneva Convention IV], are primarily the affair of Governments. Governments discuss them and sign them, and it is based upon Governments that the duty of applying them devolves.'[14] The Geneva Conventions and their Additional Protocols are international treaties and as such, in principle, are binding on states only.[15] Even if it were accepted that some of their provisions might be self-executing and would therefore apply to individuals *qua* treaty, none of those provisions, not even their grave breaches sections, were ever meant to be regarded *per se* as an international criminal code the breach of which could entail individual criminal responsibility directly under the treaty regime. When it had been suggested by the Soviet delegate during the negotiation of the Geneva Conventions to replace the expression 'breaches' in the 'grave breaches' phrase with the expression 'crimes', it was pointed out to him that:

> an act only becomes a crime when this act is made punishable by a penal law. The Conference is not making international penal law but is undertaking to insert in the national penal laws certain acts enumerated as grave breaches of the Convention, which will become crimes when they have been inserted in the national penal laws.[16]

[12] See, for example, the amendments to the Australian Criminal Code Act 1995 (Cth) made by the International Criminal Court (Consequential Amendments) Act 2002 (Cth), which added offences under the categories of genocide, crimes against humanity, and war crimes to the Australian Criminal Code.

[13] At the end of the negotiations, all delegates were reminded that the Diplomatic Conference which led to the adoption of the Conventions 'is not here to work out international penal law. Bodies far more competent than we are have tried to do it for years' (Fourth Report drawn up by the Special Committee of the Joint Committee, 12 July 1949, Final Record of Diplomatic Conference II, Section B, p 115).

[14] See J. Pictet (gen. ed.), *Commentary, Geneva Convention Relative to the Protection of Civilian Persons, Convention IV* (Geneva: ICRC, 1960), p 26 ('ICRC, *Commentary to Geneva Convention IV*').

[15] The Preamble of Additional Protocol I makes it clear, for instance, that this instrument is directed to and binding upon 'the High Contracting Parties, ie, states parties to this treaty'. According to the Commentary of the ICRC, '[t]his unquestionably refers to the States for which these treaties are in force in accordance with their relevant provisions' C. Pilloud *et al.* (eds.), *Commentary on the Additional Protocols of Conventions 8 June 1977 to the Geneva of 12 August 1949* (Geneva: ICRC, 1987), ('ICRC, Commentary to the Additional Protocols').

[16] Fourth Report drawn up by the Special Committee of the Joint Committee, 12 July 1949, Final Record of Diplomatic Conference II, Section B, p 115.

This is not to say that a number of provisions contained in the four Geneva Conventions or their Additional Protocols may not have become criminal offences under customary international law as indeed many have. But that is not the same as suggesting (as the Trial Chamber did in the *Galić* case) that, regardless of its crystallization under customary international law, the treaty *itself* may form the basis of a criminal conviction. Those instruments were never meant to and cannot do so conceptually as they are not binding *qua* treaty upon individuals, but only upon signatory states.

What the *Galić* Trial Chamber appears to have done is to mix up two different issues, as the Nuremberg Tribunal had done in relation to the crime of aggression, and to equate two levels of international prohibitions: illegality and criminality. Because a particular conduct is prohibited under a treaty provision, its breach does not necessarily (and generally does not) entail individual criminal responsibility for the perpetrator for in fact, and as already pointed out, not every illegal act is criminal. Most of them are not. The fact that two or more states have agreed to render a certain act illegal between them, and that a breach by one of them would render that state liable to pay compensation does not mean that those states have decided to render such violation a crime entailing the individual criminal liability of the actual perpetrator of the act.[17] From the point of view of the individual, 'a finding to the effect that a given norm is binding *upon a state* – *qua* custom or treaty law – does not entail that its breach may also engage the criminal liability of the individual who committed the act, let alone that it may have that effect under customary international law'.[18] Only a limited category of conduct contrary to international law has, thus far, been recognized as international crimes.

In sum, but for this one apparently misguided exception, the ICTY has constantly and consistently relied upon customary international law to determine the scope and the nature of its subject-matter jurisdiction.

It is almost certain that the negotiations of the Statute of the International Criminal Court, and its subsequent adoption by a relatively large number of states, had an important impact on the content of customary international law in this field. Because most of the crimes relevant to the jurisdiction of the ICTY (and all those relevant to the jurisdiction of the ICTR) were committed prior to 1998, the relevancy of the Rome Statute in identifying customary international law at the *ad hoc* Tribunals has been very limited.[19] As a result of these developments,

[17] The distinction between the illegality and the criminal nature of an act under international law was raised by defendant Muller in the Belgian case *Prosecutor v. Strauch et consorts* but it was rejected by the Belgian Court de Cassation without motivation (*Strauch and others*, Belgium, Court of Cassation, decision of 22 July 1949, in *Pasicrisie belge*, 1949, I, 561–563. Summary in English in *Annual Digest 1949*, 404).

[18] *Vasiljević* Trial Judgment, f 545, p 77. See also *Kunarac* Trial Judgment, par 489.

[19] See, e.g. ibid., footnote 1210 ('Although the ICC Statute does not necessarily represent the present status of international customary law, it is a useful instrument in confirming the content of customary international law. These provisions obviously do not *necessarily* indicate what the state of the relevant law was at the time relevant to this case. However they do provide some evidence of state *opinio juris* as to the relevant customary international law at the time at which the recommendations were adopted'); *Furundžija* Trial Judgment, par 227; *Tadić* Appeal Judgment, par 223.

however, some of the findings of the *ad hoc* Tribunals as to the state of customary law might already be outdated. Findings of the *ad hoc* Tribunals that a particular principle or a particular crime (or elements of a crime) is or is not part of customary international law must therefore be considered in light of the timeframe in relation to which such findings were made.

2.2 ICTR

On the face of it, the subject-matter jurisdiction of the ICTR appears to have been defined more expansively than that of the ICTY. In his Report, the Secretary-General of the United Nations wrote that the Security Council had drawn the subject-matter jurisdiction of the Rwanda Tribunal more broadly than it had for the ICTY by including not only violations of customary international law but also certain violations of treaties:[20]

> [T]he 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 individual criminal responsibility of the perpetrator of the crime. Article 4 of the [ICTR] statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law [. . .].

It is not totally clear whether that position intentionally departed from that adopted by the ICTY or whether it was, as one author has suggested, 'an unintentional distinction'.[21] Based on the Secretary-General's statement, however, a number of Trial Chambers have suggested that the ICTR's jurisdiction *ratione materiae* was defined more broadly than that of the ICTY and that the Rwanda Tribunal was therefore empowered to apply both customary international law and treaty law, insofar as it was binding in Rwanda at the relevant time.[22] Most of those Chambers, however, when defining a particular crime or when determining its content did not limit the scope of their considerations to those treaties on which they claimed they could rely to base their jurisdiction. The Chambers often failed to make it clear what body of law they were *in fact* applying to determine the scope of their jurisdiction.

[20] Comprehensive Report of the Secretary-General 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), par 12.

[21] M. C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson: Transnational Publishers, 1996), p 458.

[22] See, e.g. *Akayesu* Trial Judgment, pars 604–607; *Kayishema and Ruzindana* Trial Judgment, pars 156–158, 597–598; *Musema* Trial Judgment, par 242; *Semanza* Trial Judgment, par 353.

By contrast, on those few occasions where it discussed that issue, the Appeals Chamber has hinted that the ICTR too should be applying customary law to its jurisdiction *ratione materiae*. In the *Čelebići* case, for instance, the Appeals Chamber pointed out that the Security Council, when establishing the ICTR, 'was not creating new law but was *inter alia* codifying existing customary rules for the purposes of the jurisdiction of the ICTR'.[23] Also, the Appeals Chamber of the ICTR made it clear that it would be both 'unnecessary and unfair' to hold an accused person responsible in relation to a conduct which was not clearly defined under international criminal law.[24] Such definitions might be found in certain treaties, but very few would be of sufficient clarity.

There are, in fact, good reasons why the ICTR should also be applying custom: first, treaties are, in principle, binding upon states, not individuals, and the ICTR must determine what rules are applicable to individuals, not states. As noted above, the fact that a treaty might have been breached is not yet sufficient to conclude that an international crime has been committed. Even if the ICTR were permitted to rely upon treaties to determine the contours of a particular prohibited conduct, it would still have to establish that the violation of that provision entails individual criminal responsibility under international law. And as noted above, at the time relevant to the Tribunal's jurisdiction, and insofar as Rwanda is concerned, there was no treaty applicable that provided for the criminalization of either war crimes or crimes against humanity. Secondly, where treaties regulating certain conduct do exist (as in the case of the Geneva Conventions of 1949), they might be so outdated in some respects that their application in the circumstances of contemporary conflicts would sometimes be all but impossible. In contrast, by relying upon customary international law, judges are able to take into consideration the gradual evolution of contemporary laws of armed conflict without departing from the politically potent legalism necessary to the legitimacy of the Tribunals.[25] Thirdly, treaties might exist in relation to some, but not all of the crimes provided for in the Statute of the ICTR, and where no treaty exists in relation to a particular crime, the Tribunal would generally have no choice but to rely on customary law. Thus, for instance, there is no convention relating to the definition and elements of crimes against humanity and the ICTR may turn nowhere other than custom for its definitions. Finally, applying customary international law at the ICTR would promote a degree of homogeneity in the jurisprudence of both *ad hoc* Tribunals in relation to the definitions of international crimes and would prevent the injustice that might result from two ICTR Trial Chambers which could apply different bodies of law (sometimes treaties, sometimes custom) to different accused who have been charged with the same crimes.

[23] *Čelebići* Appeal Judgment, par 170.

[24] *Bagilishema* Appeal Judgment, par 34.

[25] See T. Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 American Journal of International Law (AJIL) 238, 247 (1996).

The fact that the law applied by the *ad hoc* Tribunals is more than mere statutory law gives their pronouncements particular authority and resonance outside of The Hague and Arusha courtrooms. And it may persuade other courts, not least the ICC, to regard their legal findings, if not as precedents, at least as important jurisprudential guideposts.[26]

[26] The existence and jurisprudence of the *ad hoc* Tribunals already appears to have had an essential de-inhibiting function with national courts by showing them that crimes such as genocide or crimes against humanity exist in law and that they can be sanctioned in courts. It is significant that a disproportionate number of cases recently taken on by domestic courts relating to international crimes (in countries such as Switzerland, Germany, Belgium, or France) are dealing with violations of humanitarian law which occurred in the very places for which *ad hoc* Tribunals have been set up (namely, the former Yugoslavia and Rwanda), rather than in relation to any of the many other places where such violations are occurring daily. It is also significant that, when doing so, domestic courts have relied so heavily, almost religiously, on the law developed by these two Tribunals. See, *inter alia*, in Switzerland, *Niyonteze*, Tribunal Militaire d'Appel 1A, judgment of 26 May 2000 (www.icrc.org/ihl-nat.nsf); *Niyonteze*, Tribunal Militaire de Cassation, judgment of 27 April 2001 (www.icrc.org/ihl-nat.nsf); *In re G.*, Tribunal Militaire de Division I, decision of 18 April 1997 (www. cicr.org/ ihl-nat). In Germany, see *Jorgić*, *Djajić*, *Sokolović* and *Kuslić* cases (for references and discussions of these cases, see K. Ambos and S. Wirth, 'Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts', in H. Fischer, C. Kress, and R. Lüder (eds.), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Berlin Verlag, 2001), pp 769 et seq.). In Belgium, see Cour d'Assise de l'arrondissement administrative de Bruxelles–Capitale (http://www.asf.be/AssisesRwanda2/fr/fr_VERDICT_verdict.htm).

3

Identifying Customary International Law and the Role of Judges in the Customary Process

Penetrating 'les ténèbres du droit coutumier'[1] and identifying customary rules in the field of international criminal law is a truly daunting task, particularly as most instances of state practice will occur 'in juridical outer space'[2] and out of judicial sight:[3]

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

Locating *opinio juris* will be no easier than identifying state practice. Even where the Tribunal is satisfied that a particular prohibition exists under customary international law, it must still establish that this prohibition applies to individuals (and not only to states), that the standard that it sets out is sufficiently foreseeable and accessible to meet the requirements of the principle of legality, and that the breach of that prohibition entails individual criminal responsibility under customary international law.[4]

[1] V. Pella, *La Guerre-Crime et les criminels de guerre: Réflexions sur la justice pénale internationale* (Neuchâtel: Editions de la Baconnière, 1949), p 82.

[2] D. Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1997), p 355.

[3] *Tadić* Jurisdiction Decision, par 99.

[4] In the jurisprudence of the Tribunals, *opinio juris* systematically plays the dominant role (see, e.g. *Kupreškić* Trial Judgment, par 527). State practice often operates more as a way of explaining or justifying the finding of the court that a norm is indeed customary, rather than for that practice to constitute the rule. Customary rules in international criminal law have therefore emerged even where

5

War Crimes in the Statutes of the *ad hoc* Tribunals

Wars have traditionally been unique opportunities for all sorts of egregious criminal conducts as they foster an environment in which 'the powerful do what they will, and the poor suffer what they must'.[1] Whilst fear and blind hatred for the enemy give some appearance of legitimacy to the use of force as a tool of self-preservation, the relevancy of the law as a traditional inhibitor of criminal conduct appears to diminish with every instance of abuse and atrocities. The laws and customs of war are an attempt to recast the use of indiscriminate violence at war in its true aberrational character, by creating a sufficiently potent disincentive upon that 'perpetual temptation to behave badly' at war.[2] The extent to which the laws of war will be successful in doing so in practice depends not only on the standards set by those rules, but primarily on the consequences that an infringement is likely to trigger for the perpetrator.

The creation of the *ad hoc* Tribunals is an important advance in both respects insofar as their Statutes recognise minimum standards of conduct at war which, if breached, attract penal sanctions and also set up a judicial mechanism whereby those standards may be enforced and the guilty punished. The recognition in the Tribunals' Statutes that certain serious violations of the laws of war entail individual criminal responsibility, and the provision of a clear enforcement mechanism for the trial and punishment of those crimes, gives new potency to the standards. The fact that the United Nations Tribunals were given jurisdiction over various categories of serious violations of the laws or customs of war gives meaning to the idea that such violations as well as their punishment are matters of universal interest and concern.

[1] Quote attributed to Mr Arria, Ambassador of Venezuela, during the discussion leading up to the adoption Security Council Resolution 780 (1992), 6 October 1992, S/RES/780 (1992), reprinted in V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 2 (Ardsley: Transnational Publishers, 1995) ('Morris and Scharf, *The Yugoslav Tribunal*') pp 147, 149.

[2] J. Keegan, *War and our World: The Reith Lectures 1998* (London: Pimlico, 1999), p 50.

'War crimes', as serious violations of the laws or customs of war are commonly known, are sometimes understood as involving a different, intrinsically less serious, often unplanned, sort of criminality than either crimes against humanity or genocide. In many ways, war crimes are regarded as the almost inevitable criminal consequence of any armed conflict. A war crime, in its technical, legalistic, sense is, however, both more restricted and more complex than this popular perception would have it. A war crime, for the purpose of the *ad hoc* Tribunals, consists in a serious violation of the laws or customs of war entailing individual criminal responsibility. Within that general framework, the Statutes of the *ad hoc* Tribunals contain a list of war crimes over which the Tribunals may in principle exercise their jurisdictions. Whereas the subject-matter jurisdiction of both *ad hoc* Tribunals is almost identical in relation to crimes against humanity and genocide, their respective jurisdictional framework has been cast quite differently in relation to war crimes.

5.1 War crimes in the Statute of the ICTY

The ICTY Statute contains two articles – Article 2 and Article 3 – which deal specifically with war crimes: Article 2 is concerned solely with a specific category of war crimes, namely, 'grave breaches of the Geneva Conventions of 1949', whilst Article 3 covers other serious violations of the laws or customs of war:

> Article 2
>
> Grave breaches of the Geneva Conventions of 1949
>
> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
> (b) torture or inhuman treatment, including biological experiments;
> (c) wilfully causing great suffering or serious injury to body or health;
> (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
> (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
> (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
> (g) unlawful deportation or transfer or unlawful confinement of a civilian;
> (h) taking civilians as hostages.
>
> Article 3
>
> Violations of the laws or customs of war
>
> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
> (e) plunder of public or private property.

The jurisprudence of the Tribunal has established a clear 'division of labour'[3] between Articles 2 and 3 of the ICTY Statute: Article 2 is only concerned with those acts and omissions which may be said to constitute 'grave breaches' of the Geneva Conventions. Article 3 of the Statute has been said to constitute a general and residual clause covering all serious violations of international humanitarian law not covered by the other articles of the Statute,[4] in particular those which do not fall within Article 2 of the Statute ('lest [Article 2] should become superfluous').[5] That, in turn, means that whenever an accused person is being charged cumulatively under both articles of the Statute in relation to the same conduct, and if the conditions and requirements of Article 2 are met, he or she may not additionally be found guilty under Article 3 of the Statute.[6] The list of offences enumerated in Article 3 are, as the language makes clear, illustrative and not exhaustive,[7] and it may cover other serious violations of international humanitarian law not explicitly listed in the Statute, provided they are recognized by customary law and do entail individual criminal responsibility in case of breach.[8]

According to the Appeals Chamber, the role and function of Article 3 of the ICTY Statute is to fill those gaps which the legislator, the Security Council, may have left in the text of the Statute, but which were intended to come within its terms:[9] 'Article 3 functions 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. Article 3 aims to make such jurisdiction watertight and inescapable.'

When interpreted in such a way, the Appeals Chamber concluded, Article 3 fully realizes the primary purpose of the establishment of the International

[3] *Čelebići* Appeal Judgment, par 137, by reference to *Čelebići* Trial Judgment, par 297.

[4] See, *inter alia*, *Tadić* Jurisdiction Decision, par 89–91; and *Kordić and Čerkez* Articles 2 and 3 Jurisdiction Decision, pars 17–23; *Čelebići* Appeal Judgment, para 125; *Kunarac* Appeal Judgment, par 68; *Tadić* Trial Judgment, par 559; *Blaškić* Trial Judgment, par 168; *Jelišić* Trial Judgment, par 33.

[5] *Tadić* Jurisdiction Decision, par 87.

[6] See below, chapter 23. See also 'Article 2 is more specific than common Article 3' (*Čelebići* Appeal Judgment, par 420).

[7] *Tadić* Jurisdiction Decision, par 87.

[8] *Prosecutor v. Kvočka et al.*, IT-98-30/1-PT, Decision on Preliminary Motions Filed by Mlado Radić, and Miroslav Kvočka Challenging Jurisdiction, 1 April 1999, par 23.

[9] *Tadić* Jurisdiction Decision, par 91.

Tribunal 'not [to] leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed'.[10]

In practice, Article 3 of the ICTY Statute has been interpreted to criminalize several categories of war crimes: (i) serious violations of the Hague law applicable in international conflicts and/or internal conflicts; (ii) serious infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches' by those Conventions; (iii) serious violations of common Article 3 of the Geneva Conventions and other customary rules applicable to internal conflicts; and (iv) serious violations of certain provisions of Additional Protocols I and II to the Geneva Conventions.[11] Also, grave breaches of Additional Protocol I have been held to fall under Article 3 of the ICTY Statute, rather than under Article 2.[12]

Articles 2 and 3 of the ICTY Statute are not, despite their areas of overlap, purely interchangeable provisions, whereby the latter only becomes relevant whenever the former is not. Whereas Article 2 of the Statute may only apply in the context of an *international* armed conflict (or in the case of a state of occupation), Article 3 applies to 'crimes perpetrated in the course of both inter-state wars and internal strife'.[13] Furthermore, Article 2 only applies to 'protected persons' and 'protected properties' (see below) and is limited to grave breaches of 1949 Geneva Conventions. By contrast, Article 3 protects a broader group of individuals and interests. In particular, and as noted above, it encompasses violations of both Hague as well as of Geneva law,[14] including violations of common Article 3, and other serious violations of international humanitarian law.[15]

[10] *Tadić* Jurisdiction Decision, par 92.

[11] Ibid., par 89; confirmed in *Čelebići* Appeal Judgment, pars 125 and 136. See also, for instance, *Kunarac* Trial Judgment, par 401; *Kordić and Čerkez* Articles 2 and 3 Jurisdiction Decision, par 22.

[12] See *Martić* Rule 61 Decision, par 8. Proceedings undertaken under Rule 61 of the Rules of Procedure and Evidence serve as a mechanism by which the International Tribunal may react to the failure of the accused to appear voluntarily and to the failure to execute the warrants issued against them. It permits the charges in the indictment and the supporting material to be publicly exposed and allows the victims to use this forum to have their voices heard. Rule 61 proceedings are not a trial *in absentia*, as they involve no finding of guilt and no verdict, and they do not deprive the accused of his right to contest the charges against him. Given the absence of the accused, the 'jurisprudence' which came out of such proceedings is to be taken with caution, and it is exceptional that it is ever cited by any Chamber of either *ad hoc* Tribunal as precedent.

[13] Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, First Annual Report, UN Doc. A/49/342, S/1994/1007 (29 August 1994), p 19.

[14] *Čelebići* Appeal Judgment, pars 126–127, 132–133. See also *Tadić* Jurisdiction Decision, pars 87–88. Statements by members of the United Nations Security Council certainly support that interpretation (for references see *Tadić* Jurisdiction Decision, par 88). See Report of the Secretary-General pursuant to Para. 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (3 May 1993) ('UN Doc. S/25704'), pars 43–44.

[15] *Čelebići* Appeal Judgment, par 134; *Kunarac* Appeal Judgment, par 68.

5.2 War crimes in the Statute of the ICTR

The regulation of war crimes as provided in the Statute of the Rwanda Tribunal differs markedly from the regime set out above. Article 4 of the ICTR Statute provides as follows:

Article 4

Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

The scope of the ICTR's subject-matter jurisdiction in relation to war crimes is narrower than that of the ICTY in at least two respects. First, it is limited, from a substantive point of view, to serious violations of common Article 3 of the Geneva Conventions and serious violations of Additional Protocol II. The more limited jurisdictional reach of the ICTR in relation to war crimes reflects the view that, for the purpose of the Rwanda Tribunal, the armed conflict that took place in Rwanda at the time should be regarded as an 'internal' one.[16] The list of war crimes within its jurisdiction *ratione materiae* was tailored accordingly, limiting them to those which constitute serious infringements of rules and provisions applying in the context of internal armed conflicts.

As a result, certain conduct which may be regarded as criminal under the ICTY Statute would fall outside of the jurisdiction of the ICTR, including conduct that

[16] See Secretary-General Report (ICTR), par 11.

would constitute a grave breach of the Geneva Conventions (Article 2 of the ICTY Statute), unless they also consitute a serious violation of common Article 3 or Additional Protocol II. Secondly, the Statute of the ICTR does not appear to cover any violations of Hague law, except for those Hague rules which have made their way into Additional Protocol II. As pointed out above, and by contrast, Article 3 of the ICTY Statute extends the jurisdiction of the ICTY to a number of serious violations of both Geneva and Hague law.

On the other hand, the jurisdictional scope of the ICTR in relation to war crimes is broader than that of the ICTY in at least one, though minor, respect: Article 4(h) of the ICTR Statute provides for the criminalization of 'threats' to commit any of the listed offences, whereas the ICTY Statute does not do so (at least not explicitly). Perhaps unsurprisingly, given the volume of crimes *actually* committed during events in Rwanda and the large number of potential accused, the possibility to charge an accused with a mere threat to commit such a crime has not yet been used by the ICTR prosecutor and may in fact never be.

The narrower jurisdictional focus of the Rwanda Tribunal in relation to war crimes appears not only to be the result of the different nature of the armed conflict in Rwanda as opposed to the former Yugoslavia, but also to be a reflection of the fact that the criminal activity in each context revolved around different cores: an attempt to exterminate a whole group in the case of Rwanda and a violent ethnic partition of a country in the Yugoslav context. In turn, the relevancy of war crimes as a criminal idiom capable of labelling the sort of crimes committed in Rwanda appears much less potent than it may be in the Yugoslav context.[17]

As is clear from the text of the Statute of the ICTY, the list of war crimes over which the Tribunal may exercise jurisdiction is not exhaustive and the ICTY has in fact exercised jurisdiction over a number of serious violations of the laws of war which are not expressly mentioned in their Statutes where those violations satisfied a number of substantive and jurisdictional requirements set by the court. The ICTR, by contrast, would appear to have limited the scope of its war crimes jurisdiction to those expressly provided in the statute.

[17] It is quite significant in that respect to note that, until the Judgment of the Appeals Chamber in *Rutaganda* (26 May 2003), not a single accused had been found guilty of war crimes at the ICTR. Equally revealing, perhaps, is the fact that this first conviction for war crimes at the ICTR was imposed, not by any Arusha-based Trial Chamber, but by the Hague-based Appeals Chamber.

6

Chapeau Elements of War Crimes

6.1 General remarks

The laws or customs of war may be defined generally as the 'rules of international law with which belligerents have customarily, or by special conventions, agreed to comply in case of war'.[1] The content of that body of rules is not static, 'but by continual adaptation follows the needs of a changing world',[2] so that the determination of what may constitute a war crime (or a serious violation of the laws or customs of war) will depend on the state of the laws of war at the time when that determination is made.[3]

A 'war crime' may in turn be defined as a serious violation of the laws or customs of war which entails individual criminal responsibility under international law.[4]

[1] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, compiled by the United Nations War Crimes Commission (London: His Majesty's Stationery Office, 1948) ('*UN War Crimes Commision*'), p 24. In *ex parte Quirin*, the law of war was said to include 'that part of the law of nations which prescribes for the conduct of war the status, rights and duties of enemy nations and of enemy individuals' (*Ex parte Quirin*, US Supreme Court, Judgment of 31 July 1942, 317 U.S.1, 27–28 (also in 17 AILC, 457–485 and 63 S.Ct 87 L.Ed.3 (1942)).

[2] IMT Judgment, p 221.

[3] *Kunarac* Appeal Judgment, par 67. See also Memorandum of the Secretary-General, 'The Charter and Judgment of the Nürnberg Tribunal, History and Analysis', UN Doc. A/CN.4/5 (3 March 1949) ('UN Doc. A/CN.4/5'), p 62.

[4] In 1942, Professor Lauterpacht as representative of the Commission for Penal Reconstruction and Development, defined war crimes as follows: 'War crimes may properly be defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of