Implementing International Humanitarian Law

From The *Ad Hoc* Tribunals to a Permanent International Criminal Court

YUSUF AKSAR

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To the Memory of My Mother,
Dilber Aksar

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This work examines the international humanitarian law rules and their application by the *ad hoc* tribunals with regard to the substantive laws of the ICTY and the ICTR. The practice of the ICTY and the ICTR and their contribution to international humanitarian law and possible impact on the ICC are indicated in light of the decisions rendered by the *ad hoc* tribunals and of the latest international humanitarian law instruments such as the 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind and the ICC Statute. All major relevant developments up to November 2002 are taken into account in this work.

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Lastly, I wish to state that the ideas and views expressed in this book, unless explicitly indicated otherwise, were my own. Any shortcomings in the work remain my sole responsibility.

Yusuf Aksar
November 2002
Bristol, UK

List of Abbreviations

Afr. J. Int.'l & Comp. L.	*African Journal of International & Comparative Law*
AJIL	*American Journal of International Law*
Alb. L. Rev.	*Albany Law Review*
All E R	*All England Law Reports*
Am. U. J. Int.'l L. & Pol'y	*American University Journal of International Law and Policy Proceedings*
ASIL	*American Society of International Law Proceedings*
ASILS Int.'l L. J.	*ASILS International Law Journal*
Bos. Univ. Int.'l L. J.	*Boston University International Law Journal*
Brook. J. Int.'l L.	*Brooklyn Journal of International Law*
BYIL	*British Yearbook of International Law*
Can. Y. Int.'l L.	*Canadian Yearbook of International Law*
CLP	*Current Legal Problems*
Col. Hum. Rts. L. Rev.	*Columbia Human Rights Law Review*
Col. J. Trans.' lL.	*Columbia Journal of Transnational Law*
Corn. Int.'l L. J.	*Cornell International Law Journal*
Crim. L. F.	*Criminal Law Forum*
Denv. J. Int.'l L.	*Denver Journal of International Law*
Denv. J. Int.'l L. & Pol'y	*Denver Journal of International Law & Policy*
Dick. J. Int.'l L.	*Dickinson Journal of International Law*
Duke J. Comp. & Int.'l L.	*Duke Journal of Comparative & International Law*
EHRR	*European Human Rights Reports*
EJIL	*European Journal of International Law*
Emory Int.'l L. R.	*Emory International Law Review*
Eur. J. Cr., Cr. L. & Cr. J.	*European Journal of Crime, Criminal Law and Criminal Justice*
Flet. F. W. Aff.	*Fletcher Forum World Affairs*
Ford. Int.'l L. J.	*Fordham International Law Journal*
GA. J. Int.'l & Comp. L.	*Georgia Journal of International & Comparative Law*
Ge. Imm. L. J.	*Georgetown Immigration Law Journal*
Harv. Int.'l L. J.	*Harvard International Law Journal*
HRQ	*Human Rights Quarterly*

Hum. Rts. L. J.	*Human Rights Law Journal*
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rep.	*Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice*
ICLQ	*International and Comparative Law Quarterly*
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILM	International Legal Materials
ILR	*International Law Reports*
Int. Aff.	*International Affairs*
Int.'l Gen. Y.	*International Geneva Yearbook*
Int.'l Rev. Red Cross	*International Review of the Red Cross*
Keesing's	*Keesing's Record of World Events (continuation of Keesing's Contemporary Archives)*
Law Reports	Law Reports of Trials of War Criminals, London: Published by Her Majesty's Stationery Office.
LCP	*Law and Contemporary Problems*
L. & S.	*Law & State*
Mich. J. Int.'l L.	*Michigan Journal of International Law*
Mich. L. Rev.	*Michigan Law Review*
Mil. L. Rev.	*Military Law Review*
Nat. Int.	*National Interest*
Neth. Int.'l L. Rev.	*Netherlands International Law Review*
Neth. Y.B.I.L.	*Netherlands Yearbook of International Law*
New. U. L. Rev.	*New York University Law Review*
N.Y. Univ. J. Int.'l L.&Pol.	*New York University Journal of International Law & Politics*
Otago L. Rev.	*Otago Law Review*
Pace Int.'l L. Rev.	*Pace International Law Review*
PCIJ	Permanent Court of International Justice
Rev. L. & Soc.	*Review of Law & Social Change*
Rev. Int. D. P.	*Revue Internationale de Droit Pénal*
St. John's J. L. Comm.	*St. John's Journal of Legal Commentary*
Stet. L. Rev.	*Stetson Law Review*
Temple Int.'l & Comp. L. J.	*Temple International & Comparative Law Journal*
UCLA Pac. Bas. L. J.	*UCLA Pacific Basin Law Journal*
UN	United Nations
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
Van. J. Int.'l L.	*Vanderbilt Journal of International Law*
Van. J. Trans.'l L.	*Vanderbilt Journal of Transnational Law*
Virg. J. Int.'l L.	*Virginia Journal of International Law*
WLR	*Weekly Law Reports*
Yale J. Int.'l L.	*Yale Journal of International Law*

Y. B. Eur. Conv. H. R.	*Yearbook of the European Convention on Human Rights*
YIHL	*Yearbook of International Humanitarian Law*

Foreword

Few topics have so rapidly seized the imagination of legal communities – both at a national and international level – as has the emergence of a coherent body of international criminal law during the last ten years. This, moreover, has been matched by a near unprecedented level of more general public interest and public support. Since the Nuremberg and Tokyo trials following the ending of the Second World War, the desire to see those individuals responsible for serious violations of international humanitarian law in times of war has been tempered by the suspicion that the fora available for trying such cases were themselves lacking in legitimacy, being the creation of those states victorious in combat and exercising their jurisdiction only over the defeated. Perhaps surprisingly, it was not until the early 1990s that the creation of international tribunals was again utilised as a means of bringing to account those accused of crimes that attract individual criminal responsibility under international law. Crucially, they derived their legitimacy not from the whim of those victorious in combat, but from the will of the international community operating within the framework of the UN Charter. The *ad hoc* Tribunals for the Former Yugoslavia and Rwanda proved to be more than a temporary return to the past: they proved to be harbingers of a new era in international criminal justice, which reached its apogee with the adoption of the Rome Statute of the International Criminal Court in 1998, and its subsequent entry into force.

As this book goes to press, the first Judges of the ICC have just been elected by the States parties. Those elected include persons who already have served as Judges of the *ad hoc* tribunals. Similarly, the seat of the ICC at The Hague places it in close proximity to the ICTY. All this merely serves to reinforce the nexus between the Tribunals and the Court. Obviously, the experience of the *ad hoc* tribunals has already played a major role in the shaping of the ICC and the nature of the crimes over which it exercises jurisdiction. Unsurprisingly too, the jurisprudence of the *ad hoc* tribunals has helped shape the understanding of the various elements of the offences that fall within their respective jurisdictions. But how?

Much already been written about the *ad hoc* tribunals and, indeed, the ICC itself. However, much of this writing focuses upon the historical background to their creation, their drafting and prognoses of their general significance in international law. The actual jurisprudence of the *ad hoc* tribunals has received surprisingly little scrutiny in comparison. The purpose of this work is to address that gap and, moreover, relate that body of work to the ICC; tracing its impact upon its Statute and the extent to which it can usefully inform the substantive work of the ICC as it comes into being.

This is, then, an exceedingly timely publication. Dr Aksar subjects the jurisprudence of the *ad hoc* tribunals to detailed scrutiny, teasing out the lessons that it provides. It is a work of considerable legal sophistication, yet presented in as clear a narrative format as the nature of the complex legal

material permits and will doubtless be of considerable practical utility to all those involved in the application and further development of international humanitarian law.

Malcolm D. Evans
Professor of Public International Law, University of Bristol
March 2003

Introduction

International human rights law and international humanitarian law are both part of international law. Although there are significant differences between two branches of international law, they are interrelated in protecting the rights of individuals. As far as the concept of international humanitarian law is concerned, one of the main purposes of this branch is to enforce – in addition to State responsibility – individual criminal responsibility through either domestic courts or international tribunals (or courts, *ad hoc* or permanent).[1]

Since national courts are not adequate in this respect, the establishment of international criminal institutions were inescapable. The international community was faced with the International Military Tribunals at Nuremberg and at Tokyo after the Second World War.[2] The practice of the International Military Tribunals has played a key role in applying customary international law and conventional law rules, which were accepted by the international community before the alleged crimes committed in the Second World War, and for the first time in its history the international community witnessed the categorisation of international crimes such as crimes against peace, war crimes and crimes against humanity. The acceptance of international crimes either under conventional or customary law rules and the possibility of enforcing individual criminal responsibility through international organisations demonstrated the desirability of the establishment of an international criminal court. The main reason for this was the widespread and systematic violations of international human rights and of international humanitarian law during the twentieth century. In 1993 and 1994, the establishment of the International Criminal Tribunal for the Prosecution

1. For differences and similarities between international human rights and international humanitarian law, *see* Vinuesa, R.E., 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law' (1998), 1 *YIHL,* pp. 69–110; Eide, A., 'The Laws of War and Human Rights – Differences and Convergences', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva, The Hague: International Committee of the Red Cross, Martinus Nijhoff Publishers, 1984), pp. 675–97; Robertson, A.H., 'Humanitarian Law and Human Rights', in C. Swinarski (ed.), pp. 793–802. For the concept of international humanitarian law, *see* McCoubrey, H., *International Humanitarian Law Modern Developments in the Limitation of Warfare*, Second Edition (Aldershot, Brookfield USA, Singapore, Sydney: Ashgate, Dartmouth, 1998); McCoubrey, H. and White, N.D., *International Law and Armed Conflict* (Aldershot, Brookfield USA, Hong Kong, Singapore, Sydney: Dartmouth, 1992), pp. 257–78.
2. *See infra* Chapter 1, note 1.

of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the ICTY)[3] and the International Criminal Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 (the ICTR)[4] by the UN Security Council under Chapter VII of the UN Charter as a measure to protect international peace and security and the practice of these *ad hoc* tribunals proved that individual criminal responsibility was enforceable at the international level for the crimes which are of concern to the international community.

Despite the fact that there are many problems deriving from the different legal systems being used around the world, one of the main issues is the limitation of the substantive law (subject-matter jurisdiction) of the international criminal tribunals or courts. One solution to this problem is the ruling that the international criminal institutions should apply the customary rules of international humanitarian law. This was the approach taken by the Commentary (the *Secretary-General's Report*)[5] to the ICTY Statute. However, this way of regulation may not be sufficient or may create many problems in practice. In this sense, some reasons can be indicated as follows:

First, although some practice can be found at the national level, international customary or conventional law rules have not been applied by a truly established international criminal organisation.

Second, although the nature of crimes remain the same, the way of committing crimes, targeting civilians and civilian objects or property have remarkably changed since the Second World War. For example, rape as a crime was accepted in international customary and conventional law rules and in the CCL No. 10 for Germany under the concept of crimes against humanity, but the commission of this crime, as the international community faced in the former Yugoslavia, in Rwanda and Kosovo, makes rape a weapon in destroying an ethnic, religious, racial or national group within the meaning of the Genocide Convention.

On this ground, the practice of the ICTY and the ICTR plays a central role in interpreting and applying the rules of international humanitarian law in accordance with the necessity of the recent events that have occurred around the world. There cannot be any doubt that the practice of the *ad hoc* tribunals will contribute to international humanitarian and human rights law in a positive way, and most importantly, it will have an immense precedential value for the International Criminal Court (ICC)

3. *See infra* Chapter 1, note 2.
4. *See infra* Chapter 1, note 4.
5. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN. Doc. No. S/25704 & Add. 1 (1993). '… the international tribunal should apply rules of international humanitarian law which are *beyond any doubt part of customary law* …' (para. 34 emphasis added).

which came into operation on 1 July 2002. The main reason why the practice of the *ad hoc* tribunals will create a precedential value for the ICC lies in the fact that the ICTY and the ICTR have to apply the customary rules of international humanitarian law as far as the substantive law of the International Tribunal (in particular, the rules governing war crimes, the crime of genocide and crimes against humanity) are concerned. In the same vein, the regulation of the ICC Statute is, *mutatis mutandis*, similar to the Statutes of the ICTY and the ICTR in this regard, and it is considered as reflecting the customary international humanitarian law with regard to these international crimes. In this sense, the *ad hoc* tribunals and the ICC are established to implement the customary rules of international law at the international level for the crimes which are of concern to the international community. Of course, the Judgements rendered by the ICTY and the ICTR will not have a binding effect on the ICC, but they will constitute invaluable sources of guidance for the ICC. In this study, the use of the phrase 'precedential value' should be understood in this context, not in any other literal meaning.

For the reasons indicated above, the aim of this study is to examine the international humanitarian law rules and their application by the *ad hoc* tribunals in relation to the substantive law of the ICTY and the ICTR. In this sense, the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and impact on the ICC will be discussed.

In accordance with this purpose, the study is divided into two parts: Under Part 1 (comprising Chapters 1 and 2) the legality of the establishment of the *ad hoc* tribunals and of the ICC is examined.

Chapter 1 specifically deals with the establishment of the ICTY and the ICTR. The situations which lead the UN Security Council to establish such tribunals are briefly explained, and the legality and the competence of the Security Council to create these international criminal organisations are discussed in light of the theory and of the practice of the ICTY. Due to its importance (being the first truly established international criminal tribunal in human history), the view taken by the Trial and Appeals Chamber of the ICTY is discussed in detail.

Chapter 2 looks at the background of the creation of the ICC. The reasons for including this as a separate chapter is first to indicate the impact of the *ad hoc* tribunals on the establishment of the ICC and its Statute, and secondly, to refer to the regulations of the Statute of the ICC in the following chapters in order to address differences and similarities between the *ad hoc* tribunals and the ICC. This chapter also examines the obstacles to creating an international criminal court that prevented the international community from having such a court for centuries under the practice of the International Tribunals.

Part 2 (comprising Chapters 3–6) represents the core of this study and deals with the substantive law of the *ad hoc* tribunals consisting of individual criminal responsibility, war crimes, the crime of genocide and crimes against humanity.

Chapter 3 examines first the concept of individual criminal responsibility in international law since it is crucial with regard to enforcing the

rules of international humanitarian law. Then, the practice of the ICTY and the ICTR and their contribution to international humanitarian law and impact on the ICC is discussed in light of the Judgements rendered by the *ad hoc* tribunals and of the latest developments in international humanitarian law such as the 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind and of the ICC Statute.

Chapters 4–6 deal with the international crimes, war crimes (the grave breaches of the Geneva Conventions of 1949 and the 1977 Additional Protocol I on the one hand, and violations of the laws or customs of war on the other hand), the crime of genocide, and crimes against humanity, respectively. In this context, the theory and practice of the *ad hoc* tribunals with regard to interpreting and applying the elements of international crimes and the substantive contents of war crimes, genocide and crimes against humanity are discussed in detail. The approach taken by the ICTY and the ICTR in this regard and its significance in international humanitarian law – in particular, creating a precedential value for the ICC – are indicated in light of the 1996 ILC Draft Code and of the ICC Statute.

The study is ended by drawing some general conclusions under the heading of 'Concluding Remarks'.

Part 1

The Establishment of the *Ad Hoc* Tribunals (the ICTY and the ICTR) and the International Criminal Court (the ICC)

1

The Establishment of the ICTY and the ICTR

Introduction

As is well known, in 1945 and 1946 after the Second World War, the International Military Tribunal at Nuremberg (the Nuremberg Tribunal) and the International Military Tribunal for the Far East (the Tokyo Tribunal) were established by the Allied Powers to prosecute German and Japanese war criminals.[1] In 1993 and 1994 for the first time since the Nuremberg and Tokyo trials, the international community created two further international criminal tribunals to try individuals charged with violations of international humanitarian law. The first is the ICTY which was established by UN Security Council Resolution 827 of May 1993[2] 'to prosecute persons responsible for serious violations of international

1. The United Kingdom, France, the United States and the Soviet Union were the Allied Powers in the Second World War. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945 (hereinafter the London Agreement), 59 Stat. 1544, 82 UNTS 279 that includes the Charter of the Nuremberg Tribunal and the basic principles of the trial. However, the Tokyo Tribunal was not established by conclusion of a treaty. *See Special Proclamation by the Supreme Commander for the Allied Powers, Establishment of an International Tribunal for the Far East*, 19 January 1946, TIAS No. 1589. 4 Bevans 20; In international law, there are a number of works considering the Nuremberg and Tokyo Tribunals. Some of them can be indicated as follows: Conot, R., *Justice at Nuremberg* (New York: Harper and Row, 1983); Taylor, T., *The Anatomy of the Nuremberg Trials* (New York: Knopf, 1992); Brackman, A., *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (Morrow, 1987); Wright, Q., 'The Law of the Nuremberg Trial' (1947) 41 *AJIL*, p. 38; Wright, Q., 'Legal Positivism and the Nuremberg Judgement' (1948) 42 *AJIL*, p. 405; Schick, F.B., 'The Nuremberg Trial and the International Law of the Future' (1947) 41 *AJIL*, p. 770; Kuhn, A.K., 'International Criminal Jurisdiction' (1947) 41 *AJIL*, p. 430; Finch, G.A., 'The Nuremberg Trial and International Law' (1947) 41 *AJIL*, p. 20; Ehard, H., 'The Nuremberg Trial Against the Major War Criminals and International Law' (1949) 43 *AJIL*, p. 223; Clark, R.S., 'Nuremberg and Tokyo in Contemporary Perspective', in T.L.H. McCormack and G.J. Simpson (eds.), *The Law of War Crimes National and International Approaches* (The Hague, London, Boston: Kluwer Law International, 1997), p. 171; Chaney, K.R., 'Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials' (1995), 14 *Dick. J. Int.'l L.*, p. 57.
2. Adopted unanimously by the Security Council at its 3217 meeting, on 25 May 1993. SC Res. 827, UNSCOR, 48th Year, 1993 SC Res. & Dec. At 29, UN Doc. S/INF/49 (1993).

humanitarian law committed in the territory of the former Yugoslavia since 1991'.[3] The second is the ICTR which was set up again by the Security Council Resolution 955 of 8 November 1994[4] 'to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994'.[5]

In contrast to the Nuremberg and Tokyo Tribunals,[6] the Yugoslavia and Rwanda Tribunals were established by the Security Council on behalf of the entire international community in order to maintain or restore international peace and security.[7] For this reason, these two tribunals can be seen as the first truly established international criminal tribunals for the prosecution of those persons who are responsible for serious violations of international human rights law and of international humanitarian law.[8]

In this chapter, before examining the legality of the establishment of the ICTY and the ICTR in light of the practice of the *ad hoc* tribunals, the legal and factual conditions which led the UN Security Council to establish international criminal tribunals in the former Yugoslavia and Rwanda will be briefly explained below.

The Situations in the Former Yugoslavia and Rwanda

In the last decade of the twentieth century, the international community witnessed two major human rights tragedies; one of them in the heart of Europe (in the former Yugoslavia) and the other in the central African State of Rwanda. As will be seen in detail in the following sections, the types of crimes committed in the former Yugoslavia included genocide, torture, rape or other forms of sexual assaults used as an instrument of war and the practice of ethnic cleansing, mistreatment of civilian prisoners, destruction of personal, historical and cultural public property, forceful displacement of the civil population and attacks on schools, hospitals and so on. Similarly, in Rwanda, hundreds of thousands of people have suffered the same forms of ill treatment in violation of human rights and of international humanitarian law.

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3. Art 1 of the ICTY Statute.
4. Adopted by a vote 13-1-1 by the Security Council at its 3453rd meeting, on 8 November 1994. SC Res. 955, UNSCOR, 49th Year, 3453 meeting at 1, UN Doc. S/Res/955 (1994).
5. Art. 1 of the ICTR Statute.
6. Some scholars accept the Nuremberg and Tokyo tribunals as 'Victors' courts'. In this context, *see* Minear, R.H., *Victors' Justice the Tokyo War Crimes Trial* (Princeton, New Jersey: Princeton University Press, 1971); Rubin, A.P., 'International Crime and Punishment' (1993), 33 *Nat. Int.*, p. 73.
7. Greenwood, C., 'The International Tribunal for Former Yugoslavia' (1993), 69, 4 *Int. Aff.*, p. 641; Scharf, M.P., 'Have We Really Learned the Lessons of Nuremberg?' (1995), 149 *Mil. L. Rev.*, p. 66.
8. Meron, T., 'War Crimes in Yugoslavia and the Development of International Law' (1994), 88 *AJIL*, p. 78.

The Former Yugoslavia

The Socialist Federal Republic of Yugoslavia which was situated in the Balkan Peninsula, consisted of six republics (Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Montenegro, Macedonia), and two autonomous regions (Kosovo and Vojvodina). The ethnic and religious structure of the republics of the former Yugoslavia is one of the most complex in the world.[9] In this context, before the dissolution of the Socialist Federal Republic of Yugoslavia, Slovenia was comprised of 90 per cent ethnic Slovenes and 10 per cent ethnic minorities of Serbs, Croats and Hungarians. Croatia was comprised of 85 per cent ethnic Croats and 11.5 per cent ethnic Serbs, who predominantly inhabit Krajina and Petrinja. Two-thirds of the population of Serbia are ethnic Serbs. This includes Kosovo with, at that time a 91 per cent ethnic Albanian population, and Vojvodina with a 19 per cent ethnic Hungarian population; these were formerly autonomous regions that were incorporated into Serbia in September 1990. Bosnia-Herzegovina has 40 per cent Muslims, 32 per cent Serbs and 18 per cent Croats. Two-thirds of Montenegro's population are Montenegrins and the minority is made up of Muslims and Albanians. Macedonia consists of 67 per cent Macedonians, 20 per cent Albanians and other minorities.[10]

Prior to the disintegration of the former Yugoslavia, there were relatively few manifestations of ethnic problems in this part of Europe.[11] Formally, the dissolution of the former Yugoslavia began on 25 June 1991 when Slovenia and Croatia declared their independence from the Yugoslavian Federation, following their own Assemblies' resolutions on 20 February 1991 and 21 February 1991 respectively.[12] This had preceded a referendum in Slovenia on 23 December 1990 in which 88.5 per cent of the Slovenes voted in favour of independence from Yugoslavia.[13] The ethnic Serbs in Slovenia and Croatia responded by declaring their own autonomous regions: On 13 August 1991, the Serbs in Slovenia declared a 'Serbian Autonomous Region of Western Slovenia'. In Croatia, this ethnic group had shown their intention to do the same in a referendum held on 12 May 1991 in which they manifested their wish to remain a part of the Yugoslavian Federation.[14]

The process of disintegration in the former Yugoslavia eventually descended into a series of military clashes which gave rise to some of the worst human rights violations yet seen. The parties involved in the

9. For the ethnic structure of the republics of the former Yugoslavia and its effect on the dissolution, *see* Glenny, M., *The Fall of Yugoslavia the Third Balkan War* (Penguin Books, 1992); Duncan, W.R., 'Yugoslavia's Break-up', in W. Raymond Duncan and G. Paul Holman, Jr. (eds), *Ethnic Nationalism and Regional Conflict: The Former Soviet Union and Yugoslavia* (Boulder, San Francisco, Oxford: Westview Press, 1994), pp. 19–33.
10. Weller, M., 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992), 86 *AJIL*, p. 569.
11. Morris, V. and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 1 (Irvington-on-Hudson, New York: Transnational Publishers, 1995), p. 18.
12. Keesing's Record of World Events, 1991, p. 28204.
13. Weller, p. 569; Kessing's, 1990, p. 37924.
14. Keesing's, 1991, pp. 38204, 38375.

conflict were varied and the place of the conflict changed at various times from Slovenia to Croatia and lastly to Bosnia-Herzegovina.[15]

Generally speaking, the military conflicts in the former Yugoslavia involved three phases:[16]

The first phase involved the conflict in Slovenia and it began when Slovenia declared its independence from the former Yugoslavia on 25 June 1991. The warring factions in this conflict were the Yugoslav People's Army (JNA), Slovenia Territorial Defence Forces and local Slovenian Police, and this phase lasted for a few weeks in June and July 1991.[17]

The second phase involved the conflict in Croatia and started before that Republic formally declared its independence on 25 July 1991. It involved on the one hand the JNA, Serb militia in Krajina and in eastern and western Slavonia, special forces from Serbia, local special forces, and Serb police and armed civilians; on the other hand the newly formed Croatian Army, the Croatian National Guard, local militia special forces, local Croatian Police and armed civilians. Although the JNA officially withdrew from Croatia in November 1991, it continued to support the newly formed, self-declared 'Serb Republic of Krajina' army.[18]

The third and last phase of the conflict was in Bosnia-Herzegovina and began following its declaration of independence on 6 March 1992. The conflict in Bosnia and Herzegovina was the most terrible one and involved the following warring factions: Croatian and Bosnian Government forces, Bosnian Government and Serbian forces, and Croatian and Serbian forces. The Croatian Army, local Croatian police, volunteer civilians and 'special forces' supported the Croatian Defence Council in Bosnia-Herzegovina. The fighting between the Bosnian Government and JNA lasted from April to June 1992 when the JNA 'officially' withdrew from Bosnia and Herzegovina, leaving behind JNA Serbian troops and their military equipment.[19] In addition to the regular armies of the Federal Republic of Yugoslavia[20] (FRY), Croatia and Bosnia-Herzegovina, there were three additional armies taking part in the conflict, namely, the Bosnian-Serb Army, the Serbian Army of Croatia and the Croatian Defence Council.[21]

While the conflict was continuing in the former Yugoslavia, four Yugoslav republics – Slovenia, Croatia, Bosnia-Herzegovina and Macedonia – sought recognition as independent States by the inter-

15. Bassiouni, M.C. and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, New York: Transational Publishers, 1996), p. 39.
16. *The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, paras. 110–13 (hereinafter *Final Report*).
17. *Final Report*, para. 111.
18. Ibid., para. 112.
19. Ibid., para. 113.
20. The Federal Assembly adopted the constitution of a new Yugoslav State – the Federal Republic of Yugoslavia – consisting of two republics Serbia (including its autonomous regions of Kosovo and Vojvodina) and Montenegro on 27 March 1992.
21. Bassiouni and Manikas, p. 41; *Final Report*, para. 118.

national community.[22] On 15 January 1992 the European Community (EC) recognised Slovenia and Croatia both of which fulfilled the requirements of *the Declaration on the Guidelines on Recognition of new States in Eastern Europe and the Soviet Union* issued by the Foreign Ministers of the Community.[23] These two countries were firstly recognised by Germany on 23 December 1991.[24] On 6 April 1992, the EC officially recognised Bosnia-Herzegovina.[25] The United States' recognition followed this on 7 April 1992. At the same time Slovenia and Croatia were also recognised by the United States.[26] All three States were accepted for membership in the United Nations on 22 May 1992.[27] The recognition of Macedonia was problematic in the EC, because of the Greek position arguing that the name 'Macedonia' implied that the northern part of Greece – also known as Macedonia – would be subject to territorial claims.[28]

During the period of the conflicts in the former Yugoslavia, the most shocking human rights violations, and violations of the laws of war took place in the heart of Europe. Although all conflicts involved atrocities, the quantity of the killing, rape and other forms of sexual assaults, 'ethnic cleansing' and other types of crimes committed in the former Yugoslavia impelled the international community to seek to bring to account those responsible as an element of its attempts to restore international peace.[29] In the meantime, the sources of information relating to the human rights violations were numerous. In this sense, some non-governmental organisations (NGOs) such as Amnesty International,[30] Helsinki Watch,[31] part of

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22. Rich, R., 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union (1993), 4 *EJIL*, p. 36; Turk, D., 'Recognition of States: A Comment' (1993), 4 *EJIL*, p. 66 For the British policy on recognition of new States (the Baltic States and the Republics of the Former Yugoslavia) *see* Warbrick, C., 'Recognition of States' (1992), 41 *ICLQ*, p. 473; and also *see* the same author 'Recognition of States Part 2' (1993), 42 *ICLQ*, p. 433.
23. The texts of the Declaration on the Guidelines on the Recognition of New States in eastern Europe and in the Soviet Union (16 December 1991) and Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991) are available in (1993), 4 *EJIL*, pp. 72–3 respectively. The Guidelines reprinted in (1992) 31 *ILM*, p. 1486. In this context, see *Opinions of the Arbitration Commission of the International Conference on Yugoslavia* (also known as the *Badinter Commission*, after its president, Mr Badinter), in (1993), 4 *EJIL*, p. 74, reprinted in (1992), 31 *ILM*, p. 1494; Rich, p. 49; Weller, p. 586; Warbrick (1992), p. 477.
24. Weller, p. 588.
25. Rich, p. 50; Weller, p. 593.
26. Warbrick (1993), p. 435; Rich, p. 50.
27. *Final Report*, *see supra* note 21.
28. Weller, p. 594; Rich, p. 51. As a result of the widespread recognition of these republics by the international community and also the adoption of the new Yugoslav State as the FRY on 27 April 1992 by the Federal Assembly, the existence and independence of these four republics of the former Yugoslavia was confirmed.
29. Greenwood, p. 642.
30. Amnesty International, Bosnia-Herzegovina: *'You Have No Place Here': Abuses in Bosnian Serb-Controlled Areas*, AI Index EUR 63/11/94 (this report concerns abuses in Bosnian Serb-controlled towns such as Banja Luka, Prijedor, Bosanska Gradiska, Mahovljani and others); Amnesty International, Bosnia-Herzegovina: *Living for the Day – Forcible Expulsions from Bijeljina and Janja*, AI Index EUR 63/22/94 (this document has relied largely on interviews with displaced persons in Tuzla, Bosnia-Herzegovina, in October 1994); Amnesty International, *Further Reports of Torture and Deliberate and Arbitrary Killings in War Zones* (March 1992); Amnesty International, Bosnia-Herzegovina: *Gross Abuses of Basic Human Rights* (1992).

the intergovernmental process of the Conference on Security and Cooperation in Europe (CSCE),[32] the United Nations Human Rights Commission (UNHRC),[33] the International Committee of the Red Cross (ICRC),[34] and the European Community,[35] and as an individual State the United States,[36] produced a great many documents demonstrating the widespread extent of violations of human rights and of international humanitarian law in the former Yugoslavia. Among the information sources, the most detailed and valuable was the *Final Report of the Commission of Experts* with its Annexes.[37] As will be seen below, the

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31. Helsinki Watch, *Report on War Crimes in Bosnia-Herzegovina* (August 1992); Helsinki Watch, *Abuses Continue in the Former Yugoslavia: Serbia, Montenegro and Bosnia-Herzegovina* (July 1993).
32. *Report of CSCE Mission to Inspect Places of Detention in Bosnia-Herzegovina* (29 August–4 September 1992).
33. On behalf of the UNHRC Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, submitted a series of reports concerning the alleged violations of human rights and international humanitarian law: *Report on the Situation of Human Rights in the Territory of the former Yugoslavia Submitted by Mr Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights Pursuant to Paragraph 14 of Commission Resolution 1992/S-1/1 of August 1992* (hereinafter *Periodic Report of the Special Rapporteur*) UN Doc. S/24516 (1992); UN Doc. E/CN.4/1994/3 (1993) (*First Periodic Report of the Special Rapporteur*); UN Doc. E/CN.4/1994/4 (1993) (*Second Periodic Report of the Special Rapporteur*); UN Doc. E/CN.4/1994/6 (1993) (*Third Periodic Report of the Special Rapporteour*); UN Doc. E/EN.4/1994/8 (1993) (*Fourth Periodic Report of the Special Rapporteur*); UN Doc. E/CN.4/1994/47 (1993) (*Fifth Periodic Report of the Special Rapporteur*); UN Doc. E/CN.4/1994/110 (1994) (*Sixth Periodic Report of the Special Rapporteur*); UN Doc. E/CN.4/1995/4 (1994) (*Seventh Periodic Report of the Special Rapporteur*); UN Doc. E/CN.4/1995/10 (1994) (*Eighth Periodic Report of the Special Rapporteur*); UN Doc. A/49/641 (UN Doc. S/1994/1252) (1994) (*Ninth Periodic Report of the Special Rapporteur*); UN Doc. E/CN.4/1995/57 (1995) (*Tenth Periodic Report of the Special Rapporteur).*
34. Sommaruga, C., The President of the ICRC, *Saving Lives in Bosnia-Herzegovina* (October 1992).
35. *European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to European Community Foreign Ministers*, UN Doc. S/25240 (3 February 1993).
36. The United States has submitted the most valuable information available and in its reports has depended upon to the extent possible eyewitness accounts.The estimated dates of the events, grave breaches of the fourth Geneva Convention, abuse of civilians in detention centres, deliberate attacks on non-combatants, wanton devastation and destruction of property, and other events, including mass forcible expulsion and deportation of civilians, are indicated at the left side of the report.These reports are: *First Report on the War Crimes in the Former Yugoslavia Submission of Information to the United Nations Security Council in Accordance with Paragraph 5 of Resolution 771 (1992)* (22 September 1992); *Second Report on War Crimes in the Former Yugoslavia Supplemental United States Submission of Information to the United Nations Security Council in Accordance with Paragraph 5 of Resolution 771 (1992) and Paragraph 1 of Resolution 780 (1990)* (22 October 1992); *Third Report on War Crimes in the Former Yugoslavia* (6 November 1992); *Fourth Report on War Crimes in the Former Yugoslavia* (7 December 1992); *Sixth Report on War Crimes in the Former Yugoslavia* (1 March 1993); *Seventh Report on War Crimes in the Former Yugoslavia* (12 April 1993); *Eighth Report on War Crimes in the Former Yugoslavia* (16 June 1993).
37. The *Final Report* includes twelve annexes amounting to about 3,200 pages of detailed information and analysis. Before the *Final Report*, the *Commission of Experts* had submitted two more reports: *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/25274 (hereinafter *Interim Report*); *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/26545 (hereinafter *Second Interim Report*).

Commission of Experts was established pursuant to Security Council Resolution 780 (1992) by the Secretary-General to examine and analyse the information submitted by States and international humanitarian organisations in accordance with resolution 771 (1991) and also to investigate violations of international humanitarian law committed in the territory of the former Yugoslavia. It provided much evidence relating to crimes committed in the former Yugoslavia.[38]

From the point of view of this study, a brief look at the crimes committed in the former Yugoslavia is important since it explains why it was considered necessary to establish the ICTY. The concept of 'ethnic cleansing'[39] is the major character of the crimes committed in the said area. The term 'ethnic cleansing' in the context of the conflicts in the former Yugoslavia, means 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area'.[40] It 'has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property'.[41] All parties involved in the conflicts have committed grave breaches of the Geneva Conventions, the crime of genocide and crimes against humanity; however, although the Serbs and Croats have practised these crimes as part of a policy of 'ethnic cleansing', Bosnian Muslims have not committed these crimes in the same way. The number of violations by the Bosnians is significantly less than the other violations committed by the Serbs and Croats.[42] Rape and other forms of sexual assault,[43] mass graves,[44] the shelling of cities,[45] detention

38. 'The [F]inal [R]eport of the Commission includes … substantive findings on alleged crimes of "ethnic cleansing", genocide and other massive violations of elementary dictates of humanity, rape and sexual assault and destruction of cultural property committed in various parts of Bosnia and Herzegovina' (*Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council transmitting the Final Report of the Commission of Experts*).
39. Kresock, D.M., '"Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention' (1994), 27 *Corn. Int.'l L. J.*, pp. 221–5. For the analysed meaning of this term, *see* Petrovic, D., 'Ethnic Cleansing – An Attempt at Methodology' (1994), 5 *EJIL*, pp. 342–59; and also *see* Cigar, N., *Genocide in Bosnia: The Policy of 'Ethnic Cleansing'* (College Station, TX: Texas A&M University Press, 1995); Scharf, M.P., *Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg* (Durham, NC: Carolina Academic Press, 1997), pp. 29–30.
40. *Interim Report*, para. 55; *Final Report*, para. 129.
41. *Interim Report*, para. 56; *Final Report*, para. 129.
42. *Final Report*, para. 148.
43. Ibid., paras. 232–53. 'The Commission has information indicating that girls as young as 7 years old and women as old as 65 have been raped while in captivity. The group most targeted for rape, however, is young women between the ages of 13 and 35. Mothers of young children are often raped in front of their children and are threatened with the death of their children if they do not submit to being raped. … There have also been instances of sexual abuses of men as well as castration and mutilation of male sexual organs' (para. 230 (o)).
44. Ibid., paras. 254–84. 'As of 31 March 1994, the Commission received information leading to the identification of 187 mass grave sites … 143 are located in Bosnia and Herzegovina and 44 are in Croatia' (para. 256). 'The number of bodies … ranges from 3 persons to 5,000 persons' (para. 257); Bassiouni and Manikas, pp. 56–7.

camps,[46] and the prevention of humanitarian aid,[47] are just a few examples of the facts underpinning the 'ethnic cleansing' campaign conducted by the Serbs and Croats in the former Yugoslavia.

The conflict described above lasted from 1991 to the end of 1995. Eventually on 14 December 1995, the representatives of the Republic of Bosnia-Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia signed the Dayton Peace Agreement[48] at the Paris Peace Conference. The Dayton Peace Agreement accepted the ICTY as an 'essential aspect' of peace implementation.[49] It is also important to note that the ratification of the Agreement by the Federal Republic of Yugoslavia was its first official recognition of the ICTY.[50]

Rwanda

In 1994, the international community witnessed one of the worst violations of human rights and of international humanitarian law in the central African State of Rwanda. During the course of the past 45 years, especially, 'the years 1959, 1963, 1966, 1990, 1991, 1992 and 1993 were marked by massacres in Rwanda'.[51] The last and worst in this series of massacres was started on 6 April 1994, following the death of the President of Rwanda, Juvenal Habyarimana, and the President of Burundi, Cyprion Ntyamira, in an air crash in Kigali, the capital city of Rwanda.[52] This event triggered planned, systematic, widespread human rights violations, crimes against humanity and genocide against the Tutsi minority and moderate Hutus by other members of the Hutu ethnic group.[53]

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45. Bassiouni and Manikas, pp. 57–9.
46. 'The Commission received information concerning a total of 715 camps … 237 were operated by Bosnian Serbs and the former Republic of Yugoslavia; 89 were operated by the Government and army of Bosnia and Herzegovina; 77 were operated by Bosnian Croats, the Government of Croatia, the Croatian Army and the Croatian Defence Council; 4 were operated jointly by the Bosnian Government and Bosnian Croats; and 308 camps for which it is not known with certainty under whose effective control they were' (*Final Report*, paras. 216–17).
47. *Final Report*, paras. 67–71; Bassiouni and Manikas, pp. 61–2.
48. UN Doc. S/1995/999 (1995); reprinted in (1996) 35 *ILM*, p. 89. The representatives of the three Republics had initialled the General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto on 21 November 1995 after the peace talks at Wright-Patterson Air Force Base in Dayton, Ohio. (Akhavan, P., 'The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond' (1996), 18 *HRQ*, p. 274.)
49. Akhavan, p. 260.
50. Ibid., p. 274.
51. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, UN Doc. S/1994/1405 (hereinafter *Final Report for Rwanda*), para. 55.
52. Shraga, D. and R. Zacklin, 'The International Criminal Tribunal for Rwanda' (1996), 7 *EJIL*, p. 502; Sunga, L.S., 'The First Indictments of the International Criminal Tribunal for Rwanda' (1997), 18 *Hum. Rts. L. J.*, p. 331; Dzubow, J.A., 'The International Response to the Civil War in Rwanda' (1994), 8 *Ge. Imm. L. J.*, p. 515.
53. *Report of the Representative of the Secretary-General, Mr Francis Deng, submitted Pursuant to Commission on Human Rights Resolution 1993/95*, UN Doc. E/CN.4/1995/50/Add.4 (16 February 1995) para. 1; *Final Report for Rwanda*, para. 56. Before the conflict, the Rwanda population consisted of approximately 84 per cent Hutus, 14 per cent Tutsi and 2 per cent others (*Final Report for Rwanda*, para. 59).

During the period from 6 April 1994 to 18 July 1994, an estimated 500,000 civilians were killed in Rwanda.[54] The warring factions in this civil war were the Rwandan Patriotic Front (RPF) which was a Tutsi rebel force and came from Uganda, and Hutu extremists. The crimes committed in Rwanda were all planned, systematic atrocities.[55] A great deal of evidence pointed to this: the speech of Leon Mugesera in 1992, an official in the period of President Habyarimara, calling upon 'Hutus to kill Tutsis and to dump their bodies in the rivers of Rwanda',[56] the racist campaign against the Tutsi ethnic group by the media belonging to the Government especially by Radio Rwanda and *Radio-Télévision Libre des Mille Collines* (RTLM),[57] the distribution of arms to the civilian population and the training camp for Hutu militia[58] give some indication of the preparation and planning of the violence.

While the conflict was continuing, the attempts of the United Nations Assistance Mission for Rwanda (UNAMIR) were not enough to bring an end to the civil war between the RPF and the forces of the Government of Rwanda. The civil war in Rwanda was ended by the RPF's unilateral declaration of a cease-fire on 18 July 1994.[59]

Despite the fact that there was ample evidence that acts of genocide had taken place in Rwanda, the Security Council followed the same approach (as will be seen in detail below) as with the conflict in the former Yugoslavia. After a series of resolutions, it requested the Secretary-General to establish an impartial Commission of Experts to examine and analyse information and also to provide evidence relating to the violations of international humanitarian law and particularly, the crime of genocide perpetrated in Rwanda.[60] In a short period, the *Commission of Experts* submitted its *Interim Report* to the Security Council on 1 October 1994.[61] Relying on this report and the *Special Rapporteur's*

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54. *Final Report for Rwanda*, para. 57. According to the *Report of the Special Rapporteur*, the number of murdered civilians was close to one million (*Report on the Situation of Human Rights in Rwanda Submitted by Mr R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994*, UN Doc. E/CN.4/1995/7 (28 June 1994) para. 24). In this context also, *see* Morris, V. and M.P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. I (Irvington-on-Hudson, New York: Transnational Publishers, 1998) (hereinafter the *ICTR*), pp. 53–9. For a sociological view, *see* Diessenbacher, H., 'Explaining the Genocide in Rwanda' (1995), 52 *L.&S.*, pp. 58–88.
55. UN Doc. E/CN.4/1995/7, para. 25. For the examples showing that the massacres are systematic and atrocities, *see* the same report paras. 27–8. 'Generally, the victims are attacked with machetes, axes, cudgels, clubs, sticks or iron bars. The killers sometimes go so far as to cut off their fingers, hands, arms and legs one after another before cutting off their heads or splitting their skulls' (para. 28).
56. *Final Report for Rwanda*, para. 63.
57. Ibid., para. 64; UN Doc. E/CN.4/1995/7, para. 26. For the activities of the RTLM, *see Report on the Situation of Human Rights in Rwanda submitted by Mr R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, UN Doc. E/CN.4/1995/12 (12 August 1994), paras. 19–20.
58. *Final Report for Rwanda*, para. 65; UN Doc. E/CN.4/1995/7, para. 26.
59. Johnson, L.D., 'The International Tribunal for Rwanda' (1996), 67 *Rev. Int. D. P.*, pp. 211–13.
60. SC Res. 935 (1 July 1994).
61. *Preliminary Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, UN Doc. S/1994/1125. The Final Report was submitted by a letter dated 9 December 1994 from the Secretary-General to the Security Council. In its report,

Reports of the Commission on Human Rights, the UN Security Council established the ICTR by its Resolution 955 of 8 November 1994.[62]

The Establishment of the International Criminal Tribunals

Although the Security Council sometimes had not paid a sufficient degree of attention to the violations of international humanitarian law in the former Yugoslavia, it adopted a number of strongly worded resolutions during the conflicts. For example, in its Resolutions 752 (15 May 1992) and 757 (30 May 1992), the Security Council urged all parties involved in the conflicts to refrain from mass forcible expulsion and deportation of civilians and changing the ethnic composition of the population. In the preamble to Resolution 771 (13 August 1992), it expressed 'grave alarm at continuing reports of widespread violations of international humanitarian law' and was especially concerned about abuses of civilians in detention centres and attacks on civilians, hospitals and ambulances. The same resolution and Resolution 779 (1992) expressed concern over the 'wanton devastation and destruction of property'. Resolution 787 (1992) was concerned with attacks and acts of harassment against the delivery of humanitarian aid. In 1993 and following years, resolutions such as 819 (1993), 824 (1993), 836 (1993) were all expressing concern over the atrocities including mortar attacks on public places in Sarajevo, the siege of many Muslims by the Serbs in Srebrenica, Bihac, Gorazde, Tuzla and so on and attacks on the cities declared as 'safe areas' by the Security Council such as Srebrenica and Mostar.

According to resolutions, the practice of the Security Council in relation to the establishment of the Tribunal for the former Yugoslavia can be summarised in four steps: 'condemnation; publication; investigation; and, by establishing the tribunal, punishment'.[63]

As a first step, the Security Council by its Resolution 764 of 13 July 1992 condemned atrocities perpetrated by the parties to the conflict as violations of international humanitarian law and reaffirmed that all parties must comply with international humanitarian law, especially the Geneva Conventions of 12 August 1949, and confirmed 'that persons who

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the *Commission of Experts* concluded that there is a great deal of evidence proving that 'acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodical way' (para. 183). The *Commission of Experts* has also concluded that individuals from both sides to the conflict committed crimes against humanity and serious violations of international humanitarian law during the period from 6 April 1994 to 15 July 1994 (paras. 181–2); and also in this context, for the constituent elements of genocide such as the discovery of mass graves, the existence of evidence and proof showing that the genocide of the Tutsi ethnic group was planned and identification of persons responsible for the genocide, *see Report on the Situation of Human Rights in Rwanda Submitted by Mr R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, UN Doc. E/CN.4/1995/70 (11 November 1994), paras. 6–14.

62. *See supra* note 4.

63. O'Brien, J.C., 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993), 87 *AJIL*, p. 640.

commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches'.[64]

Secondly, the Security Council adopted Resolution 771, on 13 August 1992, demanding the immediate cessation of all breaches of international humanitarian law and calling upon States and international humanitarian organisations to submit substantiated information concerning violations of international humanitarian law to the Council.[65]

Thirdly, the Security Council, by its Resolution 780 (1992), requested the Secretary-General to establish an impartial Commission of Experts to examine and analyse the information submitted in accordance with Resolution 771. And also according to this resolution, the *Commission of Experts* had authority to obtain information as a result of its own investigations or efforts.[66] Pursuant to Resolution 780 (1992), the Secretary-General established the *Commission of Experts* consisting of five members.[67] In a short time, the *Commission of Experts* submitted its first *Interim Report*, on 10 February 1993, concluding that 'it would be for the Security Council or another competent organ of the United Nations to establish such a tribunal in relation to events in the territory of the former Yugoslavia. The Commission observes that such a decision would be consistent with the direction of its work.'[68]

As a fourth and final step, the Security Council adopted Resolution 808 of 22 February 1993 deciding, in principle, to set up an 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'.[69] This resolution also requested the Secretary-General to submit 'a report on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision ... taking into account suggestions put forward in this regard by Member States'. Pursuant to Resolution 808, the Secretary-General prepared a report including a draft Statute of the Tribunal.[70] Following the *Report of the Secretary-General*, the Security Council adopted Resolution 827 of 25 May 1993 establish-

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64. SC Res. 764 (1992), adopted by the Security Council at its 3093rd meeting, on 13 July 1992. UN Doc. S/RES/764 (1992).
65. SC Res. 771 (1992), adopted by the Security Council at its 3106th meeting, on 13 August 1992, UN Doc. S/RES/771 (1992); O'Brien, p. 641.
66. SC Res. 780 (1992), adopted by the Security Council at its 3119th meeting, on 6 October 1992, UN Doc. S/RES/780 (1992).
67. The Chairman: Professor Frits Kalshoven (Netherlands), the Members: Professor M. Cherif Bassiouni (Egypt), Mr William J. Fenrick (Canada), Judge Keba Mbaye (Senegal) and Professor Torkel Opsahl (Norway) (*Interim Report*, para. 2). For the Commission's mandate and composition, the methods used to collect evidence and the Commission's findings, *see* Bassiouni, M.C., 'The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia' (1994), 5 *Crim. L.F.*, p. 279.
68. *Interim Report*, para. 74.
69. SC Res. 808 (1993), adopted by the Security Council at its 3175th meeting, on 22 February 1993, UN Doc. S/RES/808 (1993).
70. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), including the Draft Statute of the Tribunal*, UN Doc. S/25704 (3 May 1993) (hereinafter *Secretary-General's Report*).

ing the Tribunal[71] and approved the draft Statute submitted by the Secretary-General, without change.

As will be discussed below, the Security Council set up the Tribunal pursuant to Chapter VII of the United Nations Charter to restore international peace and security. In this regard, there have been a number of arguments relating to the Security Council's actions, in particular, the legality of the establishment and the competence of the Security Council and the sovereign rights of States were main issues which need to be considered.

Lastly, in this context, it can be concluded that the practice of the Security Council in relation to the establishment of the ICTY created 'a model for responses to violations of international humanitarian law'.[72] The Rwanda case and the establishment of the Rwanda Tribunal, again by the Security Council, is the best example proving this conclusion. As indicated earlier, the Security Council has followed the same approach to set up the ICTR.

The Legality of the Establishment and Competence of the Security Council

As indicated earlier, the Tribunals for the former Yugoslavia and Rwanda were established by Security Council Resolutions 827 (1993) and 955 (1994) respectively, acting under Chapter VII of the UN Charter in order to maintain or restore international peace and security. This attempt, creating an international criminal tribunal, was innovative in nature. For this reason, a number of legal issues concerning, particularly, the legality of the establishment of these Tribunals and the Security Council's competence in this regard need to be examined. In order to be credible and effective the Tribunal had to be brought into being by a method firmly based in law.[73]

The Legal Basis for the Establishment of an International Criminal Tribunal

In the field of law, regarding the establishment of an *ad hoc* or permanent international tribunal, four different methods are available: (a) an international treaty, (b) a General Assembly Resolution, (c) a Security Council Resolution, and (d) creating an international tribunal by means of amending the UN Charter (in this way the Tribunal would be similar to the International Court of Justice, ICJ).[74] In the case of the former Yugoslavia, the first three methods were considered[75] and the Tribunal was established by the Security Council acting under Chapter VII of the UN Charter.

71. SC Res. 827 (1993), adopted by the Security Council at its 3217th meeting, on 25 May 1993, UN Doc. S/RES/827 (1993).
72. O'Brien, p. 644.
73. Greenwood, p. 641.
74. Blakesley, C.L., 'Comparing the Ad Hoc Tribunal for Crimes Against Humanitarian Law in the Former Yugoslavia & the Project for an International Criminal Court, Prepared by the International Law Commission' (1996) 67 *Rev. Int. D. P.*, p. 141.
75. Kolodkin, R.A., 'An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia' (1994), 5 *Crim. L. F.*, p. 385.

An International Treaty

The classic way of establishing an international tribunal, in the normal course of events, is the conclusion of a treaty.[76] The treaty-based establishment has some important advantages with regard to giving an opportunity to States to examine and elaborate the issues relating to the establishment of the tribunal and also it allows States to exercise their sovereign will in the negotiation and conclusion of the treaty. Above all, the sovereign will of States is reflected in the fact that a tribunal created by means of a treaty would only have jurisdiction over states party to the instrument.[77] Although this approach is preferable, in the context of the former Yugoslavia, its advantages may become disadvantages in terms of the required time for the negotiation, conclusion of the treaty and the sufficient number of ratifications for its entry into force. Moreover, if the interested States do not ratify and become a party to the treaty, the tribunal would be pointless, since for the effectiveness of the tribunal, the States concerned must be parties to the treaty.[78]

A General Assembly Resolution

The second method for the establishment of an international tribunal for the former Yugoslavia was to create the tribunal by means of a General Assembly Resolution. As has been indicated in Article 7 of the UN Charter, the General Assembly is one of the principal organs of the United Nations, and its functions and powers are regulated in Articles 10–17 of the UN Charter. According to Articles 10 and 11, the General Assembly has authority to discuss any questions or matters within the scope of the UN Charter, and to make recommendations to the Member States of the United Nations or to the Security Council.[79] In this regard, the General Assembly 'may discuss any questions relating to the maintenance of international peace and security',[80] and decisions with respect to the maintenance of international peace and security have to be taken

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76. *Secretary-General's Report*, para. 19; Kolodkin, p. 385.
77. *Secretary-General's Report*, para. 19.
78. Ibid., para. 20; Morris and Scharf, p. 40; Kolodkin, p. 387; Szasz, P.C., 'The Proposed War Crimes Tribunal for Ex-Yugoslavia' (1993), 25 *N.Y. Univ. J. Int.'l L. & Pol.*, p. 411.
79. Article 10 of the UN Charter provides: 'The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.'

    Article 11 (1) of the UN Charter provides: 'The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulations of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.'
80. Art. 11 (2) of the UN Charter. Article 12 of the Charter is an exception to the functions and powers of the General Assembly. It states that 'While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.'

by a two-thirds majority of the members present and voting, it is accepted as an important question in the UN Charter.[81]

From the point of view of the establishment of the Tribunal, accepting the involvement of the General Assembly, in drafting or reviewing the Statute of the Tribunal would have been time consuming and would have been difficult to reconcile with the urgency of the situation in the former Yugoslavia, as expressed by Security Council Resolution 808 (1993).[82] On the other hand, the establishment of the Tribunal might not have been consistent with Articles 10–17, regulating the functions and powers of the General Assembly, in terms of taking necessary measures to maintain or restore international peace and security. According to Article 24 (1) of the Charter of the United Nations, the Security Council has 'primary responsibility for the maintenance of international peace and security', and in this regard, it can decide what sort of measures will be taken in accordance with Articles 41 and 42 of the UN Charter.[83] Relating to the maintenance of international peace and security, the General Assembly is merely authorised to make recommendations under Articles 10, 11, 13 and 14 of the UN Charter. In other words, the Charter does not give any authority to the General Assembly to make binding decisions in the field of maintaining international peace and security, thus, adopting a statute for an *ad hoc* tribunal, making it obligatory for States to co-operate with this tribunal and making orders and decisions of the tribunal binding on States cannot be justified by relying on the establishment of the tribunal by means of a General Assembly Resolution.[84]

A Security Council Resolution

The third way to establish an international tribunal for the former Yugoslavia case was the adoption of its Statute by a Security Council Resolution under Chapter VII of the UN Charter concerning 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'. As mentioned above, according to Article 24 (1) of the UN Charter, the Security Council has 'primary responsibility for the maintenance of international peace and security' and it acts on behalf of Member States. For discharging its duties, the Security Council has to act in accordance with the Purposes and Principles of the United Nations. Chapters VI, VII, VIII and XII give necessary power to the Security Council for the discharge of these duties.[85] Article 39 of the UN Charter, under Chapter VII, gives power to the Security Council to determine the existence of any threat to peace and security, and to take necessary measures 'in accordance with Article 41 and 42 [of the UN Charter] to maintain or restore international peace and security'.[86] Articles 41 and 42

81. Art. 18 (2) of the UN Charter.
82. *Secretary-General's Report*, para. 21.
83. Art. 39 of the UN Charter.
84. Kolodkin, pp. 388–90; Morris and Scharf, pp. 40–1.
85. Art. 24 (2) of the UN Charter. The purposes and principles of the United Nations are laid down in Chapter I of the UN Charter (Articles 1–2).
86. Article 39 of the UN Charter provides: 'The Security Council shall determine the existence

of the Charter allow the Security Council to undertake actions in order to give effect to its decisions.[87] Lastly, so as to perform its functions, the Security Council can establish subsidiary organs, acting under the Charter of the United Nations.[88] As a result of these legal regulations, an international criminal tribunal, created by means of a Security Council Resolution, can be seen as 'a product of the combination of these powers'.[89]

The Justification of the Security Council's Action

In light of this explanation, the Security Council was considered to be the most appropriate competent body to establish an international criminal tribunal. This is because 'widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of "ethnic cleansing", ... constitute[d] a threat to international peace and security'.[90] In order to put an end to violations of international humanitarian law and to take necessary measures to bring the perpetrators of such crimes to justice, the establishment of the tribunal could be the best way to achieve this purpose and to contribute to the maintenance of international peace and security.[91] As has been indicated in the *Secretary-General's Report*, the establishment of the tribunal was a measure taken under Chapter VII of the UN Charter.[92] Until the establishment of the Tribunal, the Security Council had taken different measures in conform-

of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.'

87. Article 41 of the UN Charter provides: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions. ... These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.'

    Article 42 of the UN Charter provides: 'Should the Security Council that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.'

88. Article 29 of the UN Charter states: 'The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.' Article 7 (2) of the Charter is also related to subsidiary organs.

89. Bassiouni and Manikas, p. 239.

90. SC Res. 808 (1993). SC Res. 827 (1993) also again expresses that the situation in the former Yugoslavia constitutes a threat to international peace and security. *See supra* notes, 30–6; Meron, T., 'The Normative Impact on International Law of the International Tribunal for Former Yugoslavia', in T. Meron, *War Crimes Law Comes of Age Essays* (Oxford: Clarendon Press, 1998), p. 211.

91. SC Res. 808 (1993); SC Res. 827 (1993); Akhavan, P., 'Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order' (1993), 15 *HRQ*, pp. 278–9. *See* for the opposite view, Khan, S.A., 'War Crimes without Punishment', *New York Times* (8 February 1994) at A23. (Expressing that the Tribunal is only 'a convenient way to quiet human rights activists and other supporters of the Bosnians', in P. Burns, 'An International Criminal Tribunal: The Difficult Union of Principle and Politics' (1994), 5 *Crim. L. F.*, p. 375.)

92. *Secretary-General's Report*, para. 28, '[T]he establishment of the Tribunal should undoubtedly be regarded as a measure designed to promote peace by meting out justice in a

ity with Chapter VII of the Charter. For example, Resolution 713 (1991) imposed a 'general and complete embargo on all deliveries for weapons and military equipment to Yugoslavia'.[93] The UN Protection Force (UNPROFOR) was established by Resolution 743 (1992).[94] Resolution 757 (1992) permitted the use of force against Bosnian Serbs.[95]

Moreover, the 'use of force is allowed as a "measure" under Article 42, *a fortiori*, the creation of an ad hoc international criminal court should also be allowed'[96] and it can be justified as 'a judicial response to the demands posed by the situation in the former Yugoslavia, where appalling war crimes and crimes against humanity are reported to have been perpetrated on a large scale: these are the two classes of offences the Tribunal has been created to try'.[97] In addition, while justifying the establishment of the Tribunal by means of a Security Council Resolution, it should not be forgotten that both Yugoslavia and Rwanda were exceptional cases[98] needing an effective and expeditious measure to maintain international peace and security. The best way of being effective and expeditious in the case of former Yugoslavia and Rwanda would be the establishment of the Tribunal as a means of Security Council Resolution under Chapter VII of the Charter of the United Nations, and this decision could have a binding effect on all States.[99]

The establishment of the Tribunal as a judicial organ by the United Nations (as a means of Security Council Resolution) was unprecedented in the international judicial field. The International Military Tribunals at Nuremberg and Tokyo were created in very different circumstances[100] and both of them were generally accepted as victor's courts of justice.[101] In this sense, being the first international criminal tribunal created by an international organisation, some arguments with regard to its legal basis and effectiveness arose.[102] In this regard, the Federal Republic of Yugoslavia argued that the Security Council does not have a right to

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manner conducive to the full establishment of healthy and cooperative relations among the various national and ethnic groups in the former Yugoslavia' (*The Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (14 November 1994) (hereinafter *Annual Report of the International Tribunal 1994*), para. 17); Akhavan, 'Punishing War Crimes …', p. 279.

93. SC Res. 713 (1991), reprinted in (1992), 31 *ILM*, p. 1431.
94. SC Res. 743 (1992), reprinted in (1992), 31 *ILM*, p. 1447.
95. SC Res. 757 (1992), reprinted in (1992), 31 *ILM*, p. 1453.
96. Blakesley, C.L., 'Obstacles to the Creation of a Permanent War Crimes Tribunal' (1994), 18 *Flet. F. W. Aff.*, pp. 85–6; Blakesley, C.L., 'Comparing …', p. 142; Gallant, K.S., 'Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition' (1994), 5 *Crim. L. F.,* p. 557 (indicating that, under Chapter VII of the UN Charter, the Security Council can 'take a wide range of military and non-military measures to restore and maintain international peace and security', p. 561).
97. *Annual Report of the International Tribunal 1994*, para. 4; Ambos, K., 'Establishing an International Criminal Court and an International Criminal Code, Observations from an International Criminal Law Viewpoint' (1996), 7 *EJIL*, p. 522.
98. Ambos, p. 522; Morris and Scharf, p. 42; Morris and Scharf, *the ICTR*, p. 102.
99. *Secretary-General's Report*, para. 23; McGoldrick, D. and C. Warbrick, 'International Criminal Law' (1995), 44 *ICLQ*, p. 468; Morris and Scharf, p. 42; Morris and Scharf, *the ICTR*, p. 102.
100. *Annual Report of the International Tribunal 1994*, para. 3.
101. *See supra* note 6.
102. *Annual Report of the International Tribunal 1994*, para. 5.

establish an international tribunal under Chapter VII of the UN Charter and emphasised that an international tribunal cannot be created as a subsidiary organ of any body.[103] This argument was made before the establishment of the Tribunal and it has no basis in international law because of the following reasons: Firstly, as mentioned above, under the Dayton Peace Agreement (1995), the Federal Republic of Yugoslavia had accepted the Tribunal as an 'essential aspect' of the peace implementation[104] and it was a party to this Agreement. Secondly, the Tribunal is a completely separate body from the ICJ which is the principal judicial organ of the United Nations under Article 92 of the UN Charter, although the Tribunal is also based in The Hague.[105] Because the ICJ does not have a jurisdiction to deal with charges against individuals,[106] the Tribunal had to be established by the United Nations as a subsidiary organ within the meaning of Article 7 (2) of the UN Charter. Thirdly, it is contrary to Resolution 827 (1993), adopted unanimously by the Security Council, and representing nearly all the States of the world.[107] Finally, it is against the past practice of the Security Council. This is because the Security Council has adopted a series of resolutions under Chapter VII of the Charter of the United Nations to maintain or restore international peace and security. Some of these resolutions created subsidiary organs for different purposes. Resolution 687 (1991) concerning the invasion of Kuwait by Iraq was the best example.[108]

In light of this explanation, it can be concluded that the Security Council appeared the most appropriate body to create the international criminal tribunals in the special circumstances of the former Yugoslavia and Rwanda to maintain or restore international peace and security. The aims of these Tribunals are 'to do justice, to deter further crimes, and to contribute to the restoration and maintenance of peace'.[109] The creation of the Tribunals should be seen as a contemporary example of the application of international humanitarian law for enforcing individual

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103. *Letter dated 19 May 1993 from the Permanent Mission of Yugoslavia to the Secretary-General*, UN Doc. S/25801 (1993). For a Serbian view relating to the establishment of the Tribunal by the Security Council, *see* Cotic, D., 'Introduction' (1994), 5 *Crim. L. F.*, p. 223. For the criticism of the legality of the establishment of the ICTY, *see infra* pages under the heading of 'The Practice of the ICTY'.
104. *See supra* note 49.
105. Greenwood, p. 641.
106. *See* Chapter 2 (Art. 34–8, regulating the competence of the ICJ) of the Statute of the International Court of Justice. In this context, *see* also the case brought by Bosnia and Herzegovina against the Federal Republic of Yugoslavia: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgement* (Bosnia-Herzegovina v. Yugoslavia [Serbia and Montenegro]), (11 July 1996), (1996), *ICJ Rep.*, p. 595. (Deciding that 'on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute', para. 47 (2).)
107. Morris and Scharf, p. 47.
108. *Secretary-General's Report*, paras. 24, 27. According to Resolution 687 (1991), the Security Council established a Boundary Demarcation Commission, a Compensation Commission and a Special Commission. Although, these are not pure judicial organs, they may be accepted, especially the Compensation Commission, as quasi-legal in nature.
109. Beresford, S., 'The International Criminal Tribunal for the Former Yugoslavia: the First Four Years' (1999), 9 *Otago L. Rev.*, p. 578; Tomuschat, C., 'International Criminal Prosecution: The Precedent of Nuremberg Confirmed' (1994), 5 *Crim. L. F.*, pp. 241–2; *Annual Report*

responsibility when the violations of international humanitarian law and of international human rights law occurred and it also creates a model for the future.[110]

The Practice of the ICTY

The decisions of the Trial Chamber and the Appeals Chamber of the ICTY in the case of *Prosecutor v. Dusko Tadic* (in relation to the *Jurisdiction of the Tribunal*)[111] have a significant place in international humanitarian law on the grounds that they provide the foundations for the other cases which will be tried and concluded by the ICTY and the ICTR.[112]

The approach taken by the Trial Chamber and the Appeals Chamber of the ICTY with regard to its establishment is equally valid for the ICTR since both *ad hoc* tribunals were established by the Security Council and they share the same Appeals Chamber. For this reason, in this part of the study, the practice of the ICTY will be examined in detail. Additionally, in the practice of the ICTR, there is no judgement rendered in an appeal stage concerning its establishment. In this sense, the only decision of the ICTR, rendered by Trial Chamber, can be found in the case of *Prosecutor*

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of the International Tribunal 1994, para. 11; 'Some apprehensions were expressed lest the establishment of the Tribunal might jeopardise the peace process. In fact, the Tribunal will contribute to the peace process by creating conditions rendering a return to normality less difficult. How could one hope to restore the rule of law and the development of stable, constructive and healthy relations among ethnic groups, within or between independent States, if the culprits are allowed to go unpunished? Those who have suffered, directly or indirectly, from their crimes are unlikely to forgive or set aside their deep resentment. How could a woman, who had been raped by servicemen from a different ethnic group, or a civilian whose parents or children had been killed in cold blood quell their desire for vengeance if they knew that the authors of these crimes were left unpunished and allowed to move around freely, possibly in the same town where their appalling actions had been perpetrated? The only civilised alternative to this desire for revenge is to render justice: to conduct a fair trial by a truly independent and impartial tribunal and to punish those found guilty. If no fair trial is held, feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to renewed violence' (*Annual Report of the International Tribunal 1994*, para. 15).

110. Blakesley, 'Obstacles …', p. 86; O'Brien, p. 658; 'Of course, it is for the Security Council, and only the Security Council, to decide when special circumstances exist under Chapter VII of the Charter which warrant the establishment of a penal institution competent to try large-scale breaches of human rights. It is an undeniable fact that the creation of the Tribunal has set a momentous precedent, one that, hopefully, the world community will take up in the future whenever a need arises to mete out international justice in a fully impartial way. To those who criticise the 'selective approach' of the Security Council, one should point out that the establishment of the Tribunal is a welcome step that can bear fruit in the future by providing a model that might be adopted in other situations. It is well known that, in the international community, progress takes place in a different way from that in municipal legal systems: often new legal institutions are created not in the light of and as a result of a complex and all-embracing design but under the pressure of specific circumstances. … Whenever new institutions are set up which turn out to be useful and productive, they may have a snowballing effect' (*Annual Report of the International Tribunal 1994*, para. 47).

111. *Prosecutor v. Dusko Tadic (Decision on the Defence Motion, Jurisdiction of the Tribunal)*, Trial Chamber, Case No: IT-94-1-T (10 August 1995) (hereinafter *Tadic Case, Jurisdiction Decision*); *Prosecutor v. Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, Appeals Chamber, Case No: IT-94-1-AR72 (2 October 1995) (hereinafter *Tadic Case, Jurisdiction Decision*).

v. Kanyabashi in which the decision of the Appeals Chamber of the ICTY is regarded as providing a persuasive authority on challenges to jurisdiction of the Tribunal, the ICTR.[113]

Before the trial of *Tadic* began, the defendant challenged the jurisdiction of the Tribunal on three different grounds: (a) the legality of the establishment of the Tribunal, (b) the primacy of the Tribunal over national courts, and (c) the subject-matter jurisdiction of the Tribunal.[114]

In this part of the study, the legality of the establishment of the Tribunal in light of the decisions of the Trial Chamber and the Appeals Chamber will be examined. The defendant's second and third ground of challenge to the jurisdiction of the Tribunal will be discussed in related chapters.

In the Trial Chamber

In the case of *Prosecutor v. Tadic*, the defence motions (paras. 1–4) argued that the establishment of the Tribunal was not lawful, because the UN Security Council is not competent to do so according to the UN Charter. To support this view the defence argued that such a tribunal should have been created either by an international treaty so as to be in compliance with the principle of the sovereignty of States as the practice in international law, or by a General Assembly Resolution since the General Assembly was the only organ representing the international community according to the defence.[115]

The Matter of Judicial Review of the Security Council Powers

By disputing the legality of the establishment of the International Tribunal, the defence questioned the jurisdiction of the Tribunal. As rightly concluded by the Trial Chamber, the validity of the creation of the International Tribunal was not a matter of jurisdiction; rather, it was the issue of the lawfulness of its establishment involving the judicial review of the powers of the Security Council especially in relation to whether there was a threat to international peace and security, and the measures to be employed.[116]

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112. Greenwood, C., 'International Humanitarian Law and the Tadic Case' (1996), 7 *EJIL*, p. 265; Alvarez, J.E., 'Nuremberg Revisited: The Tadic Case' (1996), 7 *EJIL*, p. 245.
113. *Prosecutor v. Joseph Kanyabashi, Decision on the Defence Motion on Jurisdiction*, Trial Chamber, Case No. ICTR-96-15-T (18 June 1997) (hereinafter *Kanyabashi Case, Jurisdiction Decision*). The full text of this decision is available in (1997), 18 *Hum. Rts. L. J.*, pp. 343–7. In its decision the Trial Chamber of the ICTR states: 'The Trial Chamber respects the persuasive authority of the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia and has taken careful note of the decision rendered by the Appeals Chamber in the Tadic case' (para. 8). In this context, *see* also Morris and Scharf, *the ICTR*, pp. 110–15; Morris, V., 'Case Note with Commentary by V. Morris' (1998), 92 *AJIL*, pp. 66–70.
114. *Defence Motions (Jurisdiction of the Tribunal, Principle of Ne-Bis-in-Idem, Form of the Indictment)*, Dusko Tadic, Case No: IT-94-1-T (23 June 1995) (hereinafter *Defence Motions*).
115. *Defence Motions*, paras. 1–2.
116. Trial Chamber, *Tadic Case, Jurisdiction Decision*, paras. 3–4.

Having indicated that the 'International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations',[117] it held that the Tribunal is 'a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.'[118] The same view was also taken by the Prosecutor, in his response to the Defence's Motions[119] by referring to the Statute of the ICTY which clearly defines the subject-matter jurisdiction of the ICTY. According to Articles 2–5 of the ICTY Statute, the Tribunal can just deal with crimes which are serious violations of humanitarian law, and it cannot extend its competence to 'disputes concerning the general interpretation of the Charter and in particular, the right to review the powers of the Security Council'.[120]

Although the Trial Chamber held that it has no authority to decide the legality of the acts of the Security Council concerning the establishment of the Tribunal, it made some comments on the accused's contentions that 'the establishment of the International Tribunal by the Security Council was beyond power and an ill-founded political action, not reasonably aimed at restoring and maintaining peace and that the International Tribunal is not duly established by law',[121] since it is the first time the international community has created a court having criminal jurisdiction over individuals, and the establishment of this Tribunal has spawned the creation of another *ad hoc* Tribunal for Rwanda, and also both of these Tribunals represent a crucial step for the establishment of a permanent international criminal court.[122]

While the Trial Chamber decided that it could not scrutinise or review the actions taken by the Security Council the Chamber depended upon the provisions which the Security Council has broad discretion in exercising its authority under Chapter VII of the UN Charter[123] and in this context, there are just few limitations deriving from Article 24 (2) of the Charter stating that '... the Security Council shall act in accordance with the Purposes and Principles of the United Nations'. To support its view, the Chamber cited a number of decisions of the ICJ proving that the Security Council's powers are mainly on its own discretion and not reviewable.[124] Although the ICJ is the principal organ of the UN accord-

117. Ibid., para. 5.
118. Ibid., paras, 5, 8. 'The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal' (para. 8).
119. *Prosecutor's Response to the Defence's Motions filed on 23 June 1995*, Dusko Tadic, Case No: IT-94-1-T (hereinafter *Prosecutor's Response*).
120. *Prosecutor's Response*, p. 10.
121. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 6.
122. Ibid., para. 6.
123. Ibid., para. 7.
124. *Certain Expenses of the United Nations*, (1962), *ICJ Rep.*, p. 151 *(the Expenses Advisory Opinion)*, 'Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted. ... As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction' (p. 168).

ing to Article 92 of the UN Charter, it has no power to review the Security Council powers especially with respect to the Chapter VII decisions. In the *Namibia Advisory Opinion*, the ICJ decided that '[u]ndoubtedly the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned'.[125] In order to have such a power there must be a clear and explicit provision authorising judicial review, and implied powers cannot be accepted in this respect.[126] Neither the UN Charter nor the Court's Statute provide the ICJ with express authority to review the exercise of Security Council powers.[127] Even though it is clear that the ICJ does not play a direct role as an organ of judicial review, in two ways the Court can pronounce on the legality of resolutions of the Security Council in the cases of an inter-State dispute and an Advisory Opinion request.[128] In both cases, there are many difficulties in bringing the case before the ICJ; for example, a request for an advisory opinion requires the support of a majority of the Council or a two-thirds majority of the Assembly.[129] Even if these means are accepted as a sort of judicial review, the ICJ will continue to engage in these types of 'judicial review' and it will not extend its judicial findings so that some particular Security Council resolution or action is legally invalid or 'null and void'.[130]

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) (the Namibia Advisory Opinion) (1971), *ICJ Rep.*, p. 16.

Case Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. US) (the Lockerbie Case) (1992), *ICJ Rep.*, p. 114. 'While the Court has the vocation of applying international law as a universal law, operating both within and outside of the United Nations, it is bound to respect, as part of that law, the binding decisions of the Security Council' (the separate opinion of Judge Manfred Lachs, p. 138; and also *see* the dissenting opinion of Judge Weeramantry, but not in dissent from other members of the Court in this regard, p. 160). For the criticism of this case, *see* Franck, T.M., 'The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality' (1992), 86 *AJIL*, p. 519; Brownlie, I., 'The Decisions of Political Organs of the United Nations and the Rule of Law', in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrect, Boston, London: Martinus Nijhoff Publishers, 1993), p. 91. *See infra* notes 126–7.

125. *Namibia Advisory Opinion* (1971), *ICJ Rep.*, p. 45, para. 89.
126. Skubiszewski, K., 'The International Court of Justice and the Security Council', in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice (Essays in Honour of Sir Robert Jennings)* (Cambridge: Grotius Publications, 1996), p. 623.
127. Gowlland-Debbas, V., 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' (1994), 88 *AJIL*, p. 664; Skubiszewski, p. 623; Watson, G.R., 'Constitutionalism, Judicial Review, and the World Court' (1993), 34 *Harv. Int.'l L. J.*, pp. 2, 4–8. The proposals for the UN to establish an Arbitral Tribunal or a Commission of Jurists or a Chapter VII Consultation Committee to review the legality of the Security Council resolutions prove that the ICJ does not have any authority in this regard. For the explanation, *see* Bowett, D., 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994), 5 *EJIL*, p. 99; and Reisman, W.M., 'The Constitutional Crisis in the United Nations' (1993), 87 *AJIL*, p. 99. For the opposite view, *see* Graefrath, B., 'Leave to the Court What Belongs to the Court – the Libyan Case' (1993), 4 *EJIL*, p. 184. According to this author, the ICJ has a power to review the legality of Security Council resolutions, and in the UN Charter, there is no provision preventing the ICJ from exercising such power (p. 200).
128. Bowett, pp. 97–8, 101.
129. Ibid., p. 98.
130. Alvarez, J.E., 'Judging the Security Council' (1996), 90 *AJIL*, p. 4.

On the other hand, the Security Council has primary responsibility for the maintenance or restoration of international peace and security. In this context, particularly the decisions taken by the Council under Chapter VII of the UN Charter need to be implemented by all members as soon as possible, and if members had a right to challenge those decisions and fail to implement them, the Security Council would face some problems in discharging its duties.[131] Moreover, the Council enjoys a wide discretion in determining whether a Chapter VII situation has occurred or not. In nature, the decisions of the Security Council taken under Chapter VII are political judgements and its members are well-qualified in this field. For this reason, it would be wrong to give any power to any court to review the legality of the resolutions of the Council.[132] The most recent example demonstrating this fact is the decision of the Trial Chamber of the ICTY. Despite the fact that the Trial Chamber indicated that the Chamber was not the place to judge the appropriateness of the acts of the Security Council, it held that in the case of former Yugoslavia, 'the Security Council did not act arbitrarily'[133] and 'the validity of the decision of the Security Council. ... rests on its finding that the events in the former Yugoslavia constituted a threat to the peace. This finding is necessarily fact-based and raises political, non-justiciable issues.'[134]

Even if it is accepted that the decisions of the Security Council taken in accordance with Chapter VII situations can be reviewed by an international organisation (court or tribunal), the place for this must be the ICJ, not the ICTY which has a limited jurisdiction in respect of serious violations of international humanitarian law and its jurisdiction cannot be extended to the review of the Security Council's powers. For aforementioned reasons, the ICTY cannot have a right of judicial review over the exercise of Security Council powers and in this sense 'it is difficult to see how the powers of the ICTY would exceed those of the International Court of Justice, which has declared itself incompetent to review the exercise of Security Council powers',[135] although it is the principal judicial organ of the UN under Article 92 of the UN Charter.

The Matter of *Ad Hoc* Tribunals as a Measure under Article 41 of the UN Charter

As mentioned above, according to Chapter VII of the UN Charter, the Security Council enjoys a wide discretion in determining the specific measures to be adopted.[136] In this respect, the defence argued that the

131. Bowett, p. 90; Gowlland-Debbas, p. 670.
132. Bowett, p. 94; Herdegen, M., 'The "Constitutionalization" of the UN Security System' (1994), 27 *Van. J. Int.'l L.*, pp. 146, 148. *Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction in the case of Prosecutor v. Tadic* (2 October 1995), IT-94-1-AR72 (hereinafter *Separate Opinion of Judge Li*), para. 3.
133. Trial Chamber, *Tadic Case*, para. 16.
134. Ibid., para. 24.
135. *Prosecutor's Response*, p. 11.
136. *See supra* p. 21, The Justification of the Security Council's Action; *Prosecutor's Response*, p. 14.

creation of the International Tribunal was not a measure in compliance with Article 41 of the Charter since the examples included in that Article deal with economic and political measures, not judicial in character.[137] However, Article 41 contains just an illustrative list of measures and it is not limited to economic and political measures. Except for involving the use of armed force, other measures which are 'fact-based, policy determinations that make this issue non-justiciable' can be adopted by the Security Council.[138]

Moreover, the defence argued that the International Tribunal was not an appropriate measure under Article 41 and it could not possibly contribute to the restoration of peace in the former Yugoslavia and was contented that it would frustrate the peace process.[139] Against this, it was argued that in the case of the former Yugoslavia, the punishment of serious violations of international humanitarian law is an essential element to deter further crimes, and to restore peace.[140] Impunity for serious violations of international humanitarian law can create an obstacle to achieving a lasting peace and can encourage further crimes against humanity such as genocide.[141]

The Matter of Characterisation of Armed Conflict (International or Non-International)

The defence also contended that the Security Council's action was not a measure within the scope of Chapter VII of the UN Charter, due to the fact that the conflict in the territory of the former Yugoslavia was not an international armed conflict.[142] As will be seen in relation to the subject-matter jurisdiction of the Tribunal in detail later, the conflict in the former Yugoslavia was an international armed conflict in nature.[143] Despite the fact that there existed an international armed conflict in the former Yugoslavia, this was not an obligatory requirement for the Security Council to take necessary action under Chapter VII as long as it deems that there is a 'threat to international peace and security' and further, Article 41 does not refer to an international armed conflict, it

137. *Defence Motions*, para. 3.2.1.
138. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 28; Prosecutor's Response, p. 14.
139. *Defence Motions*, para. 3.2.2.
140. *Prosecutor's Response*, p. 22;Trial Chamber, *Tadic Case, Jurisdiction Decision*, paras. 30–1.
141. 'The lack of an effective international response to counter the policy of ethnic cleansing perpetrated by Serb forces from the beginning of the war created the precedent of impunity which has allowed them to continue and which has encouraged Croat forces to adopt the same policy' (Mazowiecki,T., *Second Periodic Report on the Situation of Human Rights, in the Territory of the Former Yugoslavia*, UN Doc. E/CN.4/1994/4 (19 May 1993), para. 43); *Annual Report of the International Tribunal 1994*, para. 11 (*see supra* note 109). The situation in Kosovo in 1998–99 proves this reality. Although the Tribunal is effective and renders judgements, the major responsible leaders could not be brought to The Hague. If the major perpetrators of crimes had been tried and punished before now, the Serbs could not have attacked Kosovo in 1998–99.
142. *Defence Motions*, para. 3.1.1.
143. Meron, pp. 81–2, '… the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the Commission's approach in applying the law applicable in international armed conflicts to the entirety of the armed conflicts in the

refers to 'threats to international peace and security'.[144] Such a threat can occur whether an armed conflict is of an international character or not. Being an international armed conflict cannot be a precondition for the Security Council and Chapter VII situations. In practice, the Security Council has taken necessary measures even in internal armed conflicts such as in Rwanda,[145] Somalia[146] and Haiti.[147]

The Matter of Creation of *Ad Hoc* Tribunals as a Subsidiary Organ

One of the arguments in the defence motions was also that an international criminal court cannot be established as a subsidiary organ by the Security Council and such a tribunal cannot be an independent and impartial body since it was created by a political body (the Security Council).[148]

As is well known, the six principal organs of the UN, the General Assembly, the Security Council, the Economic and Social Council (ECOSOC), the Trusteeship Council, the ICJ and the Secretariat (Art. 7 (1) of the UN Charter), do have the power to establish subsidiary organs to perform their duties in accordance with the Charter (Art. 7 (2) of the UN Charter). In addition to this general authority, Articles 22, 29 and 68 give a kind of special authority to the General Assembly, the Security Council and the ECOSOC, respectively. In this context, the difference between the general authority and specific authority to set up subsidiary organs must be indicated. According to the specific authority, Articles 22, 29 and 68, the principal organ can only establish subsidiary organs in order to perform its functions, while the general authority to establish subsidiary organs, Art. 7 (2), is not subject to such a functional limitation. In this case, subsidiary organs are created to perform some functions that the principal organ cannot itself perform.[149] To execute their duties, Article 7

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territory of the former Yugoslavia' (*Final Report*, para. 44; *Interim Report*, para. 45). 'The disintegration of a federal State, as in the case of the former Yugoslavia, is often at first a civil conflict. However, as the respective States of Slovenia, Croatia and Bosnia-Herzegovina declared their independence, received international recognition and were admitted to membership in the United Nations, the conflict with respect to each of these States became an international conflict. … However, the precise time at which the different stages of this multi-party conflict became or ceased to be a conflict of an international character must be determined by a review of legally relevant facts' (*Final Report*, paras. 306–7); and also *see*, in this context, *'Amicus Curiae Brief Presented by the Government of the United States of America'* (25 July 1995), Dusko Tadic, Case No: IT-94-1-T (hereinafter *Amicus Curiae*), pp. 26–35.

144. *Prosecutor's Response*, p. 16; *Amicus Curiae,* p. 7. This argument that the nature of armed conflict and the establishment of an international criminal tribunal by the Security Council is particularly significant for the Rwanda case. This is because the Rwandan conflict was an internal armed conflict, and it was considered by the Security Council as constituting a threat to international peace and security. On this ground, the ICTR was established by the Security Council. In this context, for how the Trial Chamber of the ICTR treated this issue, *see* Trial Chamber, *Kanyabashi Case, Jurisdiction Decision*, paras. 19–24.
145. SC Res. 955, UN Doc. S/RES/955 (1994).
146. SC Res. 923, UN Doc. S/RES/923 (1994).
147. SC Res. 841, UN Doc. S/RES/841 (1993).
148. *Defence Motions*, para. 3.5.
149. Sarooshi, D., 'The Legal Framework Governing United Nations Subsidiary Organs' (1996), 67 *BYIL*, pp. 422–3, 425.

(2) of the Charter gives more authority than specific authorities to the principal organs. However, to establish such a subsidiary organ, the relevant principal organ has to possess an express or implied power under the Charter. By means of this legal regulation, in the cases of a principal organ that has no competence to perform certain functions, the establishment of subsidiary organs can help the principal organ to discharge its duties effectively.[150]

The most recent example of the use of the general authority to set up subsidiary organs to perform functions that the principal organ cannot itself perform is the establishment of the ICTY.[151] It is clear that under Article 24 (1), the Security Council has the primary responsibility to maintain or restore international peace and security, and according to Chapter VII, so as to perform its duties the Security Council can employ the necessary measures which are suitable for the situation. In this sense, the Security Council has a power to establish the ICTY which performs purely judicial function – the prosecution of violators of international humanitarian law – which the Council cannot itself perform under the Charter in order to maintain international peace and security.[152] There is nothing which precludes the Security Council from establishing an *ad hoc* subsidiary organ which has a judicial character under Article 7 (2) for maintaining international peace and security, as far as understood from the interpretation of Article 7 (2) and the whole UN Charter.[153] As indicated above, the Security Council, while establishing the ICTY, could not have been acting under Article 29 of the Charter, since the Council is not delegating to the ICTY its own functions to be performed. In this respect, the opinion of the UN Secretary-General pertaining to the establishment of the ICTY is not in compliance with this legal ground since in his report he stated that it was 'a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature'.[154] If the legal base were accepted as Article 29, the ICTY would be performing just some functions which the Council can perform.[155] It is clear that this sort of Tribunal cannot be regarded as an independent, impartial Tribunal, in other words, it cannot be accepted as a subsidiary organ that performs a purely judicial function. As referred to above, the creation of the Tribunal

150. Sarooshi, p. 427.
151. The establishment of the ICTR is also another example of this type of creation of subsidiary organs.
152. Sarooshi, pp. 428–30. 'The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, *i.e.*, as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia' (Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 38).
153. 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (Art. 31 (1) of the Vienna Convention on the Law of Treaties of 1969).
154. *Secretary-General's Report*, para. 28.
155. Sarooshi, p. 431.

was a measure under Chapter VII of the UN Charter and it was an *ad hoc* subsidiary judicial organ. In this sense, the argument in relation to the Tribunal's establishment by a political body, in this case the Security Council, which was made by the defence has no basis. This is because, all over the world, criminal courts are created by legislatures, which are completely political bodies.[156] Moreover, in the *Effect of Awards Case*,[157] the ICJ specifically held that a political organ of the UN, in that case the General Assembly, had the power to set up a judicial body.[158] The Trial Chamber, in its decision depended upon this case and decided that '[i]f the General Assembly has the authority to create a subsidiary judicial body, then surely the Security Council can create such a body in the exercise of its wide discretion to act under Chapter VII'.[159] In respect of the maintenance of international peace and security, the Security Council must have the authority to establish subsidiary organs as the Council has the primary responsibility in this field of international law, the General Assembly can play a secondary role for the maintenance of international peace and security.[160] In this context, the other argument that the Tribunal should have been established by the General Assembly[161] finds its response here. In addition, the involvement of the General Assembly was impractical and it was not an appropriate measure for the situation in the former Yugoslavia.[162]

In this respect, one more point should be emphasised: that the establishment of the Tribunal as a subsidiary judicial organ by the Security Council cannot have any effect on its independence and impartiality since the Statute of the ICTY consists of provisions which guarantee its independence and impartiality. In determining those characteristics, the constitution of the Tribunal plays a central role. As rightly decided by the Trial Chamber '[t]he question whether a court is independent and impartial depends not upon the body that creates it but upon its constitution, its judges and the way in which they function'.[163] When the Statute of the ICTY and Rules of Procedure and Evidence are examined, it is clearly understood that those rules attempt to guarantee a fair trial for an accused. In the Statute of the ICTY, Articles 13 (1) regulating qualifications and election of judges and 16 (2) regulating the Prosecutor are just a few examples of this.[164] Similarly, in the case of *Effect of Awards*, the ICJ

156. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 32.
157. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954), *ICJ Rep.*, p. 47.
158. *Effect of Awards*, pp. 56–61.
159. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 35.
160. Sarooshi, pp. 458–62.
161. *Defence Motions*, para. 2.
162. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 38. For the reasons, *see supra*, p.21, A Security Council Resolution and The Justification of the Security Council's Action.
163. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 32.
164. Article 13 (1) of the ICTY states: 'The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices'; and also *see* Rule 15 of the Rules of Procedure and Evidence regulating the disqualification of judges.

    Article 16 (2) of the ICTY states: 'The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.'

had relied on the provisions of the constituent instrument of the UN Administrative Tribunal established by the General Assembly so as to determine the independent and impartial nature of a subsidiary judicial organ, and in this case the Court held that 'examination of the relevant provisions of the Statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgements without appeal within the limited field of its functions'.[165] The Trial Chamber in its decision followed the ICJ in this regard.[166] At this point, it can be concluded that the practice of the ICJ and the International Tribunal has created an international customary law rule, which is the examination of the constituent element of the Tribunal, with respect to the question whether a subsidiary judicial organ is independent and impartial or not. In addition, the establishment of the ICTY under Article 7 (2) of the Charter in compliance with Chapter VII to determine individual criminal responsibility for violations of international humanitarian law in the former Yugoslavia gives it a degree of independence to perform judicial functions which the Council does not possess and it prevents the Council from interfering and reviewing the decisions of the ICTY.[167] This fact demonstrates that the ICTY 'is "subsidiary" in name only and can render final judgements that even the Council is not authorised to disturb – and that in turn can disturb the Council by suggesting limits on its powers'.[168]

The Matter of Protection of Humanitarian and Human Rights Law

In the *Tadic Case*, the defence also contended that the Security Council cannot be involved in the protection of humanitarian and human rights law, the power to deal with human rights having been delegated to the General Assembly, the ECOSOC, the Trusteeship Council and to their subsidiary organs by Articles 1 (4), 13 (1), 55, 62 (2) and 76 (c) of the Charter. The involvement of the Security Council in international humanitarian law, which is a neutral body of law is unfortunate since the Tribunal cannot function as a neutral body.[169] The defence moreover contended that the Security Council does not have any authority over individuals, and '[t]he attribution of jurisdiction over individuals to the Tribunal is not consistent with the Charter', since it is States which can create threats to the international peace and security, not individuals.[170]

Against these arguments, as mentioned earlier, serious violations of international humanitarian and of human rights law constituted a threat to international peace and security.[171] The maintenance or restoration of

165. *Effect of Awards*, p. 53.
166. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 32.
167. Sarooshi, pp. 453-4; 'This organ [the ICTY] … has to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions' (*Secretary-General's Report*, para. 28).
168. Alvarez, 'Judging …', p. 11.
169. *Defence Motions*, paras. 3.4.1, 3.4.2, 3.4.3, 3.4.4.
170. *Defence Motions*, para. 3.7.

international peace and security is the duty of the Security Council under Chapter VII of the UN Charter. Given this ground, the protection of humanitarian and human rights law should be seen as a legitimate area of Security Council action,[172] and the past practice of the Security Council proves this reality.[173] In relation to the argument that the Security Council has no power to attribute jurisdiction over individuals through the creation of a tribunal having criminal jurisdiction has no basis in international law. Criminal responsibility for serious violations of international humanitarian law is a well-established customary international law principle.[174] As decided by the International Military Tribunal at Nuremberg '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[175] In this sense, there is no doubt that the conflicts in the former Yugoslavia constituted a threat to international peace and security and a great number of violations of international humanitarian law committed by individuals on behalf of their States' policy. The principle of State sovereignty cannot be interpreted as to give impunity to those individuals who have committed such kinds of crimes under international law. Otherwise, international criminal law and the principle of individual criminal responsibility that is a basic expression of the enforcement of the laws of war would be pointless. On this ground, the establishment of the Tribunal to prosecute individuals responsible for serious violations of international humanitarian law by means of the Security Council 'was both appropriate and necessary … to act on individuals in order to address the threat to the peace'.[176]

In the Appeals Chamber

The defence filed a notice of (interlocutory) appeal against the decision of the Trial Chamber to dismiss the defence motion on jurisdiction. The defence (appellant) again repeated its arguments based on three grounds: (a) the Tribunal has not been established by law; (b) primary jurisdiction of the Tribunal over competent domestic courts was improperly granted; and (c) the Tribunal lacks subject-matter jurisdiction over charges which have been brought against the accused in the indict-

171. For the explanation *see supra*, p. 21, The Justification of the Security Council's Action; and *supra* notes 30–6.
172. *Prosecutor's Response*, p. 23.
173. For the Rwanda, Somalia and Haiti cases, *see supra* notes 145–7.
174. *Prosecutor's Response*, p. 24; For the concept of individual criminal responsibility in international law, the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and impact on the ICC, *see infra* Chap. 3.
175. In (1949) 22 IMT (International Military Tribunal sitting at Nuremberg. Reported in Trial of the Major War Criminals before the International Military Tribunal) p. 466. In M.C. Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992), p. 207.
176. Trial Chamber, Tadic Case, Jurisdiction Decision, para. 36. The past practice of the Security Council proves that the Security Council has authority over individuals in respect of serious violations of international humanitarian law. In its decision, the Trial Chamber

ment.[177] In this part of the study, the first contention of the defence will be examined, in particular, the approach taken by the Appeals Chamber of the International Tribunal will be analysed.

The Principle of *Compétence de la Compétence*

Although, the results both in the Trial Chamber and the Appeals Chamber hardly differ, the handling of defence assertions by the Chambers has been very interesting in many aspects. Despite the fact that the Trial Chamber made a distinction between the jurisdiction and the establishment of the Tribunal,[178] the Appeals Chamber followed a completely different approach. It did not accept the contention that the establishment of the Tribunal is distinct from its jurisdiction, as had the Trial Chamber, and commented that such a distinction 'implies a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*rationae temporis, loci, personae and materiae*)'.[179] According to the Appeals Chamber, a narrow concept of jurisdiction may exist in a domestic law context, but not in international law, due to the fact that in the international field, there is no integrated judicial system and 'every tribunal is a self-contained system (unless otherwise provided)'.[180] The Appeals Chamber did accept the interpretation of the jurisdiction made by the Trial Chamber,[181] since it consists of merely 'original', 'primary' or 'substantive' jurisdiction, however 'it does not include the 'incidental' or 'inherent' jurisdiction which derives automatically from the exercise of the judicial function'.[182] In this regard, the Chamber made a distinction between 'primary', 'original' or 'substantive' jurisdiction and "incidental" or "inherent" jurisdiction and it regarded the legality of the establishment of the International Tribunal in the second category and accepted this argument in the context of jurisdictional matters.[183]

Having accepted that the establishment of the Tribunal is a jurisdictional matter, the Chamber decided that in international law, every judicial or arbitral tribunal has 'jurisdiction to determine its own jurisdiction' (this principle is also known as '*Kompetenz-Kompetenz*' in German or '*la compétence de la compétence*' in French) and it is a funda-

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quoted resolutions 731 and 748 of the Security Council and held that: although resolutions 731 and 748, the Security Council required the Libyan Government to surrender the two Libyan nationals who were accused of the Lockerbie bombing and imposed mandatory commercial and diplomatic sanctions to obtain Libya's compliance with its decision. It was, in substance, acting upon individuals, seeking the extradition and trial of those Libyan nationals.For the treatment of this issue by the Trial Chamber of the ICTR, *see* Trial Chamber, *Kanyabashi Case, Jurisdiction Decision*, paras. 28–9.

177. *Defence's Brief to Support the Notice of Appeal (Jurisdiction of the Tribunal)*, Dusko Tadic, Case No: IT-94-1-T (25 August 1995) (hereinafter *Defence's Brief*), para. 1.1.
178. *See supra* note 116.
179. Appeals Chamber, *Tadic Case, Jurisdiction Decision,* para. 10.
180. Ibid., para. 11.
181. *See supra* notes 118, 119.
182. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 14.
183. Ibid., para. 18.

mental part of the incidental or inherent jurisdiction.[184] This principle is necessary for the exercise of the judicial function and does not have to be provided in the Statute of the Tribunal. To support this view, the Chamber cited some international legal precedents in this regard.[185] As is well-known, the jurisdictional powers of a tribunal, in this case, the examination of the legality of the establishment of the Tribunal, can be limited by a provision in the constitutive instrument of such a tribunal. In this respect, the Chamber took the view that it can be limited 'only to the extent to which such limitation does not jeopardise its "judicial character"'.[186] In the case of the International Tribunal, the Statute of the International Tribunal does not include any provision limiting its inherent or incidental jurisdiction and it has to exercise its '*compétence de la compétence*' to determine its jurisdiction.[187]

In respect of the decision of the Trial Chamber that the Tribunal cannot scrutinise the actions of the Security Council,[188] the Appeals Chamber held that: 'this is beside the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it'.[189]

From the point of view of international law, the view taken by the Appeals Chamber pertaining to the establishment of the ICTY by means of a Security Council resolution reflects an 'interventionist approach' and its interpretation of the principle of *compétence de la compétence* constitutes an unprecedented broad approach in the practice of international courts or tribunals.[190] The decision of the Appeals Chamber, by depending on the principle of *compétence de la compétence* reviews or examines the legality of the resolution of the Security Council in relation to the establishment of the ICTY. As referred to above, although the ICJ is the principal judicial organ of the UN, it has no such power.[191] Under these circumstances, how can the decision of the Appeals Chamber which reviews the Security Council resolution by relying on the doctrine of *compétence de la compétence* be justified? As a well-established principle, the concept of *compétence de la compétence*[192] only allows a court or a tribunal to examine and determine its own jurisdiction, and this cannot be extended to the review of the Security Council resolution

184. Ibid.
185. *Nottebohm Case* (Liechenstein v. Guatemala) (1953), *ICJ Rep.*, p. 7, at 119. *Dissenting Opinion of Judge Cordova* in the *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against the United Nations Educational, Scientific and Cultural Organisation* (Advisory Opinion) (1956), *ICJ Rep.*, p. 77, at 163. Appeals Chamber, *Tadic Case, Jurisdiction Decision,* para. 18.
186. Appeals Chamber, *Tadic Case, Jurisdiction Decision,* paras. 11, 19.
187. Ibid., para. 19.
188. *See supra* note 117.
189. Appeals Chamber, *Tadic Case, Jurisdiction Decision,* para. 20.
190. Fox, H., 'The Objection to Transfer of Criminal Jurisdiction to the UN Tribunal' (1997), 46 *ICLQ*, pp. 435–6.
191. *See supra* notes 124–7.
192. Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Grotius Publications, Cambridge University Press, 1994), pp. 275–8;

and the appropriateness of it, in this case the resolution establishing the ICTY. The Statute of the ICTY and the UN Charter have never given authority to the ICTY to examine the legality of the Security Council resolutions, and thus, the decision held by the Appeals Chamber must be regarded as '*ultra vires* and unlawful'.[193] If it is accepted that a court can review the legality of the resolutions of the Security Council, it must be the ICJ not the ICTY.[194]

The Matter of 'Political Questions' and 'Non-Justiciable' Disputes

Contrary to the decision of the Trial Chamber with respect to political questions and non-justiciable issues,[195] the Appeals Chamber took the view that the doctrines of 'political questions' and 'non-justiciable disputes' were just 'remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties' and they have a very limited role in contemporary international law.[196] According to the Chamber, the issue is an interpretation of an international treaty, the UN Charter, and in this case, the opinion of the ICJ in the *Certain Expenses of the United Nations*[197] should be applied almost literally to the present case.[198] The ICJ declared in its advisory opinion that: 'The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.'[199]

In this context, the approach taken by the Appeals Chamber should be seen as not in compliance with the UN Charter and international law practice and creates some controversy. This is because the establishment of the Tribunal depends on the Security Council's findings in which the situation in the former Yugoslavia constituted a threat to international peace and security.[200] The decision of the Security Council was taken in accordance with Articles 39 and 41 of the UN Charter under Chapter VII. According to this Chapter, the Security Council enjoys a wide discretionary power in determining whether there is a threat to peace or not, and if so, which types of measures should be employed. These matters are political in nature and the Council is a political organ and its members are well-qualified in this field, whereas the Judges of the ICTY have little or no experience in the political field of international law.[201] Moreover, it

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Nottebohm Case (Liechtenstein v. Guatemala) (1953), *ICJ Rep.*, p. 7, at 119. For a detailed study, *see* Shihata, I.F.I., *The Power of the International Court to Determine Its Own Jurisdiction* (*Compétence de la Compétence*) (The Hague: Martinus Nijhoff 1965).

193. *Separate Opinion of Judge Li*, para. 2.
194. *See supra* note 135 and accompanying text.
195. *See supra* note 134.
196. Appeals Chamber, *Tadic Case, Jurisdiction Decision,* para. 24.
197. *Certain Expenses of the United Nations* (1962), *ICJ Rep.*, p. 151.
198. Appeals Chamber, *Tadic Case, Jurisdiction Decision,* para. 24.
199. *Certain Expenses* (1962), *ICJ Rep.*, p. 155.
200. For the explanation, *see supra*, p.21, The Justification of the Security Council's Action; Trial Chamber, *Tadic Case, Jurisdiction Decision,* para. 24.
201. *Separate Opinion of Judge Li*, para. 3.

would be very wrong to give a power to any court or tribunal for reviewing the resolutions taken, in particular, under Chapter VII situations by the Security Council.[202] For the aforementioned reasons, the decision of the Appeals Chamber, in this respect, 'seems to be imprudent and worthless both in fact and in law'.[203]

The Matter of the Legality of and Appropriateness of the ICTY as a Measure

The appellant did not repeat his argument with respect to the Security Council's power to determine whether the situation in the former Yugoslavia created a threat to international peace and security, and the power of the Security Council to address such threats, and has acknowledged the authority of the Security Council in this regard; however, he continued to contest the legality and appropriateness of the measures adopted by the Council.[204] In contrast to the defence argument, the Appeals Chamber took the same opinion with the Trial Chamber and decided that under Chapter VII of the UN Charter the 'Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken',[205] and the establishment of the Tribunal was a measure under Chapter VII (in particular Article 41) so as to contribute to restoration and maintenance of peace.[206]

The Matter of Established by Law

Lastly, the appellant in the *Tadic Case* challenged the establishment of the Tribunal by contending that it has not been established by law.[207] By this, the appellant meant that the establishment of this *ad hoc* tribunal was not 'the result of a decision making process under democratic control, necessary to create a judicial organisation in a democratic society, but rather the result of a mere executive order'.[208] This argument seems to rely on the contention that even if the Security Council were the appropriate body to create a tribunal, it would not be justified in setting up the Tribunal due to its decision not being subject to 'democratic control' and not meeting the 'requirements for the establishment of a tribunal by law'.[209] It is clear that the source of these arguments derives from Article 14 of the UN Covenant on Civil and Political Rights of 1966 (ICCPR) which provides that: 'In the determination of any criminal charge against him, or of his rights and obligations in a suit law, everyone shall be entitled to a fair and public hearing by a competent,

202. Bowett, p. 94.
203. *Separate Opinion of Judge Li*, para. 3.
204. *Defence's Brief*, paras. 5.1, 5.2, 5.3, 5.5, 5.6.
205. Appeals Chamber, *Tadic Case, Jurisdiction Decision,* para. 31.
206. Ibid., paras. 32–40.
207. *Defence's Brief*, para. 5.4.
208. Ibid.
209. Ibid.
210. Art. 14 (1) of the ICCPR. Similar provisions can be found in Article 6 (1) of the European Convention on Human Rights (ECHR) (4 November 1950) and in Article 8 (1) of the

independent and impartial tribunal established by law.'[210] The concept of establishment by law is one of the most important principles in the national and international law systems and in the opinion of the Appeals Chamber, it can be interpreted as consisting of three possible meanings.

The first possible meaning of the concept of establishment by law is to mean the establishment by a 'legislature' not by an 'executive order' as supported by the appellant and the case law of the European Court of Human Rights.[211] However, the Chamber rejected this meaning on the grounds that a division of powers like legislative, executive and judicial powers which is applied to municipal systems cannot be applied to the international setting, nor particularly 'to the setting of an international organisation such as the United Nations' and in the United Nations system, this type of division of powers is not clear enough.[212]

The second possible meaning of the principle is the establishment of an international tribunal 'by a body which, though not a Parliament, has a limited power to take binding decisions'. As well understood from the opinion of the Chamber, the Security Council, under Chapter VII of the UN Charter, can take binding decisions by means of Article 25 of the Charter and by relying on Chapter VII, the Council has a power to create the Tribunal as a measure to restore and maintain international peace and security, moreover, the establishment of the Tribunal was approved by the UN General Assembly, and also this body elected the Judges of the Tribunal and approved its budget.[213]

The third possible meaning of the concept 'established by law' means that 'its establishment must be in accordance with the rule of law'. In this sense, the Appeals Chamber decided that if the principle of 'established by law' means the establishment in accordance with the rule of law, a tribunal 'must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments'.[214] The Chamber has favoured this interpretation of the concept of established by law, and held that the Tribunal was created in accordance with the rule of law, Article 21 of its Statute, which almost the same as Article 14 of the ICCPR, guaranteed a fair trial for the accused and Article 13 (1) ensured the impartiality, integrity and competence of Judges.[215] As far as the Statute and the Rules of Procedure and Evidence

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American Convention on Human Rights (ACHR) (22 November 1969).

Article 6 (1) of the ECHR states: 'In the determinations of his civil right and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Article 8 (1) of the ACHR states: 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law.'

211. Appeals Chamber, *Tadic Case, Jurisdiction Decision,* para. 43.
212. Ibid., para. 43.
213. Ibid., para. 44.
214. Ibid., para. 45.
215. Ibid., para. 46.

of the International Tribunal are concerned, the Tribunal fulfils all requirements in order to provide a fair trial and necessary elements of the principle of 'established by law'.[216]

Conclusions

As has been indicated above, there is no doubt that the situations in the former Yugoslavia and in Rwanda constituted threats to international peace and security. In the last decade of the twentieth century, the international community witnessed the worst violations of human rights and of international humanitarian law in these two regions of the world. The massive scale of killings, rape and other forms of sexual assaults, 'ethnic cleansing', genocide and other types of crimes committed in the former Yugoslavia and in Rwanda impelled the international community to bring those responsible for such crimes to justice. To achieve this purpose and to contribute to the maintenance of international peace and security, the only way was to establish an international criminal tribunal by means of a Security Council Resolution which was in compliance with the urgency of the situations of the former Yugoslavia and Rwanda. On this background, the UN Security Council established the ICTY and the ICTR acting under Chapter VII of the UN Charter 'to do justice, to deter further crimes, and to contribute to the restoration and maintenance of peace'.[217]

In contrast to the Nuremberg and Tokyo Tribunals, the ICTY and the ICTR were established neither by the victors as a 'victor's court of justice' nor by the parties involved in the conflict, but rather by the UN Security Council on behalf of the entire international community in order to protect international peace and security. For this reason, the establishment of these Tribunals was innovative in character and some questions have arisen in relation to their creation by the UN Security Council.

As can be predicted, in the first case of the ICTY (*Tadic Case*), the defence challenged the legality of the establishment of the International Tribunal, on the grounds of jurisdiction of the Tribunal, as mentioned in detail above, the Trial Chamber refused the jurisdictional challenge of the defence by deciding that 'the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather of the lawfulness of its creation, involving scrutiny of the powers of the Security Council and of the manner of their exercise.[218] However, the fact that the Appeals Chamber did not accept the decision of the Trial Chamber with respect to the creation of the Tribunal can be regarded as a separate concept from the jurisdiction of the Tribunal, and it took 'a more interventionist approach' and 'interpreted in an unprecedentedly broad manner the

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216. Ibid., para. 47.
217. *See supra* note 109.
218. Trial Chamber, *Tadic Case, Jurisdiction Decision,* para. 4; and also *see* paras. 5, 8, 40, and the explanation made on p. 25 under the heading of 'In the Trial Chamber' above.

principle of *compétence de la compétence*'[219] (emphasis added). Under this principle, the examination of the establishment of the Tribunal is a part of jurisdiction ('incidental' or 'inherent' jurisdiction) and every international tribunal or court do have a right to examine its creation as part of its jurisdiction.

From the point of view of international law, the decision held by the Appeals Chamber under the principle of *compétence de la compétence* should be regarded as reviewing the legality of the Security Council Resolution and the establishment of the Tribunal. This principle merely allows the Tribunal to examine and determine its own jurisdiction and it cannot be extended to the examination of the competence and appropriateness of the Security Council Resolution establishing the Tribunal.[220] As rightly held by the Trial Chamber and supported by the Prosecutor's Response to the Defence Motions and Judge Li, in his separate opinion in the Appeals Chamber, the International Tribunal does not have any power to review its creation by the Security Council and its power as indicated in Article 1 of its Statute limited to 'prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute', and also Articles 2–5 of the Statute of the Tribunal regulating the subject-matter jurisdiction of the Tribunal together with Article 1 cannot be interpreted as giving the Tribunal competence to review the acts of the Security Council in respect to the establishment of the Tribunal.[221] Moreover, although the ICJ is the principal organ of the UN under Article 92 of the UN Charter, it does not have any such type of competence. In this sense, how can it be justified that the International Tribunal which has a limited jurisdiction can review the Security Council Resolutions in relation to its creation? On the other hand, as discussed earlier, the UN Security Council has 'primary responsibility for the maintenance of international peace and security'.[222] Chapter VII of the UN Charter gives power to the Security Council to determine the existence of any threat to peace and security, and to take necessary measures 'in accordance with Article 41 and 42 to maintain or restore international peace and security'.[223] So as to perform its functions, the Security Council can establish subsidiary organs.[224] In light of this legal base, the International Tribunal was created as a measure by the Security Council. While this background is in front of the international community, acceptance of the examination of the legality of the Tribunal's creation by the International Tribunal must be regarded as not in compliance with the principles of international law. Furthermore, whether a threat exists to international peace and security and what sort of measures are to be employed are political questions. This field of international law is the legitimate area of the UN Security Council and its

219. Fox, pp. 435–6; *see* the explanation made under 'In the Appeals Chamber', p. 34 above.
220. *Separate Opinion of Judge Li*, para. 2.
221. *See supra* notes 117–20, 135.
222. Art. 24 (1) of the UN Charter.
223. Art. 39 of the UN Charter.
224. Arts. 7 (2) and 29 of the UN Charter.

members are well-qualified in this area. The Judges of the Tribunal have little or no experience in international political affairs, thus the review of the Security Council Resolution in this regard 'seems to be imprudent and worthless both in fact and in law'.[225]

For the reasons explained above, the approach taken by the Trial Chamber and supported by Judge Li in the Appeals Chamber seems to be more consonant with the international legal regulations. Although the Trial Chamber decided that it has no authority to review the acts of the Security Council with respect to its creation, it commented on the arguments made by the defence for the following reasons: Firstly, for the first time in international law, the international community has created such a tribunal having criminal jurisdiction over individuals. Secondly, the International Tribunal for Rwanda followed the same approach as the Yugoslavia Tribunal. Thirdly, the establishment of the ICTY and the ICTR represented a crucial step for the establishment of a permanent international criminal court. In this context, in particular, the last reason is especially significant on the grounds that despite the fact that these Tribunals are created for the purpose of prosecuting violations of international humanitarian law in the former Yugoslavia and in Rwanda, they affected positively the establishment of the permanent international criminal court.

In conclusion, the establishment of the International Tribunals must be regarded as a contemporary example of the application of international humanitarian law for enforcing individual responsibility when the violations of international humanitarian and international human rights law have occurred.[226] Additionally, it should also be noted that the establishment of the ICTY and the ICTR has played a central role in the establishment of an international criminal court which should be considered as one of the major achievements of the international community before the new millennium. In this sense, the approach taken by the international community, just before the end of the twentieth century, should be perceived in the light that violations of fundamental human rights will not be tolerated in the new millennium.

225. *Separate Opinion of Judge Li*, para. 3.
226. *See supra* note 110.

2

The Creation of the International Criminal Court

Introduction and Historical Background

One of the most serious defects to enforcing the rules of law is the lack of an international criminal court to try individuals charged with the violations of international humanitarian law. The only way for the enforcement of international humanitarian law is the prosecution and punishment of individuals who are responsible for violations of international humanitarian law either through a created international criminal court or domestic courts.The need for such a court has been accepted and discussed by international scholars for almost 100 years.[1]

Before the First World War

The idea of creating an international criminal court goes back to the First Hague Convention for the Pacific Settlement of International Disputes of 1899 which includes provisions establishing 'The Permanent Court of Arbitration'.[2] However, it has never been effective due to the fact that States parties to the Convention were unwilling to surrender a part of their sovereignty to such an arbitration court.[3] In addition to the emergence of the concept of setting up an international criminal court, the most important

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1. Bridge, J.W., 'The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law', in Mark W. Janis (ed.), *International Courts for the Twenty-First Century* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992), p. 221; Cassese, A., 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998), 9 *EJIL*, p. 4; Gianaris, W.N., 'The New World Order and the Need for an International Criminal Court' (1992/1993), 16 *Ford. Int.'l L. J.*, p. 88. In particular, for the problems that an international criminal court would address, *see* pp. 109–11; Kutner, L., 'Politicide: the Necessity of an International Court of Criminal Justice' (1972), 2 *Denv. J. Int.'l L. & Pol'y*, p. 55.
2. Arts. 20–9. Hague Peace Conference, Final Act, Conventions and Declarations, and the text of Convention for the Pacific Settlement of International Disputes (29 July 1899) are available in Benjamin B. Ferencz, *An International Criminal Court – A Step Toward World Peace, A Documentary History and Analysis*, Vol. I (London, Rome, New York: Oceana Publications, 1980), p. 103.
3. Ferencz, pp. 8–9.

contribution of the First Hague Conference was the Convention regulating the Rules of the Laws and Customs of War on Land.[4]

In 1907, in the Second Hague Conference, The Prize Court Convention[5] was signed by 39 States. This Convention could be accepted as a major step toward developing the rule of international law and establishing the first organised international court, which has ever been seen in the history of international law. But no State has ratified the Convention[6] and the creation of an international court has remained an aspiration rather than a reality.

After the First World War

After the First World War, the concept of creating an international criminal court to bring to justice individuals, including State officials, responsible for violations of the laws or customs of war was discussed and a number of proposals were made at this point. In particular, the '*Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*' recommended the establishment of a 'high tribunal composed of judges drawn from many nations'.[7] Consistent with the *Commission Report*, the Treaty of Versailles signed by Germany on 26 June 1919 included Article 227 that provided for the establishment of such a tribunal to try the ex-German emperor, Kaiser Wilhelm II, for the supreme offence against the peace, and Article 228 provided for the prosecution of German officers and soldiers who committed war crimes. However, this tribunal could not be established.[8]

Between the two world wars, several attempts were made to create an international criminal tribunal or court. One of them was in 1920 when the Council of the League of Nations appointed an Advisory Committee of Jurists to set up a plan for the establishment of the Permanent Court of International Justice which would 'be competent to try crimes constituting a breach of international public order or against the universal law of nations', but this recommendation was rejected by the Assembly of the League of Nations as being premature.[9] The other attempt to adopt draft statutes for an international criminal court was made by non-governmental organisations such as the Inter-Parliamentary Union in 1925,[10] and the International Law Association in 1926.[11] None of these efforts could bring the international criminal court into the sphere of international law.

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4. Ibid., p. 9.
5. The Second Hague Conference, Final Act and Draft Convention Relative to the Creation of an International Prize Court are available in Ferencz, Vol. I, pp. 123–63.
6. Ferencz, Vol. I, pp. 17, 20.
7. For the *Report of the Commission*, *see* (1920), 14 *AJIL*, pp. 95–154, and also *see* Ferencz, Vol. I, pp. 176, 169–92.
8. For reasons, *see infra* Chap. 3, notes 9–11 and accompanying text.
9. Records of the First Assembly of the League of Nations (1920), Plenary Meetings, pp. 744–5.
10. For the Inter-Parliamentary Union Proposal for an International Criminal Code for the Repression of International Crimes (7 October 1925), *see* Ferencz, Vol. I, pp. 244–51.
11. For the International Law Association proposal for an International Criminal Court, including Statute for the Court (11 August 1926), *see* Ferencz, Vol. I, pp. 252–68.

Similarly, a Convention for the creation of an international criminal court to try terrorist offences was annexed to the Convention for the Prevention and Punishment of Terrorism[12] on 16 November 1937 by the League of Nations, but it never came into operation.

After the Second World War

After the Second World War, the idea of creating an international criminal court was revived again to try individuals who were responsible for the worst crimes against humanity and human dignity. For this reason, in 1944 the UN established a War Crimes Commission to investigate allegations against German war criminals, and this Commission prepared a draft convention for the establishment of a United Nations War Crimes Court.[13] Thereafter, the Allied powers created the International Military Tribunal at Nuremberg to prosecute and punish major German war criminals.[14] A similar approach was also taken for the Japanese in the Far East and another International Military Tribunal was established at Tokyo.[15] Despite the fact that these tribunals were criticised as a 'victor's court of justice'[16] they were the first International Tribunals in the history of mankind and their Charters and decisions have played a crucial role in the classification of crimes in international humanitarian law. The international community, for the first time in its history, was faced with the definition of crimes against peace, crimes against humanity and war crimes[17] and witnessed the applicability of international humanitarian law rules as a means of created International Tribunals.

Although the International Military Tribunals have made very important contributions to international humanitarian law, they cannot be accepted as truly established international criminal courts from the point of view of international law. This is because during the war many atrocities were also

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12. For the text of the Conventions, *see* Ferencz, Vol. I. pp. 380–98.
13. For the related documents, *see* Ferencz, Vol. I, pp. 414–33.
14. *See supra* Chapter 1, note 1.
15. Ibid.
16. *See supra* Chapter 1, note 6.
17. Article 6 of the Charter of the International Military Tribunal defines these crimes as follows:

    (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;

    (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

    (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

    Leaders, organisers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

committed by the Allied powers, but no one was charged with that by the Tribunals. In other words, the Nuremberg and Tokyo trials 'were imposed by victorious nations on defeated nations'.[18]

Having seen the International Military Tribunals, the UN recognised the necessity of the establishment of an international criminal court to prosecute and punish individuals responsible for committing international crimes such as genocide.[19] The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9 December 1948.[20] In this Convention, genocide was accepted as 'a crime under international law'[21] and it stated that persons charged with genocide 'shall be tried by a competent tribunal of the State in the territory on which the act was committed or by such international penal tribunal as may have jurisdiction'.[22] To bring this regulation into operation, the UN General Assembly mandated the International Law Commission to work on the possibility of setting up a permanent international criminal court.[23] According to the Commission's conclusion, the creation of an international criminal court was both desirable and possible. Moreover, the Nuremberg principles and the Geneva Conventions – which were adopted in 1949 and extended the list of war crimes consisting of torture, international infliction of suffering, serious bodily injury, forcing prisoners to work for imprisoners, and the deprivation of a right to a free trial – could be drafted as a 'Code of Offences'.[24] Although two draft statutes for an international criminal court were successfully prepared in the years 1951 and 1953,[25] the General Assembly decided to postpone the considera-

18. Jamison. S.L., 'A Permanent International Criminal Court: A Proposal that Overcomes Past Objections' (1995), 23 *Denv. J. Int.l L. & Pol'y*, p. 426. '(T)he new crimes created for Nuremberg were defined by the victorious allies only in the context of Nazi and Imperial Japanese activities and were not applied to the Soviets, who also invaded Poland and Baltic States by what were evidently prearranged "acts of aggression", and whose treatment of some national minorities might have been considered within any definition of "crimes against humanity" that had not been drafted to apply only to the defeated enemies' (Rubin, A.P., 'International Crime and Punishment' (1993), 33 *Nat. Int.*, p. 73).'Nor were they applied to the bombing of Dresden, Tokyo, Hiroshima, or Nagasaki, or to other Allied conduct including treatment of prisoners and submarine warfare. The offences were drafted to apply only to the defeated enemies' (Blakesley, C.L., 'Obstacles to the Creation of a Permanent War Crimes Tribunal' (1994), 18 *Flet. F. W. Aff.*, p. 80).
19. UN GA Res. 260, 179th Plenary Meeting (9 December 1948).
20. The text of the Genocide Convention is available in the annex to the UN GA Res. of 260 of 9 December 1948.
21. Art. 1 of the Genocide Convention.
22. Art. 6 of the Genocide Convention.
23. UNGA Res. 260 of 9 December 1948 '… to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions'.
24. Jamison, p. 426; Bridge, p. 222.
25. UN General Assembly, Official Records, Seventh Session, Supplement No. 11, '*Report of the Committee on International Criminal Jurisdiction*' on its session held from 1 to 31 August 1951, UN Doc. A/2136, New York, 1952, and UN General Assembly, Official Records, Ninth Session, Supplement No. 12,'*Report of the 1953 Committee on International Criminal Jurisdiction*' (27 July–20 August 1953), UN Doc. A/2645, New York, 1954. Documents are also available in Ferencz, Vol. II, pp. 337–64, 429–59 respectively. For some of the particular Articles and features of these draft statutes, *see* Bloom, R.A., 'Introduction to Various Drafts Concerning an International Criminal Court', in Julius Stone and Robert K. Woetzel (eds), *Toward a Feasible International Criminal Court* (Geneva: World Peace Through Law Center 1970), (pp. 160–7), pp. 164–7.

tion of draft statutes because of the question of defining aggression and its connection with the Draft Code of Offences against the Peace and Security of Mankind.[26] In 1957, the UN General Assembly repeated its view again in relation to the definition of the crime of aggression when it decided to defer consideration of the question of the Draft Code of Offences against the Peace and Security of Mankind.[27] The lack of definition of aggression had been a major obstacle to creating an international criminal court, and its definition was not made possible in 1974 by means of a General Assembly Resolution[28] which included some phrases that were not clear enough and could be interpreted in different ways.[29]

In addition to the difficulty in defining the crime of aggression, the international political situation during the 1960s, 1970s and 1980s made the idea of creating an international criminal court impossible. In this respect, particularly, the Soviet Union was opposed to establishing such a court throughout the Cold War by stating that it was an infringement upon its state sovereignty.[30] However, during these periods, the demand of the international community to try individuals who had committed international crimes occurred in some international conventions.[31] The Convention for the Suppression of the Unlawful Seizure of Aircraft,[32] the International Convention for the Suppression and Punishment of the Crime of Apartheid,[33] the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons,[34] and the International Convention against the Taking of Hostages[35] were just some examples proving this fact.

The Establishment of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and the International Criminal Court

The proposal of Trinidad and Tobago to fight against narcotics trafficking by means of the establishment of an international criminal court focused the attention of the international community on creating an international crimi-

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26. UNGA Res. of 266 [898(IX)], adopted by the General Assembly at its 512th Plenary Meeting on 14 December 1954.
27. UNGA Res. of 1186 (XII), adopted at its 727th meeting on 11 December 1957.
28. UNGA Res. of 3314 (XXIX) (14 December 1974). Article 1 of the Resolution (including eight Articles to define aggression) defines aggression as follows:
    Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.
29. Ferencz, Vol. II, p. 75.
30. Jamison, p. 427.
31. Ibid.
32. Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, UNTS 860, 105 (1971), 10 *ILM*, 133.
33. International Convention for the Suppression and Punishment of the Crime of Apartheid (1974), 13 *ILM*, 50.
34. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents, UNTS 1035, 167 (1974), 13 *ILM*, 41.
35. 1979 International Convention against the Taking of Hostages (1979), 18 *ILM*, 1456.

nal court in 1989.[36] After that, the UN General Assembly mandated the International Law Commission to work on a draft statute, including jurisdiction for drug trafficking, for an international criminal court.[37]

Apart from this proposal, in 1990, the idea of establishing an international criminal court was revived again in order to try Iraqi leaders for crimes such as aggression and war crimes committed during the Iraqi invasion of Kuwait and the ensuing Gulf War. Although this idea was strongly supported by the international community, no action was taken.[38]

During the conflict in the former Yugoslavia, the international community witnessed one of the most widespread atrocities constituting war crimes, crimes against humanity and genocide as a part of the policy of ethnic cleansing, which led to the UN Security Council establishing the ICTY in 1993.[39] Similarly, the crime of genocide committed, among other international crimes, in Rwanda in 1994 made the Security Council follow the same procedure with the Yugoslavian case. As a result, another international tribunal, the ICTR, was established to hold individuals accountable for those atrocities and to deter future crimes.[40]

In light of these developments, in 1994, the International Law Commission by examining international precedents such as the Nuremberg and the Tokyo International Military Tribunals' Statutes, the 1951 and 1953 draft statutes, the ICTY and the ICTR Statutes, prepared a draft statute for an international criminal court[41] and submitted it to the UN General Assembly. Thereafter, the General Assembly established an *Ad Hoc Committee on the Establishment of an International Criminal Court* 'to review the major

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36. *See* '*Analysis of Issues in the Draft Statute*' [for the ICC], prepared by the UN Department of Public Information (May 1998). Available on the web: www.un.org/icc/ statute.htm#intro.
37. UNGA Res. 47/33 (25 November 1992).
38. The concept of creating an international criminal court by means of the United Nations to deal with crimes against humanity, crimes against peace, genocide, war crimes and environmental crimes was suggested by Germany (*Speech by the German Federal Minister for Foreign Affairs, Hans-Dietrich Genscher, Upon Receiving an Honorary Doctorate from the University of Ottawa on 27 September 1991*). Another suggestion, at this point, was made by France and it supported the idea of using 'a Nuremberg-type procedure' (*Note of Professor Alain Pellet on the responsibility of Saddam Hussein*). The Council of Ministers of the European Communities also discussed the question of the personal responsibility of the Iraqi leaders and the possibility of bringing them to justice before an international court and, moreover, wanted the Secretary-General of the United Nations to consider these matters (*Letter from Mr Jacques Poos, President-in-Office of the Council of Ministers of the European Communities, to the Secretary-General of the United Nations, on 16 April 1991*). For these documents and other related materials, and a review of efforts in relation to the establishment of an international tribunal to try Iraqi leaders, *see The Path to the Hague-Selected Documents on the Origins of the ICTY* (1996). And *see* also, Greenberg, M.D., 'Creating an International Criminal Court' (1992), 10 *Bos. Univ. Int.'l L. J.*, p. 119; Cavvichia, J., 'The Prospects for an International Criminal Court in the 1990s' (1992), 10 *Dick. J. Int.'l L.*, p. 223; O'Brien, W.V., 'The Nuremberg Precedent and the Gulf War' (1991), 31 *Virg. J. Int.'l L.*, p. 391; Moore, J.N., 'War Crimes and the Rule of Law in the Gulf Crisis' (1991), 31 *Virg. J. Int.'l L.*, p. 403.
39. For historical background and the steps taken by the UN Security Council to establish the ICTY, *see supra* Chapter 1, p. 9, The Former Yugoslavia and p. 16, The Establishment of the International Criminal Tribunals.
40. *See supra* Chapter 1, p. 14, Rwanda.
41. For the analysed study outlining and explaining the characteristics of the Statute, *see* Crawford, J., 'The ILC's Draft Statute for an International Criminal Tribunal' (1994), 88 *AJIL*, pp.

substantive and administrative issues arising out of the draft statute'.[42] In 1995, the General Assembly established another committee called the *Preparatory Committee* to deal with 'preparing a widely acceptable consolidated text of a convention for an International Criminal Court as a next step towards consideration by a Conference of plenipotentiaries'.[43]

The *Preparatory Committee* met six times during the period 1996–98 to prepare for the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[44] In these preparatory meetings, the Draft Statute submitted by the International Law Commission was taken as a base for discussion. In its sessions, the Committee generally dealt with the issues of the scope of jurisdiction and the definition of crimes, general principles of criminal law, complementarity, trigger mechanisms, state co-operation with the International Criminal Court, fair trial and the rights of suspects and accused, penalties, the composition and administration of the Court, the method of establishing the Court and the relationship between the Court and the United Nations.[45]

As a result of this work, a Diplomatic Conference, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, was held in Rome, Italy, from 15 June to 17 July 1998 and terminated with the adoption of a 'Statute of the International Criminal Court'.[46] The Conference and some features of the Statute will be examined below.

Obstacles to the Establishment of the International Criminal Court (the ICC)

There are a number of issues that made the establishment of the ICC difficult. Some of them are the principle of State sovereignty and criminal

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140–52; and also *see* Crawford, J., 'Prospects for an International Criminal Court' (1995), 48 *CLP*, pp. 303–26.

42. UN GA Res. 49/53, UN Doc. A/Res/49/53.
43. UN GA Res. 50/46, UN Doc. A/Res/50/46.
44. The General Assembly had decided that 'a diplomatic conference of plenipotentiaries ... be held in 1998, with a view to finalising and adopting a convention on the establishment of an international criminal court' in its resolution 51/207 on 16 December 1996.
45. For an account of these sessions, *see* Hall, C.K., 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1997), 91 *AJIL*, p. 177; Kaul, H.P., 'Towards a Permanent International Criminal Court, Some Observations of a Negotiator' (1997), 18 *Hum. Rts. L. J.*, p. 169; Hall, C.K., 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998), 92 *AJIL*, p. 124; Hall, C.K., 'The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998), 92 *AJIL*, p. 331; Hall, C.K., 'The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998), 92 *AJIL*, p. 548; and also *see* Bassiouni, M.C., 'Observations Concerning the 1997–98 Preparatory Committee's Work', in *The International Criminal Court: Observations and Issues before the 1997–98 Preparatory Committee; and Administrative and Financial Implications* (Chicago: International Human Rights Institute De Paul University, 1997), pp. 5–32.
46. Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, UN Doc. A/CONF.183/9.

jurisdiction, subject-matter jurisdiction (which law will be applied) and personal jurisdiction (to whom this law will be applied), the possibility of creating *ad hoc* tribunals when circumstances require and procedural law to be applied.

The Principles of State Sovereignty and Criminal Jurisdiction

Two of the fundamental obstacles, among others as will be indicated below, to the creation of an international criminal court are the principles of State sovereignty and criminal jurisdiction. This is because the concept of sovereignty and criminal jurisdiction are interrelated, and States do not want to surrender their exclusive jurisdiction in criminal matters to any other State or international institutions (international tribunal or court) being regarded as a major, inevitable element of State sovereignty.[47] On the other hand, the internationalisation of events has created a new world in which the sovereignty of States can affect other States' rights.[48] In this sense, it should not be seen that, for example, the conflicts in the former Yugoslavia and in Rwanda were solely matters of these States alone and the international community should not have intervened to bring an end to these conflicts. In fact, crimes such as genocide, war crimes and crimes against humanity committed in the territory of the former Yugoslavia and Rwanda had created a threat to international peace and security. In order to reach a peaceful world for the benefit of mankind, States should take part in establishing an international criminal court to try individuals who have committed certain crimes, and should relinquish their criminal jurisdiction, in this regard, to this international organisation. If this is regarded as a limitation to the principle of State sovereignty, it will be valid for every State and the limitation of sovereignty in this way will play a crucial role for preventing the most serious crimes of concern to the international community. For this reason, it can be said that this type of limitation makes States more sovereign than they were, since they will be able to prosecute and punish the perpetrators of international crimes through the establishment of an international criminal court.

Due to States' reluctance to surrender their criminal jurisdiction to an international court as being accepted as a mark of States' sovereignty, one solution could be the establishment of an international tribunal or court having a 'concurrent or complementary jurisdiction', which 'concerns the allocation of jurisdiction between domestic courts and the ICC'.[49] The Statutes of the ICTY and ICTR both include the same provisions giving concurrent jurisdiction to the national courts and the International Tribunals.[50] However, the concurrent jurisdiction of national courts is

47. Remarks by James R. Crawford on 'The Internationalisation of Criminal Law' (1995), *ASIL Proceedings*, p. 301; Crawford, *'Prospects …'*, p. 305; Graefrath, B., 'Universal Criminal Jurisdiction and an International Criminal Court' (1990), 1 *EJIL*, pp. 72-5.
48. Jamison, p. 431.
49. Bleich, J.L., 'Complementarity', in *The International Criminal Court: Observations and Issues Before the 1997–98 Preparatory Committee; and Administrative and Financial Implications*,(Chicago: International Human Rights Law Institute De Paul University, 1997), p. 231.
50. Article 9 of the ICTY Statute (concurrent jurisdiction) provides:

limited by the primacy of the International Tribunal. In other words, the Statutes of the *ad hoc* tribunals give primacy to the International Tribunals. When exercising their primacy over national courts the *ad hoc* tribunals have power to intervene 'at any stage of the procedure … request national courts to defer to the competence of the International Tribunal'.[51] This intervention into national courts' concurrent jurisdiction can even be at the investigation stage.[52]

The principle of concurrent jurisdiction is interrelated with the other principle namely, '*non bis in idem*' which means nobody shall be tried or punished twice with regard to the same offence. Articles 10 (1) and 9 (1) of the Statutes of the ICTY and the ICTR include the principle of *non bis in idem*.[53] The primacy of the International Tribunals can be again examined with respect to the application of this principle.[54] In this sense, if an accused is tried by the International Tribunal, it creates an obstacle for further national proceedings, but in the case of trial before a national court will not prevent the International Tribunal from a following trial which is subject to the condition that 'the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted'.[55]

'1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.'

Article 8 of the ICTR Statute (concurrent jurisdiction) provides:

'1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

51. Article 9 (2) of the ICTY Statute states that:

'2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.'

Article 8 (2) of the ICTR Statute states that:

'The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.'

52. Rule 8 of the Rules of Procedure and Evidence of the ICTY.
53. Article 10 (1) of the ICTY Statute (*non-bis-in-idem)* reads:

'1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.'

Article 9 (1) of the ICTR Statute (*non-bis-in-idem)* reads:

'1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.'

54. Shraga, D. and R. Zacklin, 'The International Tribunal for the Former Yugoslavia' (1994), 5 *EJIL*, p. 372; Greenwood, C., 'The International Tribunal for Former Yugoslavia' (1993), 69 *Int. Aff.*, p. 654.
55. Art. 10 (2) of the ICTY Statute; Art. 9 (2) of the ICTR Statute.

In practice, in the case of *Prosecutor v. Dusko Tadic,* the defence challenged the primacy of the ICTY on the grounds that there were no basis in international law to give primacy to the ICTY and it created an infringement upon the sovereignty of States. In this case, according to the defence, the States were the Republic of Bosnia-Herzegovina, where the crimes were committed, the Bosnian Serb Republic, which was directly affected and the Federal Republic of Germany, where the accused resided at the time of his arrest and which was indirectly affected.[56] In fact, this argument is directly related to the establishment of the ICTY by the Security Council and was discussed in detail in the previous chapter.[57] Nevertheless in order to demonstrate that the argument of the defence has no basis in international law, it is useful to refer to some principles in this regard:

First, the defence has no right to raise the issue of primacy over domestic courts, because issues related to sovereignty can be raised only by a sovereign State, and an individual cannot put himself in the position of a State so as to challenge the jurisdiction of an international tribunal, in this case the ICTY. In the case of *Israel v. Eichman*, the District Court of Jerusalem rightly held that 'the right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State.'[58] The Trial Chamber and the Appeals Chamber of the ICTY in their decisions referred to this judgement to support their views.[59] In addition, it should be noted that the most affected States, in this case Bosnia-Herzegovina where the crimes were committed and the Federal Republic of Germany where the accused resided at the time of his arrest, have accepted the jurisdiction of the International Tribunal. On this ground, the allegation of the defence clearly constitutes a controversy to the express intent of those States.[60] In relation to the entity known as Bosnian Serb Republic, the international law principle is clear enough, that is to say, without recognition by the international community that entity cannot claim the violation of its sovereignty as not having the full rights of a State may enjoy.[61] In this sense, 'the accused as an individual, has no *locus standi*' and 'to allow the accused to do so would

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56. *Defence Motions (Jurisdiction of the Tribunal, Principle of Ne-Bis-in-Idem, Form of the Indictment), Dusko Tadic*, Case No: IT-94-1-T (23 June 1995) (hereinafter *Defence Motions*), paras. 6, 7.4.1, 7.4.2, 7.4.3, 7.4.4, 7.4.5; *Defence's Brief to Support the Notice of (Interlocutory) Appeal (Jurisdiction of the Tribunal, Dusko Tadic*, Case No: IT-94-1-T (25 August 1995) (hereinafter *Defence's Brief)*, paras. 7.3, 7.4, 7.5.
57. *See supra* Chapter 1, p. 24,The Practice of the ICTY.
58. *Israel v. Eichman* (1961), 36 *ILR*, p. 5, p. 62, affirmed by the Supreme Court of Israel, (1962), 36 *ILR*, 277.
59. *Prosecutor v. Dusko Tadic* (*Decision on the Defence Motion on Jurisdiction*), Trial Chamber, Case No: IT-94-1-T (10 August 1995) (hereinafter *Tadic Case, Jurisdiction Decision*), para. 41; *Prosecutor v. Dusko Tadic* (*Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*), Appeals Chamber, Case No: IT-94-1-AR72 (2 October 1995) (hereinafter *Tadic Case, Jurisdiction Decision*), para. 55.
60. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 41.
61. *Prosecutor's Response to the Defence's Motions Filed on 23 June 1995*, *Dusko Tadic*, Case No: IT-94-1-T (7 July 1995) (hereinafter *Prosecutor's Response)*, pp. 31–2.

be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction'.[62]

Second, it should be emphasised that the crimes over which the International Tribunal has jurisdiction to try are not crimes purely domestic in nature, but crimes universal in nature, and prosecution and punishment of those crimes are of concern to the international community. The principle of sovereignty of States cannot prevent the international community from acting appropriately when the situations 'affect the whole of mankind and shock the conscience of all nations of the world'.[63]

Third, the contention of the defence relying on the principle of *jus de non evocando*,[64] the right to be tried by one's national courts, cannot be upheld in this context. This is because this principle does not prevent the accused from being tried before an international tribunal and does not defeat the right of a State to confer jurisdiction on such a tribunal, in this case the ICTY. As rightly concluded by the Appeals Chamber, '(t)his principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations'.[65] Further, as being accepted the concept of universal jurisdiction in relation to international crimes, a suspect of such offences can be brought before an international court or tribunal. In the *Tadic Case*, the accused was brought before the ICTY 'for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming ... from all continents of the world'.[66]

Finally, as explained in Chapter 1, the establishment of the ICTY by the Security Council in accordance with Chapter VII of the UN Charter binds States under Article 25 of the Charter and this type of regulation overrides the sovereign rights of States. The creation of the ICTY to try those responsible for committing international crimes cannot be accepted as an invasion into a State's sovereignty in criminal jurisdiction as these crimes were not within the exclusive jurisdiction of any State.[67]

On the other hand, the significance of the principle of State sovereignty can be examined with regard to the investigation stage of any case as a factor affecting the work of an international tribunal.[68] The ICTY was faced with this issue in the case of *Prosecutor v. Tihomir Blaskic* when seeking to get documents related to this case. The problem was the validity of orders, *subpoena duces tecum,* to appear in the court for the purpose of handing over documents, issued by a Judge of the Trial Chamber of the Tribunal on 15 January 1997 to the Republic of Croatia and

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62. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 41.
63. Ibid., para. 42. Similarly, the Appeals Chamber in its *Jurisdiction Decision* also held that: 'It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights' (para. 58). '[T]he offences alleged … do not affect the interests of one State alone but shock the conscience of mankind' (para. 57).
64. *Defence Motions*, paras. 7.1, 7.2, 7.3.
65. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 62.
66. Ibid., para. 62; *see* also Trial Chamber, *Tadic Case, Jurisdiction Decision*, paras. 37–43.
67. *Prosecutor's Response*, p. 35; Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 44.
68. Cassese, p. 14.

its Defence Minister.[69] The Republic of Croatia challenged the competence of the ICTY with respect to issuing a subpoena to a sovereign State and to the naming of its high government official, and additionally, also stated that like any sovereign State, it has a right to protect its national security interests.[70] On the grounds of these allegations, the Republic of Croatia did not complete the requirements of the *subpoena.*

The Trial Chamber of the ICTY concluded in relation to these arguments that it has the power and authority to issue orders that properly come within the term *subpoena duces tecum* to States and to their high government officials as well as individuals,[71] and also stated that the objection of national security interests is not subject to full privilege and cannot be validly raised as an obstacle to compliance with orders of the ICTY, and the concept of national security interests cannot be used to prevail over the international interests.[72]

However, the Appeals Chamber took a different view from the Trial Chamber's decision, and it held that *subpoena duces tecum* (in the sense of injunction accompanied by threat of penalty) could not be addressed to States as the International Tribunal does not have any power to take enforcement measures against States, and criminal sanctions in the context of national criminal systems cannot be applied to States under modern international law,[73] but binding 'orders' or 'requests' can be addressed to States.[74] With regard to addressing subpoenas to State officials acting in their official capacity, the Appeals Chamber dismissed the Trial Chamber decision and stated that such officials were just instruments of a State and their action in this sense could be attributed to the State, not to them.[75] In relation to the concept of the national security interests of a State, the

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69. *Prosecutor v. Tihomir Blaskic, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum,* Trial Chamber, Case No: IT-95-14-PT (18 July 1997) (hereinafter *Subpoena Decision*), para. 1.
70. Trial Chamber, *Blaskic Case, Subpoena Decision*, para. 3.
71. Ibid., paras. 30, 69. '… a Judge of Trial Chamber of the International Tribunal has the authority and power to issue orders to States and individuals, including high government officials, for the production of documents required for the preparation or conduct of a trial. Moreover, these orders may properly be termed *subpoena duces tecum* and, as such, there is a clear obligation on both States and their officials to comply fully with their terms' (para. 150). For the analysis of these issues by the Trial Chamber, *see* the decision paras. 14–64 (justifying the power of the ICTY to issue *subpoenas* to States), paras. 65–9 (explaining the reasons why the ICTY has the power to issue binding orders to government officials).
72. Trial Chamber, *Blaskic Case, Subpoena Decision*, paras. 132–3. 'Any objection to an order for the production of documents, including a claim that a State's national security interests could be threatened by disclosure, does not automatically excuse the State or individual from compliance. Rather, such claims must first be assessed by the relevant Trial Chamber' (para. 150); and also *see* paras. 107–49 (justifying the national security interests that cannot take over the international interests, in particular, para. 132). In this context, *see* Wedgwood, R., 'The International Criminal Tribunal and Subpoenas for State Documents', in M.N. Schmitt and L.C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium* (Newport, Rhode Island: Naval War College, 1998), pp. 483–99.
73. *Prosecutor v. Tihomir Blaskic, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (Appeals Chamber), Case No: IT-95-14-AR108*bis* (29 October 1997) (hereinafter *Subpoena Decision*), para. 25.
74. Appeals Chamber, *Blaskic Case, Subpoena Decision*, para. 25. For the analysis of the legal meaning of the term *subpoena, see* paras. 20–1.
75. Appeals Chamber, *Blaskic Case, Subpoena Decision*, para. 38.

Appeals Chamber shared the same view with the Trial Chamber and concluded that States could not, by depending upon national security interests, withhold documents and other evidentiary material requested by the Tribunal, but it recognised that practical arrangements could be adopted by the relevant Trial Chamber to make allowance for legitimate and bona fide concerns of States.[76]

As far as the Statute and the Rules of Procedure and Evidence of the ICTY, the UN Charter Chapter VII and the Security Council Resolution 827 (1993) are concerned, the judgement rendered by the Appeals Chamber should be seen as in compliance with the contemporary international law rules. This is the natural result of Article 29 of the Statute of the ICTY granting power to the ICTY to address binding orders including a variety of judicial matters such as: the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or the transfer of the accused.[77] By means of this legal ground a 'vertical' relationship has been established between States and the Tribunal, and it can be clearly seen in the cases of the surrender or the transfer of the accused persons to the Tribunal. As is well known, extradition between States depends upon bilateral treaties and it is subject to the discretionary power of the State concerned because of the principle of the equality of States. This relationship is 'horizontal' in nature. In contrary, the relationship between a State and the International Tribunal does not leave any room for the State to exercise its power whether it will surrender the accused or not, due to the Tribunal being endowed with binding authority as a result of its legal basis.[78]

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76. Ibid., paras. 61–9. In this context, *see* Malanczuk, P., 'A Note on the Judgement of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia on the Issuance of Subpoenae Duces Tecum in the Blaskic Case' (1998), 1 *YIHL*, pp. 229–44.

77. Article 29 of the Statute of the ICTY regulates co-operation and judicial assistance between States and the ICTY as follows:

> '1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
> 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
> (a) the identification and location of persons;
> (b) the taking of testimony and the production of evidence;
> (c) the service of documents;
> (d) the arrest or detention of persons;
> (e) the surrender or the transfer of the accused to the International Tribunal.'

The Security Council Resolution 827 (1993) establishing the Tribunal also indicates States' co-operation and judicial assistance with the ICTY as follows: '... all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States *to comply with requests for assistance or orders issued by a Trial Chamber* under Article 29 of the Statute' (emphasis added) (para. 4 of the Resolution).

78. Appeals Chamber, *Blaskic Case, Subpoena Decision*, para. 47; Cassese, pp. 13–14; and also Rule 58 of the Rules of Procedure and Evidence of the ICTY provides:

> 'The obligation laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.'

From the point of view of international law, the concept of primacy of the International Tribunals and their powers can be seen, at first glance, as an infringement upon the principle of State sovereignty. However, it should not be forgotten that the Tribunals have been dealing with the most serious crimes of concern to the international community, and individuals will get benefit from their success. For these reasons, they constitute a novelty in the world community, and co-operation and judicial assistance with them should not be perceived by States as a violation of their sovereignties.

In this context, lastly, the impact of the Statutes of the *ad hoc* tribunals on the ICC Statute and the differences between them can be indicated as follows:

First, like the Statutes of the ICTY and the ICTR, the principle of concurrent or complementary jurisdiction finds its place in paragraph 10 of the Preamble and Article 1 of the ICC Statute, which provides that 'the International Criminal Court ... shall be complementary to national criminal jurisdictions'. However, there is no provision giving the primacy to the ICC over domestic courts.This way of regulation reflects a general consensus with regard to the allocation of jurisdiction between the ICC and national authorities. In other words, the ICC does not replace national criminal courts, but can just complement these courts. In a sense, the ICC Statute gives primacy to domestic jurisdictions, contrary to the two *ad hoc* tribunals' primacy. Nevertheless, Article 17 of the ICC Statute can be interpreted as the ICC is complementary to national criminal jurisdictions in cases where national courts are not available or ineffective.[79] Article 17 of the ICC Statute provides:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

Second, as a consequence of having concurrent jurisdiction between the ICC and national courts, like ICTY and the ICTR Statutes, the principle of *non bis in idem* has taken its place in Article 20 of the ICC Statute. Although the ICC has no primacy, with the aforementioned exception, over national criminal systems in relation to the concept of concurrent or complementary jurisdiction, it has primacy, like the ICTY and the ICTR, over domestic courts with regard to the application of the principle of *non bis*

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79. The Preamble of the Draft Statute for the International Criminal Court submitted by the Preparatory Committee on the Establishment of an International Criminal Court as a Report to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy, between 15 June–17 July 1998 had emphasised the nature of the complementary jurisdiction of the ICC as follows:'… such a court [the ICC] is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective' (para. 3 of the Draft Statute, UN Doc. A/CONF. 183/2/Add.1. 14 April 1998).

in idem. In other words, the decision of the ICC precludes subsequent trials before national courts,[80] while the principle of *non bis in idem* does not preclude a subsequent trial before the ICC in the following two circumstances:

> The proceedings in the national court (a) [w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) [o]therwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[81]

Giving the primacy to the ICC in this context should be regarded as in compliance with the spirit of the Statute and paragraph 10 of the Preamble, Articles 1 and 17 of the Statute. This is because in the aforementioned situations in which the ICC has primacy over national courts, they do not act in complying with the enforcement of international humanitarian law. The only way to overcome this matter is to give power to the ICC to conduct a subsequent trial. In the present context, the primacy of the ICC over national criminal courts is an inevitable element for the implementation and enforcement of international humanitarian law. Otherwise, as a result of human nature, the international community could be faced with the danger of international crimes being treated as 'ordinary crimes' or proceedings being 'designed to shield the accused' or cases not being carefully prosecuted in national courts.[82]

Jurisdiction of the ICC

One of the other obstacles to creating an international criminal court is the question of the scope of the Court's subject-matter jurisdiction (what laws or crimes will be covered) and personal jurisdiction (to whom the laws will be applied).

As will be examined later in detail, the ICC was created to have jurisdiction over only 'the most serious crimes of concern to the international community as a whole',[83] which are: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[84] In this context, the impact of the ICTY and the ICTR Statutes on the subject-matter jurisdiction of the ICC is easily seen. In a sense, concluding that the ICC Statute is the

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80. Article 20 of the ICC states:

> 1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
> 2. No person shall be tried before another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.'

81. Art. 20 (3) of the ICC Statute.
82. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 58.
83. Para. 4 of the Preamble of the ICC Statute.
84. Art. 5 (1) of the ICC Statute.

combination of Articles 2–5 of the ICTY and Articles 2–4 of the ICTR Statutes should not be regarded as wrong with the exception of the crime of aggression.[85]

The view deployed by the international community in relation to the subject-matter jurisdiction of the ICC reflects the best system so as to provide a universal acceptance of the ICC that paves the way for early ratification of the Statute and brings the Court into operation as soon as possible. Having gained the respect of the international community, the jurisdiction of the ICC can be expanded to a larger number of international crimes by means of an agreement of the States ratified by the Court's jurisdiction.[86]

Like the ICTY and the ICTR, the ICC has jurisdiction only over natural persons,[87] and it does not have jurisdiction over legal entities such as corporations, which is very important with regard to economic crimes like money laundering, and States. When the world becomes more interdependent, it might be possible to see that the ICC has jurisdiction over such entities.[88] The concept of personal jurisdiction will be discussed in the following Chapter in light of the practice of the *ad hoc* tribunals.

The Possibility of Creating *Ad Hoc* Tribunals

The possibility of the establishment of *ad hoc* tribunals when they are needed is another problem for the creation of an international criminal court. This argument is not defensible in international humanitarian law for the following reasons:

First, the establishment of an *ad hoc* tribunal reflects a type of 'selective justice', which is why the international community established *ad hoc* tribunals for the former Yugoslavia and for Rwanda while such tribunals have never been set up for the crimes (international crimes in nature) committed in Cambodia, Haiti or Iraq during the Gulf War. An international criminal court is not faced with this type of argument and can operate in a more consistent way.

Second, *ad hoc* tribunals cannot deter future crimes as effectively as an international criminal court. The restrictions of time and place with regard to the jurisdiction of *ad hoc* tribunals play a central role in not deterring future crimes. For example, after the establishment of the ICTR thousands

85. Genocide: Art. 4 of the ICTY Statute and Art. 2 of the ICTR Statute. Crimes against Humanity: Art. 5 of the ICTY Statute and Art. 3 of the ICTR Statute. War Crimes: Arts. 2–3 of the ICTY Statute and Art. 4 of the ICTR Statute. The crime of aggression has not taken its place in the Statutes of the *ad hoc* tribunals. Although, the Statute of the ICC includes this crime, its applicability by the Court is subject to the condition provided in Article 5 (2) of the Statute that: 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.'

86. Jamison, p. 435.

87. Art. 25 of the ICC Statute; Art. 6 of the ICTY; Art. 5 of the ICTR Statute.

88. Bassiouni, M.C. and C.L. Blakesley, 'The Need for an International Criminal Court in the New International World Order' (1992), 25 *Van. J. Trans. L.*, p. 169. For the developments in criminal responsibility for breaches of international law, including acts of corporations and States, *see* Meron, T., 'Is International Law Moving towards Criminalization?' (1998), 9 *EJIL*, p. 18.

of refugees have been killed in Rwanda, but that Tribunal's power is limited to events that occurred in 1994. The existence of a permanent court would make potential criminals afraid that a punishment would be meted out by this institution.[89]

Third, the existence of a permanent international criminal court can overcome the deficiencies of *ad hoc* tribunals. As is known, the creation of *ad hoc* tribunals needs more time and is more expensive than those which prevent tribunals from coming into operation on time.[90] In the meantime, crucial evidence can be destroyed, perpetrators can escape, witnesses can be intimidated and in conclusion, investigation becomes more expensive.

Finally, the existence of a permanent institution brings an end to the argument that *ad hoc* tribunals may violate the principle of legality (*nullum crimen sine lege, nulla poena sine lege*: no crime without law, no punishment without law).[91] This principle will be discussed in the following chapters in relation to the practice of the ICTY and the ICTR.

The Issue of Procedural Laws to Apply

The issue of applicable procedural law is not of primary significance. This is because 'international human rights norms and standards on fairness have reached such a level that developing a common denominator of a sufficiently high standard to satisfy the requirements of most countries of the world is quite possible'.[92] The Statutes of the ICTY and the ICTR and their Rules of Procedure and Evidence prove the level the international community reached in terms of providing a fair trial to accused persons. Article 21 of the Statute of the Yugoslavia Tribunal and Article 20 of the Statute of the Rwanda Tribunal indicate the rights of the accused. Among those are the right to have a fair and public hearing,[93] the right to be presumed innocent until proved guilty,[94] the right to be tried in his presence, to have legal assistance (counsel), to examine the witnesses and not to be compelled to testify against himself or to confess guilt.[95] Rules of Procedures and Evidence of the ICTY and the ICTR made clearer the rights of the accused.[96]

The procedural law being applied by the *ad hoc* tribunals should be seen as mainly reflecting the principles of international human rights law and as in compliance with the human rights instruments such as Article 14 (1) of the ICCPR, Article 6 (1) of the ECHR and Article 8 (1) of the ACHR those of which provide a fair trial for the accused.[97]

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89. Jamison, p. 438.
90. Ibid.
91. Ibid., pp. 437–8. For the other advantages of having a permanent international criminal court, *see* Crawford, 'Prospects …', pp. 314–15; Ferencz, Vol. II, p. 35.
92. Bassouini and Blakesley, p. 174.
93. Art. 21 (2) of the ICTY Statute; Art. 20 (2) of the ICTR Statute.
94. Art. 21 (3) of the ICTY Statute; Art. 20 (3) of the ICTR Statute.
95. Art. 21 (4) of the ICTY Statute; Art. 20 (4) of the ICTR Statute.
96. For example, *see* Rule 42 of the ICTY's Rules of Procedure and Evidence for the rights of suspects at the investigation level of a case.
97. *See supra* Chapter 1, note 210.

Similarly, the ICC Statute has provisions indicating the rights of the accused in a detailed way. Articles 63 (trial in the presence of the accused), 66 (presumption of innocence), 67 (rights of the accused) are just a few examples demonstrating that the accused will have a fair trial before the ICC. In this regard one more point should be emphasised, that in the preparation of the Rules of Procedure and Evidence of the ICC, the legal instruments (Statutes and the Rules of Procedure and Evidence) and the practice of the *ad hoc* tribunals have played a significant role as they did in providing an example for the preparation of the Statute of the ICC.[98]

The Legal Basis for the Establishment of the ICC

As explained in the previous chapter, there are four different means of establishment of an international criminal court or tribunal: (a) an international treaty, (b) a General Assembly Resolution, (c) a Security Council Resolution, and (d) the setting up of an international criminal court by way of amending the UN Charter.[99] In the cases of the former Yugoslavia and Rwanda for the establishment of both *ad hoc* tribunals, the method of Security Council Resolution was chosen, due to its compliance with the UN Charter and the situations which need explicit and definite solution in order to protect international peace and security.[100] However, for the establishment of the ICC, this method cannot be accepted as providing a precedent, since the establishment of the ICC is prospective, not retrospective and the ICC as an international institution is created with the intention of dealing with future crimes. For these reasons, the treaty-based establishment is the most appropriate way of setting up such a Court[101] and it was deployed by the international community in the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[102]

The advantages of using the treaty approach are to give an opportunity to States to examine and elaborate the issues relating to the establishment of the ICC, and to allow States to exercise their sovereign will in the negotiation and conclusion of the treaty.[103] Moreover, the 'treaty-based court is, in general, a more solid institution, since it is firmly grounded in the consent

98. The Assembly of States Parties to the Rome Statute of the International Criminal Court, at its 3rd meeting, on 9 September 2002, adopted by consensus the Report of the Working Group of the Whole. In this connection, the Assembly, on the recommendation of the Working Group of the Whole, adopted by consensus Rules of Procedures and Evidence of the International Criminal Court. For the text of the Rules of Procedure and Evidence of the International Criminal Court, *see Report of the Preparatory Commission for the International Criminal Court,* UN Doc. PCNICC/2000/Add.1 (2 November 2000).
99. *See supra* Chap. 1, note 74 and accompanying text.
100. For the explanation of advantages and disadvantages of other methods that can be used for creating *ad hoc* tribunals, *see supra* Chapter 1, p. 20, A Security Council Resolution.
101. Kolodkin, R.A., 'An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia' (1994), 5 *Crim. L. F.*, pp. 394–5.
102. The Conference was held in Rome, Italy, 15 June–17 July 1998, and the Statute of the ICC was adopted in this Conference.
103. *See supra* Chapter 1, p. 19, An International Treaty.

of the States parties and not, as United Nations *ad hoc* tribunals are, dependent for its continued existence on the Security Council or the General Assembly',[104] however, this does not mean that the ICC created by this mode would lack prestige since it is not supported by the United Nations for the following reasons: Firstly, the ICC was created 'in relationship with the United Nations system with jurisdiction over the most serious crimes of concern to the international community as a whole'.[105] Secondly, the ICC will be brought into relationship with the United Nations through an agreement.[106] Thirdly, the Security Council acting under Chapter VII of the Charter of the United Nations can refer a situation to the Prosecutor of the ICC to initiate an investigation.[107] Lastly, if the Security Council is involved in any situation through a resolution adopted under Chapter VII of the UN Charter, the ICC may not commence or proceed with any investigation or prosecution for a period of 12 months after the Security Council has requested the Court. This request may be repeated by the Council.[108] Giving such a power to the Security Council for deferral of investigation or prosecution under Article 16 of the ICC Statute it can be seen, at first glance, that the Security Council may prevent the ICC from taking action because of its political nature and the possible veto by one of the five permanent members of the Council.[109] Nevertheless, this Article should be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty [in this case the Statute of the ICC] in their context and in the light of its object and purpose'.[110] On this ground the literal meaning of the terms used in the provision 'may be commenced or proceeded with' does not reflect the fact that the ICC has to act in accordance with the Security Council request in all circumstances. From the interpretation of this provision, it should also be understood that the ICC has the power to assess the situation in order to decide whether it will initiate investigation or prosecution. This view should be regarded as in compliance with the purposes of the creation of the ICC which are indicated in paras. 4 and 5 of the Preamble to the ICC Statute.[111] Article 16 of the Statute cannot be inter-

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104. *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court* [Comments from 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 (5 January 1995)], UN Doc. A/AC.244/1 (20 March 1995), para. 5.
105. Para. 9 of the Preamble to the ICC Statute.
106. Art. 2 of the ICC Statute. The Assembly of States Parties to the Rome Statute of the International Criminal Court, at its 3rd meeting, on 9 September 2002, adopted by consensus the Report of the Working Group of the Whole. In this connection, the Assembly, on the recommendation of the Working Group of the Whole, adopted by consensus A Draft Relationship Agreement between the Court and the United Nations. For the text of the Draft Relationship Agreement between the Court and the United Nations, *see Report of the Preparatory Commission for the International Criminal Court,* UN Doc. PCNICC/2001/1/Add.1 (8 January 2002).
107. Art. 13 (b) of the ICC Statute.
108. Art. 16 of the ICC Statute.
109. In this context, it should be noted that the USA and China, two permanent members of the Security Council, voted against the adoption of the ICC Statute.
110. Art. 31 (1) of the Vienna Convention on the Law of Treaties of 1969.
111. 'Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking

preted as it gives the power to the Security Council to take control over the ICC.

In conclusion, the method deployed by the international community, conclusion of a treaty, in establishing the ICC should be considered as the most appropriate way for the aforementioned reasons. In this sense it should also be indicated that the establishment of an organic link with the United Nations through an agreement improves the ICC's prestige and makes the ICC more effective in its work.[112]

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June–17 July 1998)

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held in Rome, Italy, between 15 June and 17 July 1998 and ended with the adoption of a 'Statute of the International Criminal Court'[113] by a vote of 120 in favour (including the UK, France and Russia) to 7 against (the USA,[114] China, Libya, Iraq, Israel, Qatar and Yemen) with 21 abstentions.[115]

During the Conference, constitutional, institutional and substantive law issues were discussed. The discussion mainly concentrated on the subject-matter jurisdiction, complementarity and trigger mechanisms of the ICC. In

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measures at the national level and by enhancing international cooperation' (para. 4 to the Preamble of the ICC Statute).

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes' (para. 5 of the Preamble to the ICC Statute).

112. *See supra* note 106.

113. *See supra* note 46. The Statute of the ICC consists of 13 Parts including 128 Articles: Part 1: Establishment of the Court, Arts. 1–4; Part 2: Jurisdiction, Admissibility and Applicable Law, Arts. 5–21; Part 3: General Principles of Criminal Law, Arts. 22–33; Part 4: Composition and Administration of the Court, Arts. 34–52; Part 5: Investigation and Prosecution, Arts. 53–61; Part 6: The Trial, Arts. 62–76; Part 7: Penalties, Arts. 77–80; Part 8: Appeal and Revision, Arts. 81–5; Part 9: International Cooperation and Judicial Assistance, Arts. 86–102; Part 10: Enforcement, Arts. 103–11; Part 11: Assembly of States Parties, Art. 112; Part 12: Financing, Arts. 113–18; Part 13: Final Clauses, Arts. 119–28.

114. It is surprising that the USA voted against the establishment of the ICC. The USA played a central role in establishing the ICTY, and always seemed to be supportive of the creation of an international criminal court until the adoption of the ICC Statute. In this sense, *see* Scharf, M.P., 'Getting Serious about an International Criminal Court' (1994), 6 *Pace Int.'l L. Rev.*, p. 103; Scharf, M.P., 'The Politics of Establishing an International Criminal Court' (1995), 6 *Duke J. Comp. & Int.'l L.*, pp. 170–1. Although the USA did not sign the Statute of the International Criminal Court at the Conference, the Clinton administration signed it on 31 December 2000. However, when the Bush administration came into power the USA clearly declared its intention not to be bound by the signature of the Statute. In a communication received on 6 May 2002, the US Government informed the Secretary-General of the following: 'This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.'

115. The Statute of the International Criminal Court entered into force in accordance with Article 126 on 1 July 2002. As of November 2002, the number of signatories to the treaty has reached 139 and parties to 82.

light of the Statute some of the characteristics of the Court can be indicated as follows.

First, according to the Statute, the ICC is a permanent institution,[116] which has an international personality,[117] and it is composed of three organs namely: (a) judicial organ consisting of the presidency, an appeals division, a trial division and a pre-trial division, (b) investigatory and prosecutorial organ (the office of the Prosecutor) and (c) administrative organ (the Registry).[118]

Second, the ICC has a power to exercise its jurisdiction over persons in relation to 'the most serious crimes of concern to the international community as a whole'.[119] Having indicated the jurisdiction of the ICC in general, the Statute specifies those crimes over which the ICC has jurisdiction as follows: (a) the crime of genocide, (b) crimes against humanity, (c) war crimes, and (d) the crime of aggression.[120] As is known from the Statutes of both *ad hoc* tribunals, the first three categories of crimes, 'core crimes', constitute the subject-matter jurisdiction of the ICTY and the ICTR. The main difference between the ICC Statute and the Statutes of the *ad hoc* tribunals lies in the inclusion of the crime of aggression in the ICC Statute. From the point of view of international humanitarian law, the jurisdiction of the ICC over the crime of aggression should be welcomed. The exclusion of the crime of aggression in the ICC Statute would mean granting immunity to those responsible for 'the supreme international crime'.[121] Ever since the judgement of Nuremberg, aggressive war was described as an international crime, not a national right.[122] If the crime of aggression had not been included within the jurisdiction of the ICC, the international community would have taken a step backwards from the practice of international humanitarian law.[123]

However, the ICC's jurisdiction over the crime of aggression is subject to the condition that is indicated in Article 5 (2) of its Statute as follows: 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.' It is clearly understood from this Article that the ICC can exercise its jurisdiction over the crime of aggression when the definition and conditions of this crime

116. Art. 1 of the ICC Statute.
117. Art. 4 of the ICC Statute.
118. Art. 34 of the ICC Statute.
119. Arts. 1 and 5 of the ICC Statute.
120. Art. 5 of the ICC Statute; For the negotiating process of the crimes over which the ICC has jurisdiction in the Rome Conference, *see* Arsanjani, M.H., 'The Rome Statute of the International Criminal Court' (1999), 93 *AJIL*, pp. 29–36; Kirsch, P. and J.T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999), 93 *AJIL*, pp. 6–8; Kirsch, P. and J.T. Holmes, 'The Birth of the International Criminal Court: The 1998 Rome Conference' (1998), 36 *Can. Y. Int.'l L.*, pp. 22–3, 30–2.
121. Statement by Benjamin B. Ferencz, Pace Peace Center (16 June 1998).
122. Ibid.; and also *see*, UN Press Release L/ROM/8, 'Former Nuremberg War Crimes Prosecutor Declares That Aggressive War is not a National Right but an International Crime' (16 June 1998).
123. Statement by HE Mr Albano L.T. Asmani, United Republic of Tanzania (16 June 1998).

are set up by the international community. This is actually the result of the aggression's link with the Security Council which is the only organ that can determine whether aggression by a State has occurred or not. For this reason, the relationship between the ICC and the Security Council was established through an agreement as provided in Article 2 of the Statute.[124] The Preparatory Commission for the International Criminal Court has been working on the definition of aggression and its elements and also providing proposals pursuant to resolution F of the Final Act for a provision on aggression, including the definition and Elements of Crimes of Aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime.[125]

Although the subject-matter jurisdiction of the ICC will be examined in comparison with the substantive law of the *ad hoc* tribunals in detail in the following chapters, one point should be indicated here in relation to the non-inclusion of the use or threat of use of nuclear weapons, anti-personnel mines, blinding laser weapons and other weapons of mass destruction under the definition of war crimes. In particular, non-inclusion of nuclear weapons can create unfair results in terms of application of the rule of law by the ICC. For example, if somebody kills one person with a poisoned arrow or dumdum bullet, the ICC has jurisdiction, but where thousands of civilians are killed with a nuclear weapon, the ICC will have no jurisdiction.[126] How can it be justified in international humanitarian law?

Third, the ICC's jurisdiction is complementary to national criminal justice systems. It does not replace national courts; where national criminal courts are not able or are unwilling to act to prosecute and punish those who committed the most serious crimes of international concern, the ICC exercises its jurisdiction.[127] As has been indicated above, this is the natural result of the principle of sovereignty of States in international law.[128]

Fourth, the ICC is designed to be independent, fair, impartial, effective and representative of the international criminal judiciary and also to be free from any political restraints.[129] In this context, the relationship between the ICC and the Security Council plays a central role. During the Conference, this was one of the main themes.[130] In particular, the USA wanted the ICC to

124. *See supra* note 106.

125. *See Report of the Preparatory Commission for the International Criminal Court, Part II, Proposals for a Provision on the Crime of Aggression*, UN Doc. PCNICC/2002/2/Add.2 (24 July 2002). And also for the historical review of developments relating to aggression, prepared by the Secretariat, *see* UN Doc. PCNICC/2002/WGCA/L.1 and Add.1.

126. UN Press Release L/ROM/14, 'Use of Weapons of Mass Destruction Should be Included in Criminal Court's Definition of War Crimes, Say Several Conference Speakers' (18 June 1998). In particular, *see* Statement by Ambassador Muhammad Zamir, Government of the People's Republic of Bangladesh (18 June 1998), Statement by Alhaji Abdullahi Ibrahim, Ofr, San, Honourable Attorney General and Minister of Justice of the Federal Republic of Nigeria (18 June 1998).

127. Art. 17 of the ICC Statute.

128. *See supra*, p. 50, The Principles of State Sovereignty and Criminal Jurisdiction.

129. UN Press Release L/ROM/22, 'UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court' (17 July 1998).

130. UN Press Release L/ROM/10, 'Role of United Nations Security Council in International Criminal Court Among Issues Discussed This Afternoon at UN Conference' (17 June 1998); Kirsch and Holmes, pp. 8–9.

be controlled by the Security Council by stating that the ICC 'must operate in co-ordination – not in conflict – with the Security Council'.[131] The view taken by the USA[132] was not accepted by the international community on the ground that if the ICC or its prosecutor was made subject to the control of any political bodies, whether the Security Council or State parties, it would not have been credible, and international justice would have been seriously injured.[133] In fact, the issue is related to the trigger mechanisms of the ICC by which the jurisdiction of the Court can be set up. The trigger mechanisms of the ICC is regulated in Article 13 of the Statute under the heading of 'exercise of jurisdiction'. According to this Article, the Court can exercise its jurisdiction over the crimes where there is a reference by a State party, the Prosecutor or the Security Council[134] to the ICC. The USA did not agree with the referral by a State party or the prosecutor by declaring that its soldiers taking part in peacekeeping forces all over the world could be faced with prosecutions by the ICC and America might have to deal with politicised complaints before the ICC.[135] From the point of view of international humanitarian law, this argument has no basis for the following reasons:

First, to create an independent, impartial, fair and effective permanent international criminal institution, its prosecutor should have the right to initiate an investigation in respect of the most serious international crimes as provided in Article 13 (c) of the ICC Statute. At the same time, although the prosecutor can initiate investigations *proprio motu*, it is subject to the approval of a three judge pre-trial chamber[136] which

131. Statement by the Hon. Bill Richardson, United States Ambassador at the United Nations (17 June 1998); UN Press Release L/ROM/11, 'United States Declares at Conference that UN Security Council Must Play Important Role in Proposed International Criminal Court' (17 June 1998).

132. For the criticism of the American position, *see* Goldstone, R., 'A Court That Needs a Fair Trial – The US is on the wrong side of history in opposing an international war-crimes court', *Time*, Vol. 152, No. 5 (3 August 1998); Ertan, F., '*Daimi Mahkeme Kutlu Olsun* (*The Permanent Court Welcomes*)', Zaman (19 July 1998). In this context, *see* Wedgwood, R., 'The International Criminal Court: An American View' (1999), 10 *EJIL*, pp. 97–8; Hafner, G., K. Boon, A. Rubesame and J. Huston, 'A Response to the American View as Presented by Ruth Wedgwood' (1999), 10 *EJIL*, pp. 113–15.

133. UN Press Release L/ROM/11, 'United States Declares at Conference that UN Security Council Must Play Important Role in Proposed International Criminal Court' (17 June 1998). Britain's Foreign Secretary, Robin Cook, indicated his view after the Conference as follows: 'I am delighted that the court will have an independent prosecutor, and I don't think that the changes that have been made strike at the heart of the court. It will be a strong court with a wide remit that will send a signal to the Saddam Husseins and Pol Pots that they will be held to account and brought to justice', in *The Observer*, John Hooper wrote, '*Nowhere to run for War Criminals*' (19 July 1998).

134. In fact, the way of giving power to the Security Council to refer a situation to the Court should be considered as one of the reflections of the establishment of the *ad hoc* tribunals on the ICC Statute since situations similar to those in the former Yugoslavia and Rwanda can be referred by the Security Council to the ICC. This is also the only exception for the principle of consent of States under which the ICC can exercise jurisdiction (Cassese, A., 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999), 10 *EJIL*, p. 161).

135. Statement by the Hon. Bill Richardson, United States Ambassador at the United Nations (17 June 1998). In this context, *see* Zwanenburg, M., 'The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?' (1999), 10 *EJIL*, pp. 124–43; Scheffer, D.J., 'The United States and the International Criminal Court' (1999), 93 *AJIL*, p. 18.

136. Art. 15 of the ICC Statute.

provides a safeguard against the possible unprofessional manner of the prosecuting service.

Second, the UN Security Council acting under Chapter VII of the UN Charter can refer a situation to the Prosecutor to launch an investigation[137] and also the Security Council may request the ICC to defer investigation or prosecution in relation to Chapter VII of the UN Charter situations.[138] As a result, the ICC will work together with the Security Council in order to protect or maintain international peace and security, as long as the situations referred to the Court by the Security Council are related to Chapter VII of the UN Charter.

Having examined some important features of the Statute of the ICC, the contribution of the ICC to international humanitarian law and human rights law needs to be briefly emphasised.

First, the establishment of the ICC should be regarded as 'a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law'.[139]

Second, the creation of the ICC fulfils the missing link in international law by enforcing individual criminal responsibility and it brings an end to the concept of impunity to achieve global justice for mankind and human dignity.[140]

Third, the establishment of the ICC will hopefully bring an end to conflicts, whether international or not and deter future international crimes, which was a significant reason for establishing the *ad hoc* tribunals for the former Yugoslavia and for Rwanda.[141]

Fourth, by creating the ICC complementary to national criminal courts as a result of the principle of State sovereignty, the international community will witness that the national legal systems will introduce necessary law regulations in their own legal systems to prosecute and punish the perpetrators of the most serious crimes of international concern. If not, the ICC will have to take over national criminal courts in accordance with its Statute.

Lastly, but most importantly, the establishment of the ICC by a vote of 120 in favour to 7 against indicated that the new world order will not be governed by the world's remaining superpower and that the rule of law which is the only way to achieve global justice will guide the international community.

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137. Art. 13 (b) of the ICC Statute.
138. Art. 16 of the ICC Statute.
139. Statement by the United Nations Secretary, General Kofi Annan at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court (18 July 1998); UN Press Release L/ROM/23, 'Secretary-General Says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights, Rule of Law' (18 July 1998).
140. As is well known, the International Court of Justice deals with cases between States; it has no jurisdiction to enforce the principle of individual criminal responsibility for serious violations of international humanitarian law.
141. *See supra* Chapter 1, note 109 and accompanying text.

Conclusions

The concept of creating an international criminal court to prosecute and punish those individuals who are responsible for violations of international humanitarian law has been discussed by the international community for almost a hundred years and its establishment became possible just before the millennium through the adoption of the Statute of the ICC in the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy, between 15 June and 17 July 1998.

The reasons why the international community was not able to have such a court for a long time derive from some obstacles to establishing a permanent institution of criminal jurisdiction which has the power to deal with individual criminal responsibility. The most important obstacles in this regard are the principles of State sovereignty and criminal jurisdiction that are interrelated. No State wants to surrender its criminal jurisdiction to any other State or international court or tribunal since the concept of criminal jurisdiction is considered to be an inevitable element of State sovereignty. However, the internationalisation of events has created a new world order, and the full enjoyment of State sovereignty by a State has affected other States' rights. As a result, States should not see that, for instance, the conflicts in the former Yugoslavia and in Rwanda were merely matters of these States alone and that the international community should not have intervened militarily or established *ad hoc* tribunals through the Security Council to bring an end to these conflicts. In fact, these conflicts consisting of international crimes such as genocide, war crimes and crimes against humanity had created a threat to international peace and security.

In order to achieve global justice, the international community urgently needs a permanent criminal court whose jurisdiction will be over certain crimes and individuals. For this reason, States have to surrender or transfer their criminal jurisdiction to this institution. If this is regarded as a limitation on the principle of State sovereignty, it will be the same for every State and will play a significant role in preventing the most serious crimes of concern to the international community. In a sense, this type of limitation makes States more sovereign than they were, because of providing prosecution and punishment of the perpetrators of international crimes through the establishment of the international criminal court.

Due to the fact that States are reluctant to transfer their criminal jurisdiction to an international criminal court as being unacceptable to their State sovereignty, the concept of concurrent or complementary jurisdiction is the only way to overcome this matter. The Statutes of the ICTY and the ICTR both include the same provisions providing concurrent jurisdiction to the national courts, with the exception of the primacy of the International Tribunals. In relation to concurrent jurisdiction, the principle of *non bis in idem* has also taken its place in the Statutes of the *ad hoc* tribunals. In practice, the international community has found it possible to apply the principle of State sovereignty and concurrent jurisdiction to international criminal institutions. In this sense, the practice of the ICTY in the cases of *Prosecutor v. Dusko Tadic* and *Prosecutor v. Tihomir Blaskic* should be

noted. There is no doubt that the established ICC will be guided by the practice of the *ad hoc* tribunals on a large scale. The impact of the Statutes of *ad hoc* tribunals on the ICC Statute clearly demonstrates this fact and it gives place to similar provisions regulating the principle of complementarity between national courts and the ICC which is different from *ad hoc* tribunals in terms of giving primacy to national courts as well as the principle of *non bis in idem*.

One of the other obstacles to creating an international criminal court is the question of the scope of the Court's subject-matter jurisdiction and personal jurisdiction. The practice of the international community with regard to the subject-matter jurisdiction of the ICTY and the ICTR have played a major role in preparing the ICC Statute. In fact, the ICC Statute should be seen mainly as a combination of Articles 2–5 of the ICTY and Articles 2–4 the ICTR Statutes on the ground that the crime of genocide, war crimes and crimes against humanity constitute the subject-matter jurisdiction of the *ad hoc* tribunals as well as the jurisdiction of the ICC. The only exception is the inclusion of the crime of aggression in the ICC Statute. The view taken by the international community at this point reflects the best way to provide universal acceptance of the ICC which paved the way for early ratification of the Statute and brought the ICC into operation. With regard to the personal jurisdiction of the ICC, the same view as that of the ICTY and the ICTR was deployed by the international community and, according to this, the ICC has jurisdiction only over natural persons, not over legal entities and States.

In respect to the issue of procedural laws to be applied by an international criminal court, the procedural law being applied by the *ad hoc* tribunals should be seen as mainly reflecting the principles of international human rights law and as in compliance with the human rights instruments such as the ICCPR, ECHR and ACHR that all provide a fair trial for the accused persons. The impact of the ICTY and the ICTR Statutes on the ICC Statute and its Rules of Procedure and Evidence can again be examined in this regard.

Although, there were lots of issues making the establishment of an international criminal court difficult, the international community was able to establish the ICC by conclusion of a treaty, the Statute of the ICC, which was the most appropriate way to establish an international organisation in Rome in 1998. This was perhaps one of the major achievements of the international community in the twentieth century for the following reasons: First, the ICC fulfils one of the most serious defects to enforcing the rule of law which is the lack of an international criminal court to try individuals responsible for violations of international humanitarian law. Second, by enforcing individual criminal responsibility through the ICC, the concept of immunity and its result, impunity, will not be argued as a defence before the ICC or national courts. Finally, succeeding generations will hopefully not be faced with the conflicts, and *ad hoc* tribunals, which are generally regarded as victor's justice or selective justice, and will not become the victims of the most serious crimes of international concern.

Part 2

The Substantive Law (Subject-Matter Jurisdiction) of the *Ad Hoc* Tribunals: Their Practice and Their Contribution to International Humanitarian Law and Impact on the ICC

3

Individual Criminal Responsibility in International Law

Introduction

Despite the fact that international humanitarian law and international human rights law are interrelated in protecting the rights of individuals, there are significant differences between the two branches of international law with regard to being a subject of international law. International humanitarian law originated in customary law and sought to implement individual criminal responsibility through either domestic courts or international institutions (tribunals or courts, *ad hoc* or permanent). Human rights law is a recent category of international law and regulates the relations between States and individuals who are seeking protection of their rights, primarily against States.[1] As will be explained below, although the purpose of international humanitarian law is to enforce individual criminal responsibility, this concept could not be truly implemented by the international community until recent times, and States remain internationally responsible since they are the principal subject of international law. However, during the twentieth century the international community has witnessed two World Wars and a number of international or non-international armed conflicts around the world. These events resulted in the notion that individual criminal responsibility should be enforceable by international and national courts or tribunals in order to deter future crimes and to prevent future conflicts. The establishment of the ICTY and the ICTR by the Security Council under Chapter VII of the UN Charter as a measure to protect international peace and security, and the practice of these *ad hoc* tribunals are the latest examples proving that individual criminal responsibility is enforceable at the international level for crimes which are of concern to the international community. Moreover, the adoption of the Statute of the ICC by a large number of States indicated that the principle of individual criminal responsibility and its implementation is one of the most important desires of the international community in achieving a universal justice for

1. For the differences and similarities between international human rights and international humanitarian law, *see* Vinuesa, R.E., 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law' (1998), 1 *YIHL*, p. 69.

human beings.

In this part of the study, before examining the substantive law of the *ad hoc* tribunals, their practice and contribution to international humanitarian law, the concept of individual criminal responsibility will be explained since it lies at the centre of enforcement of international humanitarian law rules. The application of this principle by the ICTY and the ICTR, and in this sense their contribution to international humanitarian law and the possible effect on the ICC and the regulation of the ICC Statute will be examined and analysed.

The Concept of Individual Criminal Responsibility in International Law

The concept of attribution of criminal responsibility to individuals is not a completely new issue in international law. Some international crimes such as piracy, slavery (slave trading and slave trafficking) were regulated in the 1800s and these regulations today became a part of customary international law, *jus cogens* in nature.[2] However, the regulation of armed conflict as a concept just goes back to the last part of the nineteenth and the beginning of the twentieth century.[3] This created the base for international humanitarian law known as the Law of The Hague which was the result of diplomatic conferences held in 1899 and 1907.[4] The main importance of the Hague Law in respect of humanitarian law was the codification of customary law rules with regard to the Laws and Customs of War on Land,[5] and after this time the notion of violations of laws or customs of war emerged in the international scene, and constitutes today one of the major parts of war crimes.[6] On the other hand, Hague Conventions and Regulations provided for State responsibility rather than individual criminal responsibility for the breaches of the laws and customs of war.[7]

For the first time at the international level, the enforcement of individual criminal responsibility under a treaty was provided in the Treaty of Versailles signed by Germany on 26 June 1919 that established the individual criminal responsibility of the ex-German emperor, Kaiser Wilhelm II, under Article 227 of that Treaty for the supreme offence against peace. Article 228 provided for the prosecution of German military personnel

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2. Bassiouni, M.C., *Crimes Against Humanity in International Criminal Law* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992), pp. 193–6.
3. For a historical background on the laws of war and examples on war crimes trials, *see* Keen, M.H., *The Laws of War in the Late Middle Ages* (London: Routledge & Kegan Paul, Toronto: University of Toronto Press, 1965); Sunga, L.S., *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992), p. 18.
4. The text is available in D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Sijthoff & Noordhoff, 1981), pp. 57–92.
5. *See supra* Chapter 2, note 4 and accompanying text.
6. For the explanation of violations of laws or customs of war and the practice of the ICTY and the ICTR, *see infra* Chapter 4, p. 181, Violations of the Laws or Customs of War.
7. Sunga, p. 21.

who committed war crimes.[8] It was decided to implement the provisions of the Treaty by establishing a war crimes tribunal,[9] but it proved impossible to proceed since Germany did not surrender its own nationals and the Allies ultimately agreed to allow Germany to prosecute its own citizens before its national court in Leipzig.[10] The trials held in Leipzig between 23 May and 16 July 1921 can be regarded as a failure and demonstrated the difficulty in implementing individual criminal responsibility through national courts, but in terms of setting up the principle that individuals committing war crimes should be held responsible and not go unpunished marked an important place in the history of war crimes trials.[11]

One of the most significant developments, after the First World War, in the context of the emergence of the principle of individual criminal responsibility was probably the *1919 Report of the Commission on the Responsibilities of the Authors of War and Enforcement of Penalties for Violations of the Laws and Customs of War.*[12] The significance of this Report lies in the fact that it provides a list of international crimes that constitute violations of the laws and customs of war[13] and individual criminal responsibility.[14]

However, whatever the achievements of the international community prior to the Nuremberg trials are, international responsibility was predominantly fixed on States not on individuals, since States are the first and main subject of international law. For this reason, the turning point for the development of the principle of individual criminal responsibility was the view taken by the international community to establish the International Military Tribunals at Nuremberg and at Tokyo in order to enforce personal responsibility for war crimes, crimes against peace and crimes against humanity after the Second World War.[15] The practice of these tribunals clearly indicated that any individual, regardless of his rank should be

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8. Article 228 of the Treaty of Versailles states: The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.
9. Art. 229 of the Treaty of Versailles.
10. Bassiouni, pp. 199–200; Marquardt, P.D., 'Law Without Borders: The Constitutionality of an International Criminal Court' (1995), 33 *Col. J. Trans.'l L.*, pp. 79–80.
11. Bassiouni, p. 202.
12. For the Report of the Commission, *see* Ferencz, B.B., *An International Criminal Court – A Step Toward World Peace: A Documentary History and Analysis*, Vol. I (London, Rome, New York: Oceana Publications, 1980), pp. 169–92; and also available in (192) 14 *AJIL*, pp. 95–154.
13. The Commission in its Report under Chapter II (Violations of the Laws and Customs of War) listed 32 different types of international crimes. Some of these are: murders and massacres, systematic terrorism, putting hostages to death, torture of civilians, deliberate starvation of civilians, rape, abduction of girls and women for the purpose of enforced prostitution, deportation of civilians, internment of civilians under inhuman conditions, pillage, confiscation of property, imposition of collective penalties, wanton devastation and destruction of property, deliberate bombardment of undefended places, wanton destruction of religious, charitable, educational, and historic buildings and monuments, and so on.
14. The Commission in its Report under Chapter III (Personal Responsibility) concluded that: 'All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution'.
15. Ratner, S.R. and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997), p. 6. For the impact of the Nuremberg trials on the protection of individuals, *see* pp. 6–7.

responsible for war crimes, crimes against peace and crimes against humanity and that individual responsibility is enforceable at the international level.[16] Under this guideline, the ICTY, the ICTR and the ICC were able to be established by the international community.

Despite the fact that the application of the principle of individual criminal responsibility and substantive law at this point by the International Military Tribunals creates an important example in international humanitarian law, it was not sufficient for the international community's needs in this context. On this ground, new codification movements with regard to the customary international law and conventional law rules regulating armed conflicts (international or non-international), in particular the Geneva Conventions of 1949 and the Additional Protocols (I and II) of 1977, some other international conventions such as the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 were introduced to the international community. Parallel to these developments, customary international and conventional law rules have evolved even since the adoption of these conventions, in addition to the judgements of the Nuremberg and Tokyo Tribunals and principles derived from these judgements and from the Nuremberg Charter.[17] In compliance with this, the concept of individual criminal responsibility has also evolved. In this regard its application by the ICTY and the ICTR should be seen as having an historical place in international humanitarian law since they were first truly established international criminal tribunals in contrast to the argument of the International Military Tribunals being a victor's justice.[18] Undoubtedly, their practice will have a significant impact on the ICC.

Due to the significance of the principle of individual criminal responsibility for the effective enforcement of international humanitarian law, in compliance with the structure of the study, the emergence of this principle will be briefly and separately explained for each category of international crime. Some other international human rights and humanitarian law instruments will also be indicated below, before the examination of the practice of the ICTY and the ICTR and their contribution to international humanitarian law and impact on the ICC in this regard.

War Crimes[19]

In international humanitarian law, war crimes are divided into two principal categories: 'grave breaches' and 'violations of the laws or customs of

16. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994),* para. 171 (hereinafter *Final Report for Rwanda*); Marquardt, pp. 82–3.
17. The United Nations General Assembly adopted a resolution as Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal in 1946. UNGA Res. 95 (I) (11 December 1946); and also in 1950 the International Law Commission prepared a report called Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal (hereinafter the Nuremberg Principles), available in Schindler and Toman (eds), pp. 835–6.
18. *See supra* Chapter 1, note 6.
19. *See infra* Chapter 4.

war'. Both of them are mainly regarded as regulating international armed conflicts. As will be examined later, although to protect human rights, the nature of the conflict whether international or non-international is not important any more, the law applicable to non-international armed conflicts is different from the law applicable to the international one.[20]

The Grave Breaches System

The 1949 Geneva Conventions[21] were one of the most important results of the Second World War as regards the protection of victims of war and represented a major step towards the codification of the law of armed conflicts. Additional Protocols (I and II) of 1977 followed this development.[22]

Common Articles 49 of the First Geneva Convention, 50 of the Second Geneva Convention, 129 of the Third Geneva Convention and 146 of the Fourth Geneva Convention are different from all other breaches of the Conventions since they place an obligation on the High Contracting Parties to legislate and prosecute 'grave breaches' of the Conventions.[23] As will be examined in detail later, the important point in this respect is to indicate the regulation of individual criminal responsibility under this new system.

The Geneva Conventions do not place any direct obligations on individuals but States are obliged to enact necessary legislation and provide prosecution for grave breaches.[24] However, when the relevant provisions of the Geneva Conventions are examined, it can be clearly seen that although in the Conventions the phrase 'war crimes' is not used in relation to the

20. For the explanation *see infra* Chapter 4, p. 135, The Nature of Armed Conflicts Must Not Have Any Significance in International Humanitarian Law.
21. The four Conventions were signed at Geneva on 12 August 1949: Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (First Geneva Convention). The Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 75 UNTS 85 (Second Geneva Convention); Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (Third Geneva Convention); Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (Fourth Geneva Convention).
22. For the explanation, *see infra* Chapter 4, p. 115, The Grave Breaches System; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (8 June 1977) (Protocol I) (1977), 16 *ILM*, 1391; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) (1977), 16 *ILM*, 1442.
23. Article 49 of the first Geneva Convention provides:

    'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

    Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case …'

    Articles 50, 129 and 146 of the Second, Third and Fourth Geneva Convention have the same provisions (respectively).
24. Gross, O., 'The Grave Breaches System and the Armed Conflict in the Former Yugoslavia' (1995), 16 *Mich. J. Int'l L.*, p. 793.

acts defined as grave breaches, those acts constitute war crimes and in consequence individuals are fully responsible for the breaches of the laws of war.[25] These acts are defined in the Geneva Conventions as involving any of the following acts: 'wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'.[26] Under the modern concept of international humanitarian law, there is no doubt that the grave breaches system constitutes a part of war crimes and whoever commits such acts is individually criminally responsible. Moreover, it can be concluded that the grave breaches system, both as a part of war crimes and also as a part of customary international law, has reached the level of *jus cogens* and the obligation to prosecute and punish individuals responsible is an *obligatio erga omnes* in nature.[27]

The recent practice of the international community with regard to the grave breaches system and individual criminal responsibility in this regard supports this view. Article 2 of the Statute of the ICTY, under the heading of 'Grave breaches of the Geneva Conventions of 1949' (which literally contains the same acts), and its practice on this point and Article 8 (2) (a) of the ICC Statute (again under the same heading as in the ICTY Statute) are recent examples proving this fact. Lastly, in relation to the obligations imposed on States in the Geneva Conventions, it can be said that at the time when the Conventions were adopted, there was no international criminal court and the enforcement of individual criminal responsibility could only have been possible through national courts, but the international community now has two *ad hoc* international criminal tribunals and one international criminal court. For this reason, the provisions of the Conventions should be interpreted by taking into account these facts in order to understand why the Geneva Conventions did not place any direct obligation on individuals.

Violations of the Laws or Customs of War

The other part of war crimes are the so-called 'violations of the laws or customs of war' which derives from the Regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land,[28] from the Nuremberg Charter[29] and from the judgements of the

25. Ibid.
26. Art. 50 of the First Geneva Convention; Art. 51 of the Second Geneva Convention; Art. 130 of the Third Geneva Convention; Art. 147 of the Fourth Geneva Convention; and Art. 85 of the Protocol I of 1977.
27. Bassiouni, M.C., 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996), 59 *LCP*, pp. 68, 72; Sunga, pp. 52–3. For a recent and detailed study on the concept of *erga omnes*, *see* Ragazzi, M., *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 1997). In particular, for the relationship between the concept of *jus cogens* and the concept of *erga omnes*, *see* pp. 189–210.
28. Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention No. IV Respecting the Laws and Customs of War on Land (18 October 1907) (hereinafter Regulations), in Schindler and Toman (eds), pp. 69–87.
29. Art. 6 (b) of the Nuremberg Charter.

International Military Tribunals.[30] Some of the acts constituting violations of the laws or customs of war can be indicated as follows and any individual engaged in any of the following acts is fully responsible in international humanitarian law: using poisonous weapons or other weapons calculated to cause unnecessary suffering,[31] the wanton destruction or devastation of cities, towns or villages not justified by military necessity,[32] attack, or bombardment of undefended towns, villages, dwellings or buildings,[33] the seizure of or destruction or damage to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science[34] and the plunder of public or private property.[35] In addition to these acts, which are regarded as mainly governing the means and methods of warfare, violations of Common Article 3 to the Geneva Conventions and the 1977 Additional Protocols to the Geneva Conventions should also be noted as a part of the concept of violations of the laws or customs of war.[36] These acts today in international humanitarian law have reached the level of *jus cogens* and obligations of States to prosecute, punish or extradite the perpetrators is an *obligatio erga omnes*.[37] In accordance with the development of international humanitarian law, whoever commits violations of the laws or customs of war (a part of war crimes) is fully responsible for his or her acts.[38] The Statutes of the ICTY and the ICC are the latest legal documents proving that the principle of individual criminal responsibility for the acts mentioned is a part of the *jus cogens* norm.[39]

The Crime of Genocide[40]

Despite the fact that the international community has been faced with a number of acts of genocide, as a concept, the crime of genocide is really a new and well-developed category of international crime resulting from the atrocities of the Second World War.[41] Although the term 'genocide' was not used in the Nuremberg Charter and the Judgements of the Tribunal, many

30. For the agreements establishing these tribunals *see supra* Chapter 1, note 1.
31. Regulation 23 (a) and (e); Art. 3 (a) of the ICTY Statute; Art. 8 (2) (b) (xvii–xx) of the ICC Statute.
32. Regulation 23 (g); Art. 6 (b) of the Nuremberg Charter; Art. 3 (b) of the ICTY Statute.
33. Regulation 25; Art. 3 (c) of the ICTY Statute; Art. 8 (2) (b) (v) of the ICC Statute.
34. Regulation 56; Art. 3 (d) of the ICTY Statute; Art. 8 (2) (b) (ix) and Art. 8 (2) (e) (iv) of the ICC Statute.
35. Art. 6 (b) of the Nuremberg Charter; Art. 3 (e) of the ICTY Statute; Art. 8 (2) (b) (xvi) and Art. 8 (2) (e) (v) of the ICC Statute.
36. In this regard the practice of the *ad hoc* tribunals has played a central role in achieving this point in international humanitarian law. The inclusion of these acts in the ICC Statute should be seen as one of the reflections of this role. In this context, *see infra* Chapter 4, p. 190, Common Article 3 to the Geneva Conventions and the Additional Protocol II.
37. Bassiouni, 'International Crimes …', pp. 68, 72. Of course, not all provisions of the Geneva Conventions and the 1977 Additional Protocols thereto have reached such a level in international humanitarian law.
38. Morris, M.H., 'International Guidelines Against Impunity: Facilitating Accountability' (1996), 59 *LCP*, p. 29. For the differences of these two categories of war crimes, *see infra* Chapter 4, p. 115, The Grave Breaches System.
39. Arts. 6–7 of the ICTY Statute; Art. 25 of the ICC Statute.
40. *See infra* Chapter 5.
41. Ratner and Abrams, p. 24.

acts defined as war crimes or crimes against humanity in Article 6 (b and c) of the Nuremberg Charter definitely qualify the crime of genocide[42] which was defined and codified as reflecting the customary international law rule in the 1948 Genocide Convention.[43] According to the Genocide Convention any of the following acts constitutes the crime of genocide when committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group.[44] This Article, without any change, has taken its place in the Statutes of the *ad hoc* tribunals and of the ICC.[45] As the Genocide Convention provides, individuals criminally responsible for the responsible rulers, public officials, or private individuals,[46] under the latest developments and the practice of international humanitarian law, any individual regardless of his official position or rank (military or civilian) taking part in these acts is fully responsible for them[47] and there can be no doubt that the crime of genocide is a new separate category of international crime which has reached the level of *jus cogens* and States' obligation on prosecuting, punishing or extraditing the perpetrators of this crime, in other words, enforcing individual criminal responsibility is an *obligatio erga omnes*.[48]

Crimes Against Humanity[49]

One of the most important outcomes of the Second World War was the introduction of the concept of crimes against humanity and the enforcement of individual criminal responsibility for this category of crimes to the international community through the Charters of the Nuremberg and Tokyo Tribunals[50] and Control Council Law No. 10 for Germany,[51] since the categories of war crimes and crimes against peace were not enough to cover some offences which either occurred in peacetime or were committed against the State's own citizens.[52] According to the Nuremberg Charter,

42. Ibid., p. 25; Sunga, p. 65.
43. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.
44. Art. 2 of the Genocide Convention.
45. Art. 4 of the ICTY Statute; Art. 2 of the ICTR Statute; Art. 6 of the ICC Statute.
46. Art. 4 of the Genocide Convention.
47. Morris, p. 29; Arts. 5–6 of the ICTR Statute; Arts. 6–7 of the ICTY Statute; Art. 25 of the ICC Statute.
48. Bassiouni, 'International Crimes …', pp. 68, 72; Morris, p. 29; Sunga, p. 73; Scharf, M., 'The Letter of Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996), 59 *LCP*, pp. 43–5; Ragazzi, pp. 92–104; and also *see* the cases: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* (1951), *ICJ Reports*, 15 at 23; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgement* (Bosnia-Herzegovina v. Yugoslavia) (11 July 1996), (1996), *ICJ Rep.*, p. 595, para. 13.
49. *See infra* Chapter 6.
50. Art. 6 (c) of the Nuremberg Charter; Art. 5 (c) of the Tokyo Charter.
51. Art. 2 (1) (c) of the CCL No. 10.
52. Sunga, pp. 44, 46–7.

the following acts constitute crimes against humanity and individuals taking part in the commission of these crimes will be held responsible: 'murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.[53] In the Nuremberg practice, for the application of crimes against humanity, the Tribunal did not interpret this as a separate category of crime. Instead it looked for a connection with war crimes or crimes against peace to be a punishable offence.[54]

Since the Nuremberg Trials, the notion of crimes against humanity has evolved by means of some practice of the national courts.[55] However, in this context, the most important developments are the adoption of the Statutes of the *ad hoc* tribunals and of the ICC[56] giving power to these institutions to try individuals who have committed crimes against humanity under the subject-matter jurisdiction of each international organ. In compliance with the development of international humanitarian law, the international community has found opportunities to witness the application of crimes against humanity by the established *ad hoc* tribunals.[57] Although, in the Nuremberg Trials, the principle of individual criminal responsibility was being argued, today there is no place to assess this contention on the ground that as a concept crimes against humanity have become a separate category of international crimes that has reached the level of *jus cogens* and the duty of States to prosecute, punish or extradite the individuals responsible for crimes against humanity is an *obligatio erga omnes* in nature.[58]

The Crime of Aggression (Crimes Against Peace)

The concept of crimes against peace (the crime of aggression) and the enforcement of individual criminal responsibility for them were introduced to the international community by Article 6 (a) of the Charter of the Nuremberg Tribunal[59] which states that:

> crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy of the accomplishment of any of the foregoing.

53. Art. 6 (c) of the Nuremberg Charter; Article 5 (c) of the Charter of the Tokyo Tribunal is identical to the Nuremberg one.
54. Sunga, p. 46.
55. The most significant example in this sense is the *Eichmann Case*. In this context, *see infra* Chapter 6, note 21.
56. Art. 5 of the ICTY Statute; Art. 3 of the ICTR Statute; Art. 7 of the ICC Statute. Each Statute is slightly different from each other, although the legal base is the same as the Nuremberg and Tokyo Tribunals' Charters and CCL No. 10.
57. For the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and possible impact on the ICC with regard to crimes against humanity, *see infra* Chapter 6, p. 245.
58. Bassiouni, 'International Crimes …', pp. 68, 72; Morris, p. 29.
59. Sunga, p. 36.

At the time of drafting the Nuremberg Tribunal Charter, the launching of an aggressive war was a new category of international crime and the application of the principle of individual criminal responsibility with regard to this crime was not clear[60] on the ground that it was not covered by the definition of war crimes or any other international crimes.[61] Since the Nuremberg Trials, international humanitarian law has evolved and the notion of crimes against peace or the crime of aggression has developed in accordance with the provisions of the United Nations Charter, in particular, Articles 2 (4), 39 and 51 are related to aggression, and the resolutions (declaring that a war of aggression is a crime against peace and brings international responsibility) of the United Nations General Assembly.[62]

Despite the fact that there is a major difficulty in defining the crime of aggression,[63] it was applied by the Nuremberg Tribunal and the international community has a guideline in this regard. For these reasons, its non-inclusion, in particular in the Statute of the ICTY is unfortunate and inconsistent with the development of international humanitarian and human rights law. This is because the crime of aggression is the source of or mother of other international crimes. Moreover, its exclusion from the Statutes of the *ad hoc* tribunals raises some doubt that international politics or relations still prevail in international law practice by way of giving immunity and its consequence impunity to persons who are responsible for the commission of this crime. However, the ICC Statute gives power (with an exception)[64] to the ICC to try individuals who are responsible for the crime of aggression.[65] This regulation clearly indicates that under international humanitarian law, the crime of aggression has definitely become an independent category of international crimes that has reached the level of *jus cogens* and States' duty to prosecute, punish or extradite individuals responsible for this crime, in other words, the enforcement of individual criminal responsibility in this respect is an *obligatio erga omnes* in nature.[66]

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60. Wright, Q., 'The Law of the Nuremberg Trial' (1947), 41 *AJIL*, pp. 62–7.
61. Sunga, p. 36.
62. UNGA Res. (1970) 2625 (xxv) (Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations), and UNGA Res. (1974) 3314 (Definition of Aggression).
63. For the definition of the crime of aggression ibid., and also *see supra* Chapter 2, notes 26–9 and accompanying text, and the following note.
64. The jurisdiction of the ICC over the crime of aggression is subject to the condition that is indicated in Article 5 (2) of its Statute as follows: 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.' The Preparatory Commission for the International Criminal Court has been working on this issue and is also providing proposals pursuant to resolution F of the Final Act for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. For the definition and elements of the crime of aggression, *see Report of the Preparatory Commission for the International Criminal Court, Part II, Proposals for a Provision on the Crime of Aggression,* UN Doc. PCNICC/2002/2/Add.2 (24 July 2002). And also for the historical review of developments relating to aggression, *see* UN Doc. PCNICC/2002/WGCA/L.1 and Add. 1.
65. Art. 5 (1) of the ICC Statute.
66. Bassiouni, '*International Crimes …*', pp. 68, 72; Ragazzi, pp. 74–91.

Other International Humanitarian and Human Rights Law Instruments

In terms of implementing the principle of individual criminal responsibility at the international level some other international humanitarian and human rights law instruments have a special place. Some of them can be indicated as follows: The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,[67] The Convention on the Suppression and Punishment of the Crime of Apartheid,[68] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[69] and the Draft Code of Crimes against the Peace and Security of Mankind.[70]

In addition to providing individual criminal responsibility, those conventions together with other international human rights instruments such as the European Convention on Human Rights[71] and the American Convention on Human Rights[72] play a central role for facilitating the work of the *ad hoc* tribunals with regard to the definition of crimes. In the following chapters, under the substantive law of the *ad hoc* tribunals, this concept and its importance will be examined in detail.

The Practice of the *Ad Hoc* Tribunals and Their Contribution to International Humanitarian Law and Their Impact on the ICC

Although the Charter of the Nuremberg Tribunal and its Judgement can be regarded as the most authoritative legal source for the enforcement of individual criminal responsibility at the international level, they cannot be accepted as truly established precedents for the following reasons: The

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67. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (26 November 1968), 754 UNTS 73, reprinted in (1969), 8 *ILM*, 68. Article 2 provides: 'Convention shall apply to representatives of the state authority and private individuals …'.
68. The Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973), reprinted in (1974), 13 *ILM*, 50. Article 3 states that: 'Individual criminal responsibility shall apply ... to individuals, members of organisations and institutions and representatives of the State.' As is well known, although this Convention was adopted for events in South Africa, the Convention does not mention the State of South Africa, and it was drafted in general terms so as to be applicable to other cases (Sunga, p. 76). The recent development in relation to this concept is the inclusion of the crime of apartheid as a crime against humanity in the Statute of the ICC. *See* Art. 7 (1) (j) and 7 (2) (h) of the ICC Statute.
69. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), (1985), 24 *ILM*, 535; (1984), 23 *ILM*, 1027. Article 2 (3) of the Convention provides individual criminal responsibility as follows: 'An order from a superior officer or a public authority may not be invoked as a justification of torture.' This Article is similar to Article 8 of the Charter of the Nuremberg Tribunal which states that '[t]he fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility'. The significance of the Convention lies in providing a 'general international recognition that rules extending international responsibility to individuals are required to suppress torture' (Sunga, p. 86).
70. ILC's Draft Code of Crimes Against the Peace and the Security of Mankind of 1996, in Articles 2 (1) and 3, provide individual responsibility, respectively, as follows: 'A crime against the peace and security of mankind entails individual responsibility', 'An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment.'
71. European Convention on Human Rights (1950), 213 UNTS 221.
72. American Convention on Human Rights (1969), 1144 UNTS 123; (1970) 9 *ILM* 673; (1971) 65 *AJIL,* 679.

election of judges of the Nuremberg Tribunal, trial proceedings (in particular, there was no appeal), and the application of the principle of individual criminal responsibility were one-sided, in other words, it was the judgement enforced by the Allied Powers on the Axis countries.[73] However, the Judgement of the Nuremberg Tribunal and other post-Second World War war crimes trials may nevertheless provide guidance for the *ad hoc* tribunals. On this background, the establishment of the ICTY and the ICTR by the UN Security Council on behalf of the international community, the election of judges from neutral countries (from all over the world), trial proceedings (recognising the rights of the accused to have a fair trial together with an appeal stage) made these *ad hoc* tribunals the strongest authority for rightly implementing the concept of individual criminal responsibility in international law. For these reasons, the practice of the ICTY and the ICTR plays a crucial role for the interpretation and application of the principle and will also affect the operation of the ICC.

According to Article 5 and Article 6 of the Statutes of the ICTR and the ICTY (respectively) the personal jurisdiction of the *ad hoc* tribunals is limited to natural persons. This is in compliance with the jurisdiction of the Nuremberg Tribunal;[74] with a number of resolutions of the Security Council affirming that persons responsible for serious violations of international humanitarian law are individually responsible for them;[75] with the *Report of the Secretary-General*;[76] and also perhaps most importantly, it is consistent with the personal jurisdiction of the ICC[77] which reflects the highest level of consensus which the international community has reached in international humanitarian law.

Unlike the Nuremberg Tribunal which was seeking for the nationality of the accused[78] to hold individuals criminally responsible for the crimes, the jurisdiction of the ICTY and the ICTR gives power to *ad hoc* tribunals to try any individual, irrespective of their nationality, charged with the crimes enumerated in the Statutes of the Tribunals. The regulation of the Statutes of the *ad hoc* tribunals with regard to being unlimited in character for personal jurisdiction reflects the development of international humanitarian law and is in compliance with the principle of equality of justice and the purpose of the establishment of the ICTY and the ICTR[79] ('to do

73. *See supra* Chapter 2, note 18 and accompanying text.
74. Article 6 of the Charter of the Nuremberg Tribunal states that: '… *the power to try and punish persons* who, acting in the interests of the European Axis countries …' (emphasis added).
75. SC Res. 764 (1992) (13 July 1992); SC Res. 771 (1992) (13 August 1992); SC Res. 808 (1993) (22 February 1993); SC Res. 827 (1993) (25 May 1993); SC Res. 935 (1994) (1 July 1994); SC Res. 955 (1994) (8 November 1994).
76. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* (hereinafter *Secretary-General's Report*). '[T]he International Tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law … the ordinary meaning of the term "persons responsible for serious violations of international humanitarian law" would be natural persons to the exclusion of judicial persons' (*Secretary-General's Report*, para. 50).
77. Article 25 (1) of the ICC Statute provides that: 'The Court shall have jurisdiction over natural persons …'.
78. Article 6 of the Nuremberg Charter states: '… persons who, acting in the interests of the *European Axis countries* …'.
79. Morris, V. and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Vol. I (Irvington-on-Hudson, New York: Transnational Publishers, 1995), pp. 90–1.

justice, to deter further crimes, and to contribute to the restoration and maintenance of peace').[80]

On the other hand, while the Nuremberg Charter recognised the concept of individual criminal responsibility based on membership of a group or organisation – in other words group criminal responsibility[81] – for the first time at international law level – the Statutes of *ad hoc* tribunals (and also the Statute of the ICC) do not include such a provision, on the ground that imposing criminal responsibility on groups or organisations is not clear in international law[82] and the criminal acts enumerated in the Statutes of the *ad hoc* tribunals are carried out by natural persons, not by associations or organisations.[83] However, this view should not be regarded as in compliance with the situations, in particular, which occurred in the former Yugoslavia where a great many crimes were carried out by paramilitary groups[84] that encouraged their members to commit atrocities and expanded the conflicts to include civilians. Moreover, it does not reflect the customary international law as far as the practice of the Nuremberg Tribunal and the Judgement of this Tribunal that are creating the main guidance for the ICTY and the ICTR are concerned. For these reasons, the Statute of the ICTY (also the Statute of the ICTR and of the ICC) should have included such a provision similar to the Nuremberg Charter establishing individual criminal responsibility relying on membership of a criminal group or organisation as long as the person is aware of the criminal purpose or acts of the organisation. In the former Yugoslavia case there is no doubt that paramilitary groups fall within this definition. Despite this omission in the Statute of the ICTY, in practice, at least, the ICTY should regard being a member of a criminal organisation (paramilitary group) and taking part in criminal acts of this organisation as an aggravating factor while deciding how long a sentence the accused should serve in prison. By means of this application, one of the realities of international humanitarian law may not become ignored or avoided.

Having briefly examined the concept of personal jurisdiction of the ICTY and the ICTR, the following section will consider the principle of individual criminal responsibility and the extent to which an individual can be held criminally responsible in the light of the practice of the *ad hoc* tribunals.

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80. *See supra* Chapter 1, note 109 and accompanying text.
81. Morris and Scharf, p. 94; Morris, V. and M.P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. I (Irvington-on-Hudson, New York: Transnational Publishers, 1998) (hereinafter *the ICTR*), pp. 268–9; Ratner and Abrams, pp. 14–15; Article 6 of the Nuremberg Charter provides: 'to try and punish persons … whether as individuals or as members of organisations …', Article 9 of the Nuremberg Charter provides: '… any individual member of a group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation'.
82. Ratner and Abrams, p. 15.
83. *Secretary-General's Report*, para. 51.
84. According to the *Final Report of the Commission of Experts*, there were 45 reported special forces (paramilitary groups) 'which usually operate under the command of a named individual and apparently with substantial autonomy …' (*Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, para. 121). Among these paramilitary groups, two especially, that is, Arkan's 'Tigers' and e elj's 'White Eagles' (also referred to as 'Chetniks') committed some of the worst violations of international humanitarian and human rights law (*Final Report*, para. 121).

Individual Criminal Responsibility under Article 7 (1) of the ICTY Statute and Article 6 (1) of the ICTR Statute

Article 7 (1) of the ICTY Statute and Article 6 (1) of the ICTR Statute provide that: 'A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime ... shall be individually responsible.'

At first glance, it can be seen that these Articles reflect a broad approach to the occasions in which an individual can be held criminally responsible for his/her participation in the commission of an offence. The purpose of this type of regulation is to ensure that all those who take part in the planning, preparation or execution of serious violations of international humanitarian law, in other words, all those who contribute to the commission of the violation are individually responsible.[85] More clearly, under Articles 7 (1) and 6 (1) of the ICTY and the ICTR Statutes, the principle of individual criminal responsibility is not only just for the persons who directly committed the crime (as principal), but also for the persons who facilitated the commission of the offence in a way indicated in the Articles mentioned (as participant).

As indicated above, the concept of individual criminal responsibility for serious violations of international humanitarian law (in particular, responsibility for war crimes, genocide, crimes against humanity and the crime of aggression) has reached the level of *jus cogens*. For the persons who directly committed the offence (as principal) the rule is clear enough in the customary international and conventional law rules, but for the other persons who facilitated the commission of the crime, the principle of individual criminal responsibility and its application is more difficult: what is the degree of participation to be held criminally responsible? In this regard, as will be mentioned below, the Nuremberg and post-Second World War war crimes trials failed to reach a specific criterion, although instructive examples are available. For this reason, it is important to examine the application of the principle of individual criminal responsibility under Articles 7 (1) of the ICTY and 6 (1) of the ICTR Statutes in order to draw the line for the scope of individual responsibility and also for setting up general criteria making clear the degree of participation to be considered as individually responsible in international humanitarian law.

The Elements of the Principle of Individual Criminal Responsibility

The conditions of the principle of individual criminal responsibility under Article 7 (1) of the ICTY Statute were examined in the case of *Prosecutor v. Dusko Tadic*[86] by the Trial Chamber of the ICTY. As indicated earlier, the notion that an individual who committed the offence can be held criminally responsible for violations of international humanitarian law was regulated in the Nuremberg and Tokyo Charters and applied by these

85. *Secretary-General's Report*, para. 54; Morris and Scharf, p. 93; Morris and Scharf, *the ICTR*, p. 233.
86. *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T (7 May 1997) (hereinafter *Tadic Case, Judgement*).

International Military Tribunals.[87] In addition to the direct commission, the concept of individual criminal responsibility and accountability for assisting, aiding, abetting or in any way participating in the commission of a crime has also become a part of international customary law rule.[88] To reach this conclusion, the Trial Chamber rightly referred to conventional and customary law rules: Article 4 (1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment using the phrase 'complicity or participation in torture', Article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid using the phrase 'participate in, directly incite, or conspire in, abet, encourage or cooperate in the commission of the crime' were cited by the Chamber.[89]

The principle of criminal responsibility for those persons who participated in a crime was applied by the post-Second World War war crimes trials. In particular, two of these cases were referred by the Trial Chamber:[90] *The Trial of Wagner and Six Others*[91] and *the Trial of Martin Gottfried Weiss and 39 Others (The Dachau Concentration Camp Trial).*[92]

Having indicated the customary international nature of the principle of individual criminal responsibility for participation, the Trial Chamber discussed in detail the elements of such responsibility in light of the Nuremberg war crimes trials (which failed to set up criteria in this context) and conventional law rules in order to reach a general criterion. According to the Chamber, two conditions have to be met at the same time for individual culpability. Firstly, 'there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or

87. *See supra* notes 15–16 and accompanying text; Art. 6 of the Nuremberg Charter; Article 2 (2) of the CCL No. 10 also includes similar provision. The Trial Chamber in the *Tadic Judgement*, having indicated the developments after the First World War, in this sense, cited and accepted these provisions as a legal base for individual responsibility as a principal. *See* paras. 663–5.
88. Trial Chamber, *Tadic Case, Judgement,* para. 669.
89. Ibid., para. 666. Moreover, Article III of the Convention on the Prevention and Punishment of Genocide recognises the culpability of individuals who take part in the following acts: conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, complicity in genocide. For the practice of the *ad hoc* tribunals in relation to the establishment of individual criminal responsibility for the crime of genocide, its significance and different aspects from the regulation of the ICC Statute, *see infra* Chapter 5, p. 227, Individual Criminal Responsibility for the Crime of Genocide. Article 2 of the ILC Draft Code of Crimes Against the Peace and Security of Mankind, uses almost the same phrases in this respect, some of them are: 'order, … knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission … planning or conspiring … directly and publicly incite[ment] …'; Article 25 of the ICC Statute also includes similar provisions.
90. Trial Chamber, *Tadic Case, Judgement,* paras. 667–8.
91. *Trial of Robert Wagner, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and Six Others* (Permanent Military Tribunal at Strasbourg, 23 April–3 May 1946, and Court of Appeal, 24 July 1946), (1948), III *Law Reports of Trials of War Criminals* (hereinafter *Law Reports*), p. 23. In this case complicity was the base for criminal responsibility (pp. 40–2).
92. *The Dachau Concentration Camp Trial, Trial of Martin Gottfried Weiss and Thirty-Nine Others* (General Military Government of the United States Zone, Dachau, Germany, 15 November–13 December 1945), (1949), XI *Law Reports*, p. 5. In this case, such phrases as 'acting in pursuance of a common design to commit acts', 'wilfully, deliberately and wrongfully aid, abet and participate in' were used as a legal base for criminal responsibility (p. 5).

otherwise aiding and abetting in the commission of a crime'. Secondly, there is a requirement of 'participation in that the conduct of the accused contributed to the commission of an illegal act'.[93]

The Mental Element (Mens Rea)

According to the Trial Chamber in the *Tadic Case*, in order to hold an individual criminally responsible there must be an intent (mental element, *mens rea*), 'which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime'.[94] To reach this conclusion, the Trial Chamber examined the Second World War war crimes trials and cited some of them such as the cases of *Werner Rohde and Eight Others,*[95] *the Trial of Joseph Altstotter and Others (Justice Case)*[96] and *the Trial of Hans Alfuldisch and Six Others (the Mauthausen Concentration Camp Trial, Mauthausen Case)*[97] in which for the element of intent, knowledge was accepted as sufficient to be held individually criminally responsible.

The Physical Element (Actus Reus)

The other requirement of individual criminal responsibility is the physical element (*actus reus*), which means that there must be a participation that contributed to the commission of the crime. In this context, the Trial Chamber discussed the concepts of direct contribution and the required extent of participation to be held criminally culpable in light of the war crimes trials.[98] In this sense, the participation must directly affect the commission of the crime when it is combined with the requirement of knowledge (intent). The notion of direct contribution should not be understood as requiring that the participation must be in the physical commission of the illegal act.[99] For example, the presence of a person at the scene of the crime[100] – providing that there is also *mens rea* – is enough to be regarded as individually culpable. The other example indicating the direct contribution to the commission of a crime can be found in the *Trial of Bruno Tesch and*

93. Trial Chamber, *Tadic Case, Judgement,* para. 674.
94. Ibid.
95. *Trial of Werner Rohde and Eight Others,* (British Military Court, Wuppertal, Germany, 29 May–1 June 1946), (1948), V *Law Reports*, p. 54.
96. *Trial of Joseph Altstotter and Others (The Justice Trial)* (United States Military Tribunal, Nuremberg, 17 February–4 December 1947), (1948), VI *Law Reports*, p. 1, at 88.
97. In the *Dachau Camp Case*, the related part of the *Mauthausen Case* was cited in (1949), XI *Law Reports*, p. 15.
98. Trial Chamber, *Tadic Case, Judgement*, paras. 678–87.
99. Ibid., para. 679; and also for the interpretation of this principle in the case of *Furundzija, see infra* notes 124–5 and accompanying text.
100. *Trial of Franz Schonfeld and Nine Others* (British Military Court, Essen, 11–26 June 1946), (1949), XI *Law Reports*, p. 64, at 70; '… presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it' (Trial Chamber, *Tadic Case, Judgement*, para. 689).

Two Others (Zyklon B Case).[101] In this case, the suppliers of poison gas were found guilty on the grounds that they had knowledge that the gas was to be used for killing human beings and without the supply of gas, the killings would not have been possible in that manner. Thus the accused participated directly in contributing to the commission of the act of mass extermination.[102] With regard to the required extent of participation in other words, the amount of assistance to be held responsible for taking part in a crime needed to be interpreted by the Trial Chamber, since the post-Second World War war crimes trials did not set up specific criteria, but they can guide the *ad hoc* tribunals in providing examples.[103] In this respect, some cases like the *Dachau Camp Case,*[104] *the Mauthausen Case,*[105] *the Trial of Otto Sandrock and Three Others (Almelo Case)*[106] and the case of *Gustav Becker, Wilhelm Weber and 18 Others*[107] were cited by the Trial Chamber to indicate the required extent of participation to be held criminally culpable.[108]

Lastly, in this context, one more point relating to the degree of assistance should be noted which is that the assistance must contribute directly and substantially affect the commission of the illegal act.[109]

The Significance of the *Tadic Judgement* in International Humanitarian Law

The significance or contribution of the *Tadic Judgement* in international humanitarian law and its possible impact on the ICC with regard to interpreting and applying the concept of individual criminal responsibility for

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101. *Trial of Bruno Tesch and Two Others (the Zyklon B Case)* (British Military Court, Hamburg, 1–8 March 1946), (1947), I *Law Reports*, p. 93, at 94, 101.
102. Trial Chamber in the *Tadic Judgement* referred to the *Zyklon B Case* as an example to explain the customary international nature of the concept of direct contribution in para. 680.
103. Trial Chamber, *Tadic Case, Judgement*, para. 681.
104. *The Dachau Camp Case* in which the accused was charged with acting in pursuance of a common design to participate in the acts in a form of encouraging, aiding and abetting (in (1949), XI *Law Reports*, p. 13).
105. *The Mauthausen Concentration Camp Case* (General Military Government Court of the US Zone, Dachau, Germany, 29 March–13 May 1946), (1949), XI *Law Reports*, p. 15.
106. *Trial of Otto Sandrock and Three Others (The Almelo Trial)* (British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24–26 November 1945), (1947), I *Law Reports*, p. 35. In this case, staying in the car to prevent any person from disturbing the perpetrators killing the victims, presence, knowledge and intent to assist were regarded as a degree of participation to be held criminally responsible (p. 43).
107. *Trial of Gustac Becker, Wilhelm Weber and 18 Others* (Permanent Military Tribunal at Lyon, Concluded 17 July 1947), (1948), VII *Law Reports*, p. 67 at 70–1. In this case, complicity by means of having caused the arrest, detention and torture of innocent people by virtue of denunciation was accepted as an amount of assistance for the crimes committed by other perpetrators (p. 71). The importance of this case lies in the fact that to be criminally responsible for participation in a crime, even the presence may not be necessary, and that the act of commission of the crime and the act facilitating or contributing to the commission may be geographically and temporarily distanced from each other (Trial Chamber, *Tadic Case, Judgement,* para. 687).
108. Trial Chamber, *Tadic Case, Judgement*, paras. 682, 684–5, 687.
109. Ibid., para. 688. To reach this conclusion the Chamber accepted the ILC Draft Code as reflecting the customary nature of the Nuremberg war crimes trials. According to the ILC Draft Code '[a]n individual shall be responsible for a crime … if he knowingly aids, abets or otherwise assists, *directly and substantially,* in the commission of such a crime …', (Art. 2 (3) (d) emphasis added). For the discussion of this regulation *see infra* notes 122–6 and accompanying text.

international crimes lies in the creation of specific criteria that includes the aforementioned elements of participation in a crime to be held individually responsible. This can be quoted as follows:

> the accused [any individual] will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violated international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.[110]

There is no doubt that this achievement creates a major step towards the development of international humanitarian law and also fulfils one major gap in international humanitarian law by virtue of providing specific criteria for establishing individual criminal responsibility, since the post-Second World War war crimes trials failed to establish such criteria to hold individuals, those who contributed to the commission of the crime, criminally responsible.

The practice of the ICTY with regard to establishing specific criteria to help define individual criminal responsibility either as a perpetrator or as a participant in the *Tadic Judgement* has already taken its place as creating a precedent or guidance for the following cases of the International Tribunals.[111] By virtue of application or practice of the *ad hoc* tribunals, the scope of individual criminal responsibility has been becoming clearer day after day. In this context, the case of *Prosecutor v. Anto Furundzija*[112] should be briefly indicated in order to prove that even the application by the Trial Chamber of the ICTY in the *Tadic Judgement* may cause some misinterpretation or misunderstanding in the customary international law rules.

The Concept of 'Aiding', 'Abetting' in International Humanitarian Law

Having decided that under Article 7 (1) of the Statute, the planning, ordering or instigating of rape or sexual assault or otherwise aiding and abetting in their perpetration are prohibited as well as the commission of these acts,[113] the Trial Chamber in the *Furundzija Case* dealt, in detail, with the definition or elements of 'aiding, abetting' as indicated in Article 7 (1) of the ICTY Statute.

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110. Trial Chamber, *Tadic Case, Judgement*, para. 692.
111. *Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as 'Pavo', Hazim Delic, Esad Landzo also known as 'Zenga'*, Case No: IT-96-21-T (16 November 1998) (hereinafter *Celebici Camp Case, Judgement*), para. 329; *The Prosecutor v. Jean-Paul Akayesu, Judgement*, Case No: ICTR-96-4-T (2 September 1998) (hereinafter *Akayesu Case, Judgement*), para. 6.2, 229–30; *Prosecutor v. Clement Kayishema and Obed Ruzindana, Judgement*, Case No. ICTR-95-1-T (21 May 1999) (hereinafter *Kayishema and Ruzindana Case, Judgement*), para. 199; *Prosecutor v. Zlatko Aleksovski, Judgement* (25 June 1999) (hereinafter *Aleksovski Case, Judgement*), para. 60.
112. *Prosecutor v. Anto Furundzija, Judgement*, Case No: IT-95-17/1-T10 (hereinafter *Furundzija Case, Judgement*), (10 December 1998).
113. Trial Chamber, *Furundzija Case*, *Judgement*, para. 187.

Before examining the practice of the ICTY in the *Furundzija Case* and its contribution to international law, one issue relating to the drafting of the Statutes of *ad hoc* tribunals needs to be made clear. Article 6 (1) of the ICTR and 7 (1) of the ICTY Statutes provide for the criminal responsibility of a person who '… or otherwise *aided and abetted* in the planning, preparation or execution of a crime …' (emphasis added). When literally interpreted the terms 'aiding and abetting' may seem to be synonymous, although there is a big difference between these two concepts. Aiding indicates giving assistance to someone, while abetting may involve facilitating the commission of an act by being sympathetic to it.[114] In other words, for example, providing means for the commission of a crime can be considered as aiding, not abetting; similarly, moral encouragement, for example being present at the scene of the commission of a crime can be considered as abetting, but not aiding. The issue of 'whether the individual criminal responsibility provided for Article 6 (1) is incurred only where there was aiding and abetting at the same time' first arose in the *Jean-Paul Akayesu Case* before the ICTR, and the Chamber rightly concluded that either aiding or abetting alone is sufficient to be held criminally responsible.[115] As can easily be inferred from the examples already mentioned above, the opinion of the Trial Chamber of the ICTR and its interpretation reflect the customary international law rule on the ground that the latest two international instruments – the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, and the Statute of the ICC – both regarded as the most authoritative international legal documents constituting evidence of customary international law, reflecting, clarifying or crystallising them, do not use the terms 'aiding and abetting' together; instead, these words are separated by a comma as follows: 'aids, abets or otherwise assists …'.[116] For these reasons, the Statutes of the *ad hoc* tribunals should have been drafted as the 1996 Draft Code and the Statute of the ICC were drafted, or the Statutes should have used the word '*or*' instead of the word *'and'* between aiding and abetting. Despite the failure of the Statutes, the practice of the *ad hoc* tribunals and their interpretation and application of the customary international law rules indicate the highest level that can be considered as beyond the literal meaning of their Constitutions.

The Elements of 'Aiding', 'Abetting'

Having looked at this fact, the importance of the *Furundzija Case* will now be discussed so as to underpin some significant differences from the *Tadic Judgement*. The importance of this case in international humanitarian law lies in the examination of the nature or elements of aiding, and/or abetting in relation to rape, sexual assault and torture.

The Mental Element (*Mens Rea*)

For the requirement of *mens rea* (mental element) in the context of aiding, abetting the crime, the Trial Chamber concluded that mere knowledge that

114. Trial Chamber, *Akayesu Case, Judgement*, para. 6.2.242.243.
115. Ibid.
116. Art.2 (3) (d) of the 1996 ILC Draft Code; Art. 25 (3) (c) of the ICC Statute.

assists the principal in the commission of the crime is sufficient and that it is not necessary for the aider or abettor to share the *mens rea* of the perpetrator to be held criminally responsible under Article 7 (1) of the ICTY Statute.[117] As clearly understood from this interpretation, knowledge is different from intent in the sense of positive intention to commit the crime. This slight but important distinction can be very significant in establishing individual criminal responsibility. Article 2 (3) (d) of the ILC's Draft Code of Crimes Against the Peace and Security of Mankind that uses the phrase '*knowingly* aids, abets or otherwise assists …' (emphasis added) proves this fact.[118] However, in the *Tadic Judgement,* the terms 'intent' and 'knowledge' are used misleadingly as synonymous,[119] although both decisions reached the same standard.[120] Similarly, Article 30 of the ICC Statute uses these terms together, as, 'intent and knowledge', but when Article 30 is carefully examined, it is understood that this regulation does not create any controversy in terms of reflecting customary international law rules,[121] as long as Article 30 (2) (a) is interpreted as reflecting the mental element as intent, and Article 30 (2) (b) the phrase 'that person means to cause that consequence', and Article 30 (3) is interpreted as demonstrating the mental element as knowledge. Although this way of interpretation is consistent with the customary international law practice, the way of drafting in Article 30 (1) by virtue of using the wording 'intent and knowledge' together, instead of using a comma or the word 'or' to divide them, should be considered as unfortunate since it may cause misunderstanding, leading to a misinterpretation of the Statute; these two concepts may be looked for together before an individual can be held responsible, not allowing for differences in certain situations.

The Element of *Actus Reus*

For the requirement of physical element (*actus reus)* of aiding, abetting a crime, the Trial Chamber held that 'the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the

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117. Trial Chamber, *Furundzija Case, Judgement,* paras. 236, 245. To reach this conclusion the Trial Chamber referred to some cases including *the Tadic Judgement, the Zyklon B* and *the Schonfeld* cases. *See* paras. 237–41.
118. Trial Chamber in the *Furundzija Case* referred to the 1996 ILC Draft Code and accepted it as a legal base for its view, *see* paras. 242–3.
119. Trial Chamber, *Tadic Case, Judgement*, paras. 675–7.
120. Trial Chamber, *Furundzija Case, Judgement*, para. 247.
121. Article 30 of the ICC Statute (mental element) provides:

> '1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purposes of this article, a person has intent where:
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.'

crime'.[122] This conclusion is not completely consistent with the decision held in the *Tadic Judgement* as specific criteria for the application of Article 7 (1) of the ICTY Statute, for the following reasons: In the *Tadic Judgement* the phrase 'directly and substantially' is used (maybe under the effect of the 1996 ILC Draft Code regulation)[123] in explaining the nature of the participation or in determining the degree of assistance to be held criminally responsible. The Chamber in the *Furundzija Case* did not use the term 'directly' on the basis that 'the term "direct" [may qualify] the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime'.[124] Similarly, the Statute of the ICC does not use the word 'direct' in aiding or abetting the crime[125] in order to include either physical forms or the form of moral support in aiding, abetting as rightly concluded by the Trial Chamber in the *Furundzija Case*. Although at first glance, both decisions may seem to be controversial, in fact they are not. This is because the Trial Chamber in the *Tadic Judgement* held that 'aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support'[126] that is entirely in compliance with the *Furundzija Case*. However, the view deployed by the Chamber in the latter case should be regarded as more convenient than the first one on the ground that this way of setting up criteria prevents the future application of the concept of individual criminal responsibility by the *ad hoc* tribunal from misleading or misinterpreting the notion, and also is consistent with the ICC Statute reflecting the customary international law as the most authoritative instrument that the international community has reached.

The Distinction between the Concept of 'Aiding', 'Abetting' and Co-perpetration

In addition to analysing the elements of aiding, abetting, one of the other important contribution of the *Furundzija Case* to international humanitarian law can be seen in distinguishing the concepts of aiding, abetting from

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122. Trial Chamber, *Furundzija Case, Judgement,* para. 235.
123. Article 2 (3) (d) of the 1996 ILC Draft Code states 'knowingly aids, abets or otherwise assists, *directly and substantially'* (emphasis added).
124. Trial Chamber, *Furundzija Case, Judgement*, para. 232; '… assistance need not be tangible. In addition, assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal' (para. 209). Similarly, in the case of *Jean-Paul Akayesu, Judgement,* the Trial Chamber of the ICTR found that the position of the Accused as a major facilitated the commission of crimes including rape and sexual violence in the way of aiding, abetting. 'The Tribunal finds, under Article 6 (1) of its Statute, that the Accused aided and abetted the … acts of sexual violence, by allowing them to take place on or near the premises … by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place' (para. 7.7.141).
125. Article 25 (3) (c) and (d) of the ICC Statute provides: '3. … a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: … (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. …'.; Trial Chamber, *Furundzija Case, Judgement,* paras. 231–2.
126. Trial Chamber, *Tadic Case, Judgement*, para. 689.

the case of co-perpetration consisting of a group of persons pursuing a common design to commit crimes.[127] The Trial Chamber, to indicate the difference between these two concepts, referred to the *Dachau Concentration Camp Case*[128] in which the legal base for the prosecution was that all accused who held some position in the hierarchy running the camp, had 'acted in pursuance of a common design' to kill and mistreat prisoners, in other words to commit war crimes.[129] In this case, any degree of participation in the enterprise was regarded sufficient to be held criminally responsible. The same distinction was also made in the Statute of the ICC between participation in a common criminal plan or enterprise and aiding, abetting a crime.[130] By means of this regulation 'two separate categories of liability for criminal participation appear to have crystallised in international law – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.[131]

The decision of the Appeals Chamber in the *Furundzija Case*[132] should also be noted. In this case, the Chamber unanimously dismissed

127. Trial Chamber, *Furundzija Case, Judgement*, para. 210.

128. *See supra* note 104.

129. Ibid.

130. Article 25 (3) (d) of the ICC Statute states that a person who 'contributes to the commission or attempted commission of ... a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group … (ii) Be made in the knowledge of the intention of the group to commit the crime' shall be criminally responsible and liable for punishment for a crime.

Article 25 (3) (c) of the ICC Statute states that a person who '[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission' shall be criminally responsible and liable for punishment for a crime.

In the practice of the *ad hoc* tribunals, the notion of common purpose (participating in a common criminal purpose) was examined, in detail, by the Appeals Chamber of the ICTY in the *Tadic Judgement* in relation to the crime of murder (Appeals Chamber, *Prosecutor v. Dusko Tadic, Judgement,* Case No. IT-94-1-A, 15 July 1999). The Appeals Chamber in its Judgement focused on the concept of acting in pursuance of a common purpose or design to commit a crime that consists of three different categories of the notion of common purpose; (a) 'The first … category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention', (paras. 196-201). (b) Concentration camp cases (paras. 202–3). (c) 'The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose' (paras. 204–19). Having examined all three different aspects of the concept of common purpose, the Appeals Chamber indicated the differences between acting in pursuance of a common purpose or design to commit a crime, and aiding or abetting a crime (para. 229).

In the light of this fact, it can be concluded that the International Tribunal, by way of the practice of the Trial Chamber in the *Furundzija Judgement* and of the Appeals Chamber in the *Tadic Judgement*, clarified one of the major aspects of inter-national humanitarian law, which is the concept of common purpose. The way adopted by the Appeals Chamber should be seen as making clearer the differences between acting in pursuance of a common purpose or design to commit a crime, and aiding or abetting a crime than the *Furundzija Judgement*. More importantly, the view taken by the Appeals Chamber will create a precedential value for the ICC in its future work since the ICC Statute explicitly deploys the phrase 'common purpose' as a legal ground for establishing individual criminal responsibility.

131. Trial Chamber, *Furundzija Case, Judgement,* para. 216. For the application of these two separate categories of participation (as a perpetrator or co-perpetrator and as an aider and abettor) to torture, *see* paras. 250–7.

132. Appeals Chamber, *Prosecutor v. Anto Furundzija, Judgement,* Case No. IT-95-17/1-A (21 July 2000).

Furundzija's appeal and affirmed convictions and sentence that was imposed by the Trial Chamber.[133] The significance of this ruling lies in the confirmation of the interpretation and application of the rules or principles concerning individual criminal responsibility for the co-perpetrator of torture as a violation of the laws or customs of war and aider and abettor of outrages upon personal dignity, including rape, as a violation of the laws or customs of war.

The Significance of the *Furundzija Judgement* in International Humanitarian Law

In light of the explanation above, the contribution of the *Furundzija Case* to international humanitarian law with regard to analysing the concept of aiding, abetting in a crime is as follows:

> [For] the legal ingredients of aiding and abetting in international criminal law to be the following the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.[134]

Concluding Remarks

The view deployed in the *Furundzija Case* by the Trial Chamber of the ICTY reflects the customary international law and conventional law rules more clearly than the *Tadic Judgement*. The impact of the ICC Statute can also be witnessed in the practice of the *ad hoc* tribunals,[135] in particular with regard to distinguishing the concepts of co-perpetrator and aider or abettor as being two separate categories of responsibility for participation in a crime.

However, it should not be forgotten that the *Tadic Judgement* must be regarded as creating general criteria and that it does not cause any controversy with the *Furundzija Judgement* on the basis that the *Furundzija Case* can be considered as an interpretation and application of the notions of aiding, abetting in torture, rape, sexual assault. The significance of the

133. Press Release, 'Appeals Chamber Unanimously Dismisses Furundzija's Appeal and Affirms Convictions and Sentences', The Hague, JL/P.I.S./519-e (July 2000).
134. Ibid., para. 249.
135. Although in our study, the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and its possible effect on the ICC are discussed, surprisingly, the impact of the Statute of the ICC on the practice of the *ad hoc* tribunals can also be examined. That is why concluding that the Statute of the ICC has been interpreted by and applied to the *ad hoc* tribunals, even before the ICC, should not be regarded as wrong from the point of view of international humanitarian law practice. For examples, *see* paras. 216, 227, 231, 244 of the *Furundzija Judgement*.

Furundzija Judgement may be found in the way that attention is drawn to the possibility of misunderstanding, misinterpreting or misleading the *Tadic Judgement* when its criteria are applied by the *ad hoc* tribunals or by the ICC in their future cases. In particular, the concept of *intent, knowledge* for the requirement of *mens rea*, the concept of *directly*, *substantially effect* for the requirement of *actus reus* need not be together to hold an individual criminally responsible for participation in a crime at the international level.

For the reasons explained above, and in light of the decisions held by the *ad hoc* tribunals, general criteria to find an individual criminally culpable for participation in a crime can be drawn as follows:

Any individual is criminally responsible for any conduct where it is determined that he/she *intentionally or knowingly* participated in the commission of an illegal act that violates international humanitarian law and if his/her participation *substantially* affected the commission of that illegal act through supporting the actual commission before, during, or after the incident.

Individual Criminal Responsibility under Article 7 (2) of the ICTY Statute and Article 6 (2) of the ICTR Statute

Articles 7 (2) of the ICTY and 6 (2) of the ICTR Statutes provide that: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

The purpose of the inclusion of this provision in the Statutes of the *ad hoc* tribunals is to ensure the individual criminal responsibility for the persons who acted in pursuance of the authority of the State and to prevent them from using their official position as a defence not to be held criminally culpable.[136] This is consistent with the international practice, international customary law as applied by the International Military Tribunals after the Second World War.[137] It is also consistent with the Statute of the ICC which indicates that it will be applied equally to all persons without any distinction based on official capacity.[138] The enforcement of individual criminal

136. 'The Statute should … contain provisions which specify that a plea of Head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment' (*Secretary-General's Report*, para. 55).

137. Article 7 of the Nuremberg Charter states that: 'The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'. Article 2 (4) (a) of the CCL No. 10 has the same provision.

138. Article 27 of the ICC Statute (Irrelevance of Official Capacity) provides:

> '1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

responsibility for persons who held official position in a State and non-recognition of the concept of sovereign immunity as a defence is crucial in order to implement international humanitarian law. This is because, if the notion of sovereign immunity had been considered as a defence – for example, Heads of States had enjoyed sovereign immunity, other officials (military or civilian) of lesser rank could have claimed that they acted in accordance with superior orders, in consequence, it would not have been possible to enforce international humanitarian law.

In particular, the recognition and enforcement of individual criminal responsibility for State officials either as Head of State or Government or government senior officials plays a central role in preventing future crimes. In this sense, with regard to the crime of aggression, individual responsibility of Head of State, government officials and persons acting in official capacity is crucial for preventing human beings from being faced with violations of international humanitarian law since this is the crime which is the mother or source of other international crimes and can mainly be committed by persons who hold an official position. As indicated earlier, its non-inclusion in the *ad hoc* tribunals' Statutes is unfortunate, but this does not mean that those persons cannot be held individually criminally responsible for crimes such as war crimes, the crime of genocide and crimes against humanity. When the practice of *ad hoc* tribunals, up to now, is examined, the best examples can be found in the practice of the ICTR. In the case of *Prosecutor v. Jean Kambanda*,[139] the accused (Jean Kambanda) was the Prime Minister of Rwanda when the horrible atrocities (genocide) occurred in Rwanda. He was charged with genocide and crimes against humanity and was found guilty of participating in various ways in such crimes. For instance, he was presiding over meetings of the Rwandan Council of Ministers at which massacres against the Tutsis were discussed, he was using the media to incite the people to commit massacres against Tutsi and moderate Hutu population.[140] The significant point in this case is that for international crimes the position held in the Government administration cannot create a defence, even a mitigating factor; moreover, it can be considered as an aggravating factor on the basis that these officials are responsible for the maintenance of peace and security and their participation in any form of crime as indicated in Articles 6 (1) of the ICTR and 7 (1) of the ICTY Statutes constitutes an abuse of the authority or trust they hold because of their official position.[141] The same view was also deployed by the same tribunal in the case of *Prosecutor v. Jean-Paul Akayesu*.[142]

Similarly, for the Yugoslavian case, Heads of State or Government and public officials (including the President of the FRY, Mr Slobodan Milosevic,

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139. *The Prosecutor v. Jean Kambanda, Judgement and Sentence*, Case No: ICTR 97-23-S (4 September 1998) (hereinafter *Kambanda Case, Judgement*).
140. Trial Chamber, *Kambanda Case, Judgement*, paras. 39–40.
141. Ibid., paras. 44, 61.
142. Trial Chamber, *Akayesu Case, Judgement*, paras. 1.1.1.2.4., 1.1.1.2.12–13. Three other ministers in Rwanda were also indicted in this context, *see* indictments: *Prosecutor v. Pauline Nyiramasuhuko* (ICTR-97-21-I); *Prosecutor v. Andre Ntagerura* (ICTR-96-10-T); *Prosecutor v. Theoneste Bogosora* (ICTR-96-7-T).

and Radovan Karadzic and Ratko Mladic, first president of the Bosnian Serb administration, the general of the Bosnian Serb army, respectively) individually and in concert with others planned, instigated, ordered or otherwise aided, abetted the planning, preparation or execution of mass rape and sexual assault, the unlawful detention of civilians, unlawful attacks against the civilian population and individual civilians with area fire weapons such as mortars, rockets and artillery, the destruction of sacred sites, persecutions on political and religious grounds, and so on. The perpetrators were held responsible under Article 7 (1) and (3) of the ICTY Statute because all these crimes were committed as part of a programme of ethnic cleansing that was planned, instigated and ordered by mainly political authorities.[143]

Before leaving this topic, it should be noted that as the practice of the *ad hoc* tribunals proved, the concept of sovereign immunity and its consequence, impunity, cannot be used as a defence or mitigating factor as far as Heads of State and government officials are concerned. Moreover, official position needs to be taken into account as an aggravating factor for the reasons mentioned. This is one of the major achievements of the international community gained through the practice of the *ad hoc* tribunals. In addition, it should not be forgotten that the concept of immunity and impunity is the antithesis of accountability, and impunity for violations of international humanitarian and of international human rights law is, in fact, a betrayal of human dignity,[144] thus bringing those persons who are responsible for the horrifying atrocities that occurred in the former Yugoslavia and in Rwanda to justice; in this sense co-operation with the *ad hoc* tribunals is a duty that has reached the level of *obligatio erga omnes* for every State. This is also significant for the prevention of future conflicts and the deterrence of international crimes which, as indicated, is one of the purposes of the establishment of the *ad hoc* tribunals.[145]

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143. For the importance of the inclusion of Art. 7 (2) of the ICTY Statute with regard to mass rape and sexual assault, *see* Cleiren, C.P.M. and M.E.M. Tijsen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues' (1994), 5 *Crim. L. F.*, pp. 490–1. *See* indictments: *Prosecutor v. Radovan Karadzic, Ratko Mladic*; *Prosecutor v. Milan Martic*; *Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic also known as 'Miro Brko', Stevan Todorovic, Simo Zaric*; *Prosecutor v. Mile Mrksic, Miroslav Radic, Veselin Sljivancanin, Slavko Dokmanovic*; *Prosecutor v. Dragoljub Kunarac*; *Prosecutor v. Radislav Krstic*. In relation to the individual criminal responsibilities of the President and other high-ranking officials of the FRY for the Yugoslavian conflict, the ICTY had not issued any indictment against them, but the recent Kosovo conflict created another opportunity for the International Tribunal in this regard and the Tribunal issued an indictment against them. *See Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic and Vlajko Stojilkovic, Indictment* (22 May 1999). As is known, Slobodan Milosevic, the former President of the Federal Republic of Yugoslavia, was arrested on 1 April 2001 and then was extradited to the ICTY on 28 June 2001. His trial covering the crimes committed both in Bosnia-Herzegovina and in Kosovo is continuing before the ICTY at the moment. For the legal analysis of the extradition of Slobodan Milosevic to the ICTY, *see* Aksar, Y., 'The Transfer of Slobodan Milosevic to the International Criminal Tribunal for the Former Yugoslavia (The ICTY) and the Turning Point in International Humanitarian Law' (2002), 51/2 *Ankara University Faculty of Law Review*, pp. 19–33.

144. Bassiouni, M.C., 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996), 59 *LCP*, pp. 26–7.

145. *See supra* Chapter 1, note 109 and accompanying text.

Individual Criminal Responsibility under Article 7 (3) of the ICTY Statute and Article 6 (3) of the ICTR Statute

Articles 7 (3) of the ICTY and 6 (3) of the ICTR Statutes both provide that:

> [t]he fact that any of the acts … was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The purpose of the inclusion of this Article in both *ad hoc* tribunals' Statutes is to ensure the fact of criminal responsibility for all persons throughout the chain of hierarchy who contributed or facilitated the commission of international crimes, in our context, war crimes, the crime of genocide and crimes against humanity. This regulation is consistent with the customary international law and conventional law rules, although neither the Charter of the International Military Tribunals nor CCL No. 10 included such a provision. However, as will be discussed below, the concept of superior responsibility was applied in the post- Second World War war crimes trials,[146] in accordance with the customary international and conventional law rules which had given place to the notion before the alleged crimes committed during the course of the Second World War. The Hague Law,[147] the 1919 Report of the Commission[148] and the provisions of the Treaty of Versailles[149] constituted the necessary justification for that time. In addition to the Second World War war crimes trials, the Genocide Convention,[150] the Nuremberg Principles[151] and the 1977 Additional Protocol I[152] provided provisions for the superior responsibility. Against this background, the regulations of the Statutes of the *ad hoc* tribunals introduces a clear provision to the international community so as to incur individual criminal responsibility for those persons who are in a position of superiority, and it is in compliance with the recent international humanitarian law documents or instruments such as the *Secretary-General's Report*,[153] the *Reports of the Commission of Experts* for the Former Yugoslavia and for Rwanda,[154] the 1996 ILC Draft Code of Crimes Against

146. *See infra* notes 157, 169–72, 178 and accompanying text.
147. The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land is regarded as establishing the root of the concept of superior responsibility (Art. 1 of the Annex thereto).
148. *See supra* note 12. 'All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of State, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution' (in Ferencz, Vol. I, p. 177).
149. For Arts. 227 and 228 of the Treaty, *see supra* Chapter 2, note 8 and accompanying text, and *supra* notes 8–11.
150. Art. IV of the Genocide Convention.
151. Principle III provides: '… Head of State or responsible Government official does not relieve him from responsibility under international law'.
152. Arts. 86 and 87 of the Additional Protocol I.
153. *Secretary-General's Report*, para. 56.
154. For references, *see supra* Chapter 1, notes 16, 51. *Interim Report*, paras. 51–3; *Final Report*,

the Peace and Security of Mankind,[155] and most importantly it is consistent with the Statute of the ICC.[156]

Although, the concept of superior responsibility has found its place in a number of international humanitarian and human rights law instruments, and was applied by the post-Second World War war crimes trials, no clear rule was able to be created in this regard,[157] until recent times when the *ad hoc* tribunals and the ICC were established. Moreover, since the Second World War the notion that persons in a position of superiority can be held criminally responsible for their own acts or participation, and for the crimes committed by their subordinates had not been applied by the international community. For these reasons, the application of the concept of superior responsibility, its interpretation, making clear its elements or conditions by means of the practice of the *ad hoc* tribunals constitute a significant contribution to international humanitarian and human rights law with regard to protecting human rights by virtue of deterring future conflicts, and of preventing future crimes that can be committed under the relationship of superior–subordinate.

Before the examination of the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and impact on the ICC, one issue concerning the use of the phrase 'command responsibility' to describe individual criminal responsibility under Articles 7 (3) of the ICTY and 6 (3) of the ICTR Statutes needs to be clarified since it does not reflect the real meaning of the concept of individual criminal responsibility. Moreover, it may lead to some misunderstanding or misinterpreting such as limiting the responsibility under Articles 7 (3) and 6 (3) to justify military commanders that is completely against the purpose of the provisions of the Statutes. This is because, firstly, the Statutes do not use the terms 'command responsibility, military command' and so on; instead, the word 'superior' is used.[158] Secondly, interpreting the mentioned Articles as command responsibility creates a controversy with regard to the practice of the *ad hoc* tribunals which have been trying civilians and finding them individually criminally responsible under Articles 6 (3) of the ICTR and 7 (3) of the ICTY Statutes,[159] as well as military commanders. However, the Trial Chamber of the ICTY in the *Celebici Camp Case* employs the phrases 'command responsibility and superior responsibility' interchangeably.[160]

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paras. 55–60; *Final Report for Rwanda*, paras. 173–4.

155. Arts. 6 and 7 of the 1996 ILC Draft Code.

156. Art. 28 of the ICC Statute.

157. Brand, G., 'The War Crimes Trials and the Laws of War' (1949), 26 *BYIL*, p. 424; for explanation *see infra* notes 169–72, 178 and accompanying text.

158. *See* Art. 6 (3) of the ICTR Statute; Art. 7 (3) of the ICTY Statute. Moreover, the *Secretary-General's Report* deploys the phrase as follows: 'A person in a position of *superior* authority …' (emphasis added) (para. 56). In addition, the ICC Statute in Article 28 under the heading of 'Responsibility of Commanders and Other Superiors' makes clear the concept of superior responsibility for both military and civilian persons who are in a position of superiority by using the terms military commanders and other superiors.

159. For the case of *Prosecutor v. Jean Kambanda*, *see supra* notes 139–41 and accompanying text.

160. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 331–400. By taking this view, the international community missed the opportunity of developing a new term which prevents the international community and the international law practice from any mis-understanding or misinterpretation.

For the aforementioned reasons, individual criminal responsibility under Articles 7 (3) of the ICTY and 6 (3) of the ICTR Statutes should be termed 'superior responsibility', not 'command responsibility', on the ground that the concept of superior responsibility includes military, political, or bureaucratic superiors who can be held criminally responsible for the acts of their subordinates as well as responsible for their own acts or participation in a crime.[161]

From the point of view of this study, the significance of the practice of the *ad hoc* tribunals with regard to the concept of superior responsibility lies in the application of superior responsibility by way of explaining the legal status of the concept and of indicating its elements in detail. This was the case of the *Celebici Camp Case* in which the international community has witnessed 'the first elucidation of the concept of command [superior] responsibility by an international judicial body since the cases decided in the wake of the Second World War'.[162]

The Legal Character of Superior Responsibility and the Importance of the Use of the Term 'Objective Responsibility'

The Trial Chamber of the ICTY in the *Celebici Camp Case,* before examining the elements of individual criminal responsibility under Article 7 (3) of its Statute, considered the legal character of superior responsibility and its status under customary international law. In this context, the Trial Chamber divided the concept of superior responsibility into two principal categories under which a superior can be held criminally culpable. These are direct command (superior) responsibility which derives from the positive acts of the superior and indirect command (superior) responsibility which derives from the negligence or omission of the superior in failing to take measures to prevent or repress the unlawful conduct of his subordinates. Under these two different types of superior responsibility, a person in a position of superior authority can be held criminally responsible for both the ordering, instigating or planning of the criminal acts committed by his subordinates and for failing to take measures to prevent or repress the unlawful conduct of his subordinates. The significance of this division can be found in the legal base of criminal liability under which the first category of superior responsibility is completely the same as Article 7 (1) of the ICTY Statute, and the second category is a new and totally different criminal responsibility regarded as imputed responsibility as set out in Article 7 (3) of the Statute.[163] In this part of the study, indirect superior responsibility and its elements will be discussed in light of the practice of the *ad hoc* tribunals. For direct superior responsibility and its elements, the explanation made with respect to Articles 7 (1) of the ICTY and 6 (1) of

161. Fenrich, W.J., 'Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia' (1995), 6 *Duke J. Comp. & Int.'l L.*, p. 110. The author, in this article indicates the importance of the use of the term 'superior responsibility' defining it as including military and civilian superiors.
162. Press Release on 'Celebici Case: The Judgement of the Trial Chamber', CC/PIU/364-E, The Hague (16 November 1998).
163. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 333–4.

the ICTR Statutes is applicable and valid.[164] At this point, one issue relating to the terminology should be made clear. Although the reference made by the Trial Chamber to explain imputed responsibility as indirect command (superior) responsibility is acceptable, it may still cause some problems such as making a condition to take part in an illegal act committed by subordinates in an indirect way, for example the presence of a superior at the scene of commission of the crime. This way of interpretation is entirely against the literal and spiritual meanings of the Statutes. To prevent such an understanding, this type of responsibility can be – as an opinion – named as *objective responsibility,* on the basis that to hold a superior criminally culpable, his participation in the commission of an offence is not a condition, or in other words, is not necessary. In fact crimes are committed by his subordinates, and superiors are held responsible just because of *their position* on the ground that they failed to take measures to prevent or repress the unlawful conduct of their subordinates. Moreover, as will be discussed below, the elements of superior responsibility support this view and, more importantly, to find a superior criminally accountable, one of the main elements of crimes establishing individual criminal responsibility at national and international levels, causation, in this context, means that if the superior's failure to act by taking measures to prevent or repress the unlawful conduct of his subordinates did not cause the commission of the illegal act, the superior cannot be held criminally responsible for the acts of his subordinates is not required. For these reasons, to refer this type of superior responsibility, using the name of objective responsibility must be preferred to indirect superior responsibility.[165]

Apart from this terminology, the significance of the categorisation of the concept of superior responsibility made by the Trial Chamber of the ICTY is that it provides clear guidance as to which legal base to use: a superior can be regarded as liable or responsible either under Article 7 (1) as an accomplice or Article 7 (3) superior responsibility. This application and interpretation of the concept undoubtedly creates a precedent or example both for future cases of the *ad hoc* tribunals and especially for the ICC because it is in accordance with the development of international humanitarian law.[166] In this sense it is the first decision at international level.

The Elements of Superior Responsibility

The application of the notion of superior authority to be held criminally responsible and its interpretation by the *ad hoc* tribunals play a crucial role in international humanitarian or criminal law for establishing the elements of the concept of superior responsibility and for making clear its condi-

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164. *See supra*, p. 84, Individual Criminal Responsibility under Article 7 (1) of the ICTY Statute and Article 6 (1) of the ICTR Statute.
165. For the other element of individual responsibility under Articles 7 (3) of the ICTY and 6 (3) of the ICTR Statutes with respect to supporting this view, *see infra*, p. 86, The Mental Element (*Mens Rea*): Knew or Had Reason to Know.
166. Article 6 of the 1996 ILC Draft Code and Article 28 (2) of the ICC Statute provide similar provisions for superior responsibility.

tions and providing precedents for future cases, since the principle of individual criminal responsibility of superiors for failure to take necessary measures to prevent or repress the unlawful conduct of their subordinates has evolved after the post-Second World War war crimes trials in which the principle was applied quite differently to each case in a few situations.

On this ground, the Trial Chamber of the ICTY rightly indicated the essential elements of superior responsibility for failure to act under Article 7 (3) of its Statute as follows:

> (i) the existence of a superior–subordinate relationship; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[167]

The Element of Superior–Subordinate Relationship

For the first requirement of the superior responsibility that there must be a superior–subordinate relationship the Trial Chamber concluded that a superior, whether military or civilian, can be held criminally responsible as long as the superior has the power which can be either *de facto* or *de jure* in nature to control the acts of his subordinates committing the violations of international humanitarian law.[168]

To reach this conclusion, the Trial Chamber referred to a number of cases such as *Trial of General Tomoyuki Yamashita*,[169] *the German High Command Trial*,[170] *the Hostages Case*,[171] *the Toyoda Case*[172] in which for the element of superior–subordinate relationship, the power of the superior to control his subordinates was indicated to be held criminally responsible. The most important point in the practice of the *ad hoc* tribunal in this context is the expansion of the superior–subord-inate relationship to the civilian superiors as well as military superiors who are in *de jure* or *de facto* positions in accordance with the customary international and conventional law rules. This is especially significant for the Yugoslavian case in which the establishment of superior responsibility and a chain of

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167. Trial Chamber, *Celebici Camp Case, Judgement*, para. 346.
168. Ibid., paras. 354, 377–8.
169. *Trial of General Tomoyuki Yamashita*, United States Military Commission, Manila (8 October–7 December 1945), and the Supreme Court of the United States (Judgements Delivered on 4 February 1946), (1948), IV *Law Reports*, p. 1. In this case, the responsibility of a military commander for offences committed by his troops was examined and applied.
170. *The German High Command Trial (Trial of Wilhelm von Leeb and Thirteen Others)*, United States Military Tribunal, Nuremberg (30 December 1947–28 October 1948), (1949), XII *Law Reports*, p. 1. In this case, the prerequisites for the criminal responsibility of commanders for offences committed by their subordinates and associate units were examined and applied (pp. 1–2).
171. *The Hostages Trial (Trial of Wilhelm List and Others)*, United States Military Tribunal, Nuremberg (8 July 1947–19 February 1948), (1949), VIII *Law Reports*, p. 34. In this case, high-ranking German army officers were charged with the offences committed by troops under their command.
172. *The Trial of Admiral Toyoda*, in Major William H. Parks, 'Command Responsibility for War Crimes' (1973), 62 *Mil. L. Rev.*, p. 69.

political or military authority is not easy since the war was mainly between small paramilitary groups.[173] As the practice of the ICTY in the *Celebici Camp Case* demonstrates, it is not necessary to be an official power or to have official power or authority to be regarded as responsible when setting up a chain of political and military authority. *De facto* authority is sufficient for establishing individual criminal responsibility under Articles 7 (3) of the ICTY and 6 (3) of the ICTR Statutes. This is consistent with the political and military structures of the former Yugoslavia and most importantly consistent with the development of international humanitarian law on the ground that most of the conflicts occurring in the world today have an internal character that creates the same difficulties with the Yugoslavian case rather than international. For these reasons, the interpretation and application of the concept by the *ad hoc* tribunal in this way should be accepted as in accordance with one of the main purposes of international humanitarian law that the law should provide necessary solutions for the international community in general and in compliance with the purpose of the establishment of the *ad hoc* tribunals indicated in Articles 1 of both Statutes in particular.

*The Mental Element (*Mens Rea*): Knew or Had Reason to Know*

The second element of superior responsibility is that the superior knew or had reason to know that the illegal act was about to be or had been committed by his subordinates (the mental element, *mens rea*). The Trial Chamber concluded that a superior can possess this requirement to be held criminally responsible by way of having actual knowledge or of having information in his possession as a result of the terms 'had reason to know' used in Article 7 (3) of its Statute.[174] In terms of actual knowledge to establish the criminal responsibility of superiors, international tribunals are not faced with serious problems. This is because, proof can be easily established through direct or circumstantial evidence[175] that subordinates were about to, or were committing serious violations of international humanitarian law. However, for the second category of the requirement of *mens rea*, there is a big problem in interpreting the phrase 'had reason to know' to set up criminal responsibility for superiors. In this respect, the Trial Chamber decided that 'a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates',[176] as a result of

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173. O'Brien, J.C., 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993), 87 *AJIL*, p. 652.
174. Trial Chamber, *Celebici Camp Case, Judgement*, para. 383.
175. The Commission of Experts in its *Final Report* indicated some events that may be useful for establishing superior responsibility as follows: '(a) The number of illegal acts; (b) The type of illegal acts; (c) The scope of illegal acts; (d) The time during which the illegal acts occurred; (e) The number and type of troops involved; (f) The logistics involved, if any; (g) The geographical location of the acts; (h) The widespread occurrence of the acts; (i) The tactical tempo of operations; (j) The modus operandi of similar illegal acts; (k) The officers and staff involved; (l) The location of the commander at the time' (para. 58). The Trial Chamber in *the Celebici Camp Case* cited this in para. 386.
176. *Trial Chamber, Celebici Camp Case, Judgement*, para. 393.

applying the French text of Article 86 of Additional Protocol I which was regarded as reflecting the customary international law rule at the time of the commission of the alleged offences.[177]

The view taken by the Trial Chamber cannot be regarded as in compliance with the development of international humanitarian law and its practice in this context for the following reasons:

First, accepting that Article 86 of Additional Protocol I reflects the customary international law at the time of the commission of the offences by way of implementing the French version of the mentioned provision which requires that a superior should actually possess information that allows him to conclude that his subordinates were committing or were about to commit violations of international humanitarian law should not be accepted as consistent with the purpose of superior responsibility in the sense that the concept provides an objective responsibility for superiors, and the position taken by the Trial Chamber in relation to the wording 'had reason to know' creates a confusion in minds when it is compared with the concept of actual knowledge. The interpretation of this phrase by the Chamber is nothing other than repeating the circumstantial evidence to set up actual knowledge for the requirement of *mens rea*. If this way of application is considered as the necessary mental element of superior responsibility, what was the reason to employ the terms 'had reason to know' in both *ad hoc* tribunals' Statutes?

Second, even the Second World War war crimes trials had applied the criteria or tests of 'should have known' or 'must have known' to determine the mental element of superior responsibility.[178] Although these two tests seem to be similar, there is a significant difference in terms of providing duty on superiors in relation to preventing violations of their subordinates and of producing different results from each other. When the concept of 'must have known' or 'could have known' was applied, an objective standard or an ordinary reasonable person having a superior's knowledge of the facts and operating under the same circumstances is taken into account.[179] Although this method is preferable for the purpose

177. Ibid., para. 390. 'When considering the language of this provision as finally adopted, [Article 86 of Additional Protocol I], problems of interpretation arise if the English and French texts are compared. While the English text contains the wording "information which should have enabled them to conclude", the French version, rather than the literal translation *'des informations qui auraient dû leur permettre de concluire'*, is rendered by *"des informations leur permettant de concluire"* (literally: information enabling them to conclude). The proposition has been made that this discrepancy amounts to a distinction between the English text, which is said to embrace two requirements, one objective (that the superior had certain information) and one subjective (from the information available to the superior he should have drawn certain conclusions), and the French text containing only the objective element' (para. 392, footnote in original omitted, emphasis in original).

178. In *the High Command Case*, the test of 'should have known' was applied, but in the case of *Yamashita,* the test of 'must have known' was applied. Bassiouni, *Crimes Against Humanity*, p. 385; Bassiouni, M.C. and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, New York: Transnational Publishers, 1996), p. 362. In *the Toyoda Case*, the test of 'should have known' was again applied as follows: '… if he knew, or *should have known*, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties' (emphasis added), in Major William H. Parks, 'Command Responsibility for War Crimes' (1973), 62 *Mil. L. Rev.*, p. 1 at p. 73.

179. Bassiouni and Manikas, p. 345.

and implementation of international humanitarian law rules, the subjective standard 'should have known' which derives from the circumstances and from the knowledge of the superior must be accepted to establish superior responsibility, due to the difficulties that occur in every armed conflict.[180] With this background, the Trial Chamber should have taken into account the international law practice[181] and should have applied the second standard in the *Celebici Camp Case* to be in accordance with the previous applications of the concept that could have guided the Chamber[182] in the post-Second World War war crimes trials. In this sense, by following a completely different method or interpretation, the Trial Chamber has taken a step backward.

Third, the position taken by the Trial Chamber by virtue of indicating that Article 86 of Additional Protocol I (its French version) reflects the customary international law at the time of the commission of the alleged crimes and the present content of customary law may be different from this opinion[183] cannot have a basis in international humanitarian law on the ground that firstly, although the said Article reflects the customary nature of international law, international humanitarian law has evolved since the adoption of the mentioned Protocol (1977) and while the Chamber strongly considered this provision to find a legal base for its decision, it did not give the same weight to the previous decisions of war crimes trials in the aftermath of Second World War war crimes trials, which created clearer guidance than the 1977 Additional Protocol I. Secondly and most importantly, the alleged crimes occurred in the former Yugoslavia after 1991 and the Statute of the ICC, although it was adopted in 1998, is the most authoritative international legal document reflecting customary international law rules and in this context making crystal clear the mental element of superior responsibility by virtue of employing two different standards for both civilians and military superiors by taking into account the reality (fact) of the establishment of a chain of superior authority that is very weak for civilian superiors when compared with military superiors. According to the ICC Statute, a civilian superior is responsible under the criterion of 'either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes',[184] but for military superiors the ICC Statute brings a different standard in compliance with the international practice as follows: '… military commander or person either knew or, owing to the circum-

180. Ibid.

181. Although the Trial Chamber in its decision referred to some cases like *the Toyoda Case*, it did not consider them sufficient to establish the mental requirement of superior responsibility in this sense. *See Celebici Camp Case, Judgement*, para. 389.

182. Fenrick, p. 115. This scholar in relation to the post-Second World War war crimes trials accepts that '[t]he existence of the "should have known" test is clearly established in the case law' (p. 115).

183. Trial Chamber, *Celebici Camp Case, Judgement*, para. 393.

184. Art. 28 (2) (a) of the ICC Statute. The decision of the Trial Chamber can be found similar to this standard, but in the decision there is no indication in its conclusion that it is just for civilian superiors, in other words, there is no such categorisation to establish different standards for military and civilian superiors. In fact, the ICTR in the *Kayishema and Ruzindana Case* referred to the regulation of the ICC Statute and accepted it as reflecting customary rules of international humanitarian law (*see Kayishema and Ruzindana Case, Judgement*, paras. 226–8).

stances at the time, *should have known* that the forces were committing or about to commit such crimes'.[185] On this ground, accepting Article 86 of Additional Protocol I as a customary international law rule and indicating the ICC Statute present customary law rule[186] does not reflect the fact since a creation of customary international law principle by the inter-national community usually takes years or decades. In other words, between 1991 and 1998 was the customary law principle changed with regard to the criterion under which a superior can be held criminally responsible under Article 7 (3) of the ICTY and 6 (3) of the ICTR Statutes?

For the reasons that have already been mentioned, the position taken by the Trial Chamber of the ICTY should be considered as not in compliance with international humanitarian law and in particular, customary international law principles. On the other hand, it should also be noted that the ICTY in the following cases has adopted a different view from that taken in the *Celebici Camp Case*. The decision rendered by the ICTY in the *Blaskic Case*[187] is one of the best examples of this fact. As has been indicated above, the view of the ICTY in the *Celebici Camp Case* in relation to the mental element of superior or command responsibility has been the subject of justifiable criticisms. The *Blaskic Case* confirms the correctness of these criticisms.The related part of the decision of the ICTY can be quoted as follows:

> ... the Trial Chamber finds that if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander *had reason to know within the meaning of the Statute* (emphasis added).[188]

There cannot be any doubt that this approach is in conformity with the rules of customary international law and the underlying concept of superior responsibility. As far as the ICC is concerned, the ICC should be guided by the approach taken by the ICTY in the *Blaskic* Case. The regulation of the ICC Statute as reflecting customary law rules and the meaning of objective responsibility especially for military superiors also requires the implementation of the test of 'should have known'.[189]

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185. Art. 28 (1) (a) of the ICC Statute (emphasis added).
186. Trial Chamber, *Celebici Camp Case, Judgement*, para. 393.
187. Trial Chamber, *The Prosecutor v. Tihomir Blaskic, Judgement,* Case No. IT-95-14-T (3 March 2000) (hereinafter *Blaskic Case, Judgement*).
188. Trial Chamber, *Blaskic Case, Judgement*, para. 332. For an explanation of how such a conclusion was reached, *see* paras. 309–31.
189. The approach taken by the ICTR in the *Kayishema and Ruzindana Case* should be seen as supporting this view. In this sense, *see Kayishema and Ruzindana Case, Judgement,* paras. 225–8.

The Element of Necessary and Reasonable Measures

For the third element of the superior responsibility, that is, that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof, the Trial Chamber truly and in accordance with the ICC Statute[190] concluded that a superior can be found liable for failing to take necessary and reasonable measures which are within his powers to prevent the commission of crimes by his subordinates or to punish the perpetrators thereof.[191]

The Element of Causation

Lastly, the issue whether the principle of causation that a superior's failure to act did not cause the commission of the crime, superiors cannot be held criminally responsible for the acts of their subordinates is required to establish superior responsibility or not needs to be explained. In this context, the Trial Chamber again rightly and in accordance with the existing case law and treaty law decided that 'causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal responsibility on superiors for their failure to prevent or punish offences committed by their subordinates'.[192]

The absence of the element of causation to establish superior responsibility has a significant place for the concept of objective responsibility and for the enforcement of international humanitarian law on the basis that the notion of superior authority can be exercised in different ways and at different levels such as administratively, executively, operationally and tactically and its natural result, many superiors may be found responsible for the crimes of the same subordinates regardless of which superior's negligence led to the commission of violations of international humanitarian law.[193] Otherwise, it was not possible to implement superior responsibility on the ground that superiors could have claimed that the crimes committed by their subordinates were not the result of their criminal negligence and, consequently, a number of superiors could not have been found responsible under Articles 7 (3) of the ICTY and 6 (3) of the ICTR Statutes, but just under Articles 7 (1) and 6 (1) of the Statutes of *ad hoc* tribunals respectively. This type of interpretation and application might have been the end of the concept of superior responsibility. Moreover, as indicated earlier, in particular, for the concept of objective responsibility superiors are held responsible for the crimes committed by their subordinates just because of their positions which requires them to

190. Article 28 (1) (b) of the ICC Statute provides that: 'a … military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution'. Article 28 (2) (c) of the ICC Statute has the same provision with one difference in terms of employing the word superior instead of military commander.

191. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 394–5.

192. Ibid., para. 398. One scholar (Bassiouni) accepts the element of causation to hold superiors responsible as the essential element of culpability. Bassiouni, *Crimes Against Humanity*, p. 372; Bassiouni and Manikas, p. 350.

193. Trial Chamber, *Celebici Camp Case, Judgement*, para. 397.

prevent their subordinates from committing crimes. If superiors cannot implement their duties in this regard their criminal responsibility must be inevitable. Therefore, the principle of causation cannot be an ingredient of the concept of superior respons-ibility.

Individual Criminal Responsibility under Article 7 (4) of the ICTY Statute and 6 (4) of the ICTR Statute

Articles 7 (4) of the ICTY and 6 (4) of the ICTR Statutes provide that '[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires'.

The purpose of the inclusion of this provision in the *ad hoc* tribunals' Statutes is to prevent those persons (subordinates) who acted in accordance with an order given by their Governments or superiors from using the notion of obedience to superior orders as a defence and this is in compliance with international law practice and international humanitarian law documents.[194] The value of the non-recognition of obedience to superior orders as a defence lies in the enforcement of humanitarian law principles and shares the same logic as Articles 7 (2) of the ICTY and 6 (2) of the ICTR Statutes. As indicated earlier,[195] if this concept had been

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194. Article 8 of the Nuremberg Charter provides: 'The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.' Article 6 of the Charter of the IMTFE, Article 2 (4) (b) of the CCL No. 10 and Principle IV of the Nuremberg Principles have the same or similar provisions. In this context, *see* Bassiouni and Manikas, pp. 374–409; Green, L.C., *Superior Orders in National and International Law* (Leyden: A.W. Sijthoff, 1976); Green, L.C., 'Superior Orders and Command Responsibility' (1989), 27 *Can. Y. Int.'l L.*, p. 167; Best, G., *War and Law since 1945* (Oxford: Clarendon Press, 1994), pp. 188–92; *Secretary-General's Report*, para. 57; *Interim Report*, para. 54; *Final Report*, paras. 61–2; *Final Report for Rwanda*, para. 175; Joyner, C.C., 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability' (1998), 26 *Denv. J. Int.'l L. & Pol'y*, p. 608.

Moreover, the latest and most authoritative legal documents in international humanitarian law, the 1996 ILC's Draft Code which similarly uses the same terms as the Nuremberg Charter and the Nuremberg Principles, and the Statute of the ICC give place to the concept of superior orders. However, the inclusion of superior orders in the ICC Statute is significantly different from the international law practice in terms of providing a complete defence not to be held criminally responsible and of not using the phrases that superior orders can be considered as a mitigating factor in determining punishment. Article 33 of the ICC Statute under the heading of Superior Orders and Prescription of Law states that:

> 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey the orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and
>
> (c) The order was not manifestly unlawful.
>
> 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.'

195. *See supra* notes 136–8 and accompanying text.

accepted as a complete defence for individual criminal responsibility, other persons who are in the political, military or bureaucratic chain would have claimed that they had obeyed the orders of their superiors and this hierarchy could have reached up to the Head of State who could have claimed sovereign immunity and at the end of the day, there would not have been any point in implementing international humanitarian law rules.

In addition to this fact, it should be noted that the existence of a superior order in every situation should not be perceived as a mitigating factor in sentencing,[196] as clearly inferred from the provisions of the Statutes of the *ad hoc* tribunals using the wording 'if ... justice so requires'. In this sense, if a subordinate willingly participates in a commission of an illegal act, the existence of a superior order without any doubt does not constitute a mitigating factor in his punishment. When the subordinate commits a crime without his own free will his situation may be considered as a mitigating factor.[197] The best example accompanying this case can be examined when the concept of superior order is combined with duress. This was one of the main issues the ICTY had to deal with in the case of *Prosecutor v. Drazen Erdemovic*.[198] In this case the majority of the Appeals Chamber[199] and its consequence the Trial Chamber rightly concluded that 'duress[200] does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings',[201] '[i]t may be

196. Morris and Scharf, p. 102.

197. Ibid.

198. *Prosecutor v. Drazen Erdemovic, Sentencing Judgement* (Trial Chamber), Case No. IT-96-22-T (29 November 1996); *Prosecutor v. Drazen Erdemovic, Judgement* (Appeals Chamber), Case No. IT-96-22-A (7 October 1997). After the ruling of the Appeals Chamber, the Trial Chamber dealt with the case again and handed down its decision in accordance with the view taken by the Appeals Chamber. *Prosecutor v. Drazen Erdemovic, Sentencing Judgement* (Trial Chamber), (5 March 1998). The *Erdemovic Case* was the first sentencing judgement rendered by an international criminal institution since the Nuremberg and Tokyo Tribunals. For the significance of this case in international humanitarian law, *see* Turns, D., 'The International Criminal Tribunal for the Former Yugoslavia: The Erdemovic Case' (1998), 47 *ICLQ*, pp. 461–74.

199. For supportive opinions, *see Prosecutor v. Drazen Erdemovic, Joint Separate Opinion of Judge Mcdonald and Judge Vohrah* (7 October 1997), and *Separate and Dissenting Opinion* [but not in this context] *of Judge Li*.

For the opposite view *see, Prosecutor v. Drazen Erdemovic. Separate and Dissenting Opinion of Judge Cassese* (7 October 1997), and *Separate and Dissenting Opinion of Judge Stephen* (7 October 1997).

For a criticism on the ruling of the Appeals Chamber in the *Erdemovic Case*, *see* Rowe, P., 'Duress as a Defence to War Crimes after Erdemovic: A Laboratory for a Permanent Court' (1998), 1 *YIHL*, p. 210, in particular, pp. 213–20.

200. In this case duress was examined in combination with superior order. In this sense one part of the testimony of the accused before the Trial Chamber I on 31 May 1996 can be quoted as follows: 'Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: If you are sorry for them, stand up, line up with them and we will kill you too. I am not sorry for myself but for my family, my wife and my son who was then nine months old, and I could not refuse because they would have killed me' (in Trial Chamber, *Erdemovic Case, Sentencing Judgement*, para. 14).

201. Appeals Chamber, *Erdemovic Case, Judgement,* para. 19. Trial Chamber, *Erdemovic Case, Sentencing Judgement*, para. 17. For one of the most recent practices of national courts in relation to the commission of war crimes, crimes against humanity under duress and/or superior orders, *see* Martines, F., 'The Defences of Reprisals, Superior Orders and Duress in the Priebke Case Before the Italian Military Tribunal' (1998), 1 *YIHL*, p. 354, in particular, pp. 358–60. For background information on this case, *see* Marchisio, S., 'The Priebke Case before

taken into account only by way of mitigation'.[202]

In light of the decision held by the Appeals Chamber and the Trial Chamber of the ICTY in accordance with the international customary and conventional law rules in the *Erdemovic Case*, it can be concluded that the existence of a superior order does not constitute a complete defence not to be held individually criminally responsible and even may not constitute a mitigating factor in punishment, which results from special circumstances such as a combination of a superior order and duress. In this sense, there should not be any doubt that this way of interpretation and application of the concept will create a precedential value for future cases of the *ad hoc* tribunals and more likely for the ICC, due to being the first and detailed decision in this regard after the Second World War practice. However, it should also be noted that with regard to war crimes the regulation of the ICC Statute[203] departs from the customary rules of international law[204] in terms of providing a complete defence which is subject to the conditions set out in Article 33 (1) (a–c) of the Statute. Hopefully, the ICC will interpret and apply the provisions of Article 33 of its Statute, in its case law, in compliance with customary international law.[205] In this context, the practice of the *ad hoc* tribunals will be the main guidance for the ICC to reach such a conclusion.

Conclusions

One of the main purposes of international humanitarian law is to enforce individual criminal responsibility through either the domestic courts or international institutions (tribunals or courts, *ad hoc* or permanent). At the international level, until recently, the most authoritative precedents with regard to the implementation of the concept of individual criminal responsibility were the practice of the International Military Tribunals at Nuremberg and Tokyo and Subsequent Proceedings that the international community witnessed after the Second World War. For the reasons mentioned,[206] the practice of the post-Second World War war crimes trials do not constitute a truly established precedent. In this context, the establishment of the ICTY and the ICTR by the Security Council on behalf of the international community, under Chapter VII of the UN Charter as a measure to protect international peace and security, and the practice of the *ad hoc* tribunals with regard to interpreting and applying the principle of individual criminal responsibility have a significant place in the develop-

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the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity' (1998), 1 *YIHL*, p. 344.

202. Trial Chamber, *Erdemovic Case, Sentencing Judgement*, para. 17.

203. *See supra* note 190.

204. For an excellent analysis of Article 33 of the ICC Statute in light of the rules of customary international law, *see* Gaeta, P., 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999), 10 *EJIL*, pp. 172–91. In this sense, also *see* Cassese, A., 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999), 10 *EJIL*, pp. 156–7.

205. Gaeta, p. 191.

206. *See supra* notes 73, 78 and accompanying text.

ment of international humanitarian law in terms of proving the enforceability of individual criminal responsibility at the international level for the crimes which are of concern to the international community.The adoption of the Statute of the ICC by a large number of States followed this and indicated that the principle of individual criminal responsibility and its implementation is one of the most important desires of the international community toward achieving a universal justice for human beings.

While the international community was discussing the emergence of individual criminal responsibility and its possible implementation in international law until this decade, today in accordance with the development of international humanitarian law the establishment of the *ad hoc* tribunals for the former Yugoslavia and for Rwanda and the adoption of the Statute of the ICC left no room to discuss the possibility of the enforcement of individual criminal responsibility, in particular, for the crimes which are of concern to the international community: war crimes, the crime of genocide, crimes against humanity and the crime of aggression, all of which become an independent category of international crimes that have reached the level of *jus cogens*, and the States' duty to prosecute, punish or extradite individuals responsible for these crimes, in other words, the enforcement of individual criminal responsibility in this respect becomes an *obligatio erga omnes* in nature.

On this ground, Articles 7 (1) of the ICTY and 6 (1) of the ICTR Statutes define that individual criminal responsibility is not just only for the persons who directly committed the crime (as principal), but also for the persons who facilitated the commission of the offence in a way indicated in the Articles mentioned (as participant). For the first category of persons the rule is clear enough in the customary international and conventional law rules, but for the second category of persons who facilitated the commission of the crime, the principle of individual criminal responsibility and its application is more difficult on the basis of what degree of participation is to be held criminally culpable. At this point, the Nuremberg and the post-Second World War war crimes trials failed to reach a specific criterion. For this reason, the application of the concept of individual criminal responsibility by the *ad hoc* tribunals gains an important place for interpreting and drawing the line for the scope of individual responsibility and also for setting up general criteria making clear the degree of participation to be considered as individually criminally responsible in international humanitarian law. This is one of the main contributions[207] that can be examined in the *Prosecutor v. Dusko Tadic* and *Prosecutor v. Anto Furundzija* cases of the *ad hoc* tribunals to international humanitarian law and their possible impact on the ICC in this regard. In light of the practice of the *ad hoc* tribunals, general criteria which fulfil one major gap in international humanitarian law since the post-Second World War war crimes trials failed to establish such criteria, to find an individual criminally culpable for his

207. For the other contributions of the practice of the *ad hoc* tribunals, for example, making clear the terminology for preventing the *ad hoc* tribunals' practice in relation to future cases and preventing the ICC from misleading, misunderstanding or misinterpreting in relation to the concepts of aiding, abetting and directly and substantially effecting, distinguishing between being a co-perpetrator to a crime and aiding or abetting a crime.

participation in a crime can be drawn as follows: Any individual is criminally responsible for any conduct where it is determined that he/she *intentionally or knowingly* participated in the commission of an illegal act that violates international humanitarian law and his/her participation *substantially* affected the commission of that illegal act through supporting the actual commission before, during, or after the incident.

When the practice of the *ad hoc* tribunals in relation to Articles 7 (2) of the ICTY and 6 (2) of the ICTR Statutes is examined, it can be found that the enforcement of individual criminal responsibility for State officials, either as Head of State or Government or government senior officials, and non-recognition of the concept of sovereign immunity and its consequence, impunity, as a defence have a significant place in international law in terms of implementing international humanitarian law principles. This is because, if the notion of sovereign immunity had been considered as a defence – for example, if a Head of State had enjoyed sovereign immunity, other officials (military or civilian) who are of lesser rank could have claimed that they acted in accordance with superior orders; in consequence, it would not have been possible to enforce international humanitarian and criminal law. In addition to the non- recognition of sovereign immunity as a defence not to be held criminally accountable, even a mitigating factor, the position held at the level of State or Government administration can (must) create an aggravating factor as far as the punishment meted out to them goes on the grounds that these officials are responsible for the maintenance of peace and security, and their participation in a crime constitutes abuse of the authority or trust vested in them just because of their official positions. This is one of the major achievements of the international community by means of the practice of the *ad hoc* tribunals that can be examined in the *Prosecutor v. Jean Kambanda* and *Prosecutor v. Jean-Paul Akayesu* cases.

When the practice of the *ad hoc* tribunals with regard to the concept of superior responsibility is considered, the value of the practice can be examined in the application of the superior responsibility by virtue of explaining the legal status of the concept and of examining its elements in detail in the *Celebici Camp Case*. In this context, the Trial Chamber of the ICTY divided the concept of superior responsibility into two big categories under which a superior can be held criminally responsible as direct command (superior) responsibility and indirect command (superior) responsibility.[208] The significance of this categorisation lies in providing clear guidance with a legal base that might be either under Articles 7 (1) of the ICTY and 6 (1) of the ICTR Statutes as an accomplice or Articles 7 (3) of the ICTY and 6 (3) of the ICTR Statutes as an objective responsibility for which a superior can be held criminally responsible, and this application and interpretation of the concept undoubtedly creates a guideline for future cases of the *ad hoc* tribunals and also more likely for

208. For a discussion about the term indirect superior responsibility and why this type of responsibility should be named objective responsibility, *see supra* p. 99. The Legal Character of Superior Responsibility and the Importance of the Use of the Term 'Objective Responsibility'.

the ICC due to being the first decision in this sense. In addition to this contribution of the practice of the *ad hoc* tribunals to international humanitarian law, the real contribution can be found in the examination of the elements of the concept of superior responsibility by way of making clear its conditions and providing precedents for future cases, since the principle of individual criminal responsibility of superiors for failure to take necessary and reasonable measures to prevent or repress the unlawful conduct of their subordinates has evolved after the post-Second World War war crimes trials in which it was not possible to set up a clear principle in this sense. Although the practice is unique due to being the first elucidation of the concept by an international judicial organ, the view taken by the Trial Chamber of the ICTY in the *Celebici Camp Case* in relation to the requirement of the mental element of superior responsibility, the interpretation of the phrase 'had reason to know' and non-application of the standard of 'should have known' should be considered as inconsistent with the rules of customary international law and with the development of international humanitarian law.[209] However, it should also not be forgotten that in the following cases like the *Blaskic Case*, the ICTY has adopted the view that is in conformity with the rules of customary international law and underlies the concept of superior responsibility. Considering one of the other elements of superior responsibility, the position taken by the Trial Chamber with regard to whether the prin-ciple of causation is required or not to hold a superior criminally responsible, this reflects a big achievement in terms of supporting the view that indirect superior responsibility should be named objective responsibility in international humanitarian law.[210]

Lastly, the practice of the *ad hoc* tribunals with regard to the concept of superior orders as a defence not to be held criminally culpable, it can be concluded that it is in accordance with the international customary and conventional law rules as has been dealt with in the case of *Prosecutor v. Drazen Erdemovic*. In this case, the Appeals Chamber and the Trial Chamber held that the existence of a superior order does not constitute a complete defence for subordinates not to be held criminally accountable; it may not even constitute a mitigating factor in punishment, the application of which relies on some special circumstances such as the combination of a superior order with duress. There is no doubt that the view deployed by the ICTY will create a guideline for future cases of the *ad hoc* tribunals and for the ICC, due to being the first detailed decision held by an international judicial body after the Second World War practice.

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209. For the discussion of this issue, *see supra*, p. 102, The Mental Element *(Mens Rea)*: Knew or Had Reason to Know; and also for the other elements of superior responsibility and for the importance of the practice of the *ad hoc* tribunals, *see supra*, p. 101, The Element of Superior–Subordinate Relationship and p. 106, The Element of Causation.
210. For other reasons why this concept should be named objective responsibility, *see supra*, p. 99. The Legal Character of Superior Responsibility and the Importance of the Use of the Term 'Objective Responsibility'.

4

War Crimes

Introduction

Despite the fact that there are many problems deriving from the different legal systems being used around the world, one of the main issues is the limitation of the substantive law (subject-matter jurisdiction) of the international criminal tribunals or courts. It is not enough to solve this problem, as the *Secretary-General's Report* did in relation to the ICTY Statute, by indicating that international criminal tribunals or courts should apply 'rules of international humanitarian law which are beyond any doubt part of customary law'[1] for the following reasons:

Firstly, rules governing armed conflicts are mainly regarded as regulating international armed conflicts and these rules have not been applied by a truly established international organisation until recent times when the *ad hoc* tribunals were established by the Security Council for the former Yugoslavia and for Rwanda, both of whose interpretation and application of the rules of international humanitarian law went beyond the intention of the body that created them.[2]

Secondly, the nature of armed conflicts has changed from international to mainly internal or internationalised, and individual criminal responsibility for the crimes committed in the latter type of armed conflicts has been recognised and applied by the *ad hoc* tribunals.[3]

Thirdly, although the nature of crimes remains the same, the manner of committing them, targeting civilians and civilian property, has changed remarkably since the Second World War and the adoption of the Geneva Convention of 1949 and of the Additional Protocols (I and II) thereto of

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1. *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* (hereinafter *Secretary-General's Report*), para. 34.
2. For examples, *see infra* notes 424–32 and accompanying text.
3. In particular, the establishment of the ICTR to deal with the Rwanda case which was an internal armed conflict in nature indicates the first and major step in terms of creating a turning point by way of enforcing individual criminal responsibility for violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II (Art. 4 of the ICTR Statute) in the development of international humanitarian law. For the practice of the *ad hoc* tribunals and the regulation of the ICC Statute in this context, *see infra*, p. 182, The Practice of the *Ad Hoc* Tribunals and Their Contribution to International Humanitarian Law and Their Impact on the ICC.

1977 that are regarded as the main body of law governing armed conflicts. For example, rape as a crime under customary international law was committed on a massive scale in the former Yugoslavia, Rwanda and Kosovo as a method of war crime, as a weapon for destroying an ethnic, religious group within the meaning of the Genocide Convention. On this ground, the practice of the ICTY and the ICTR plays a crucial role in interpreting and applying the conditions, applying the international humanitarian law norms to the recent events over which they have jurisdiction. Their contribution to international humanitarian and human rights law in this respect will create guidance for the ICC since those rules for the first time at an international level were able to be applied by the *ad hoc* tribunals. In accordance with these developments, it should be noted that '[i]nternational humanitarian law has developed faster since the beginning of the atrocities in the former Yugoslavia than in the four-and-a-half decades since the Nuremberg Tribunals and the adoption of the Geneva Conventions for the Protection of Victims of War of August 12, 1949'.[4]

Having indicated the changing structure of international humanitarian law, from the perspective of this study, war crimes and the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and their impact on the ICC will be examined by way of dividing the concept of war crimes into two principal categories: 'The Grave Breaches System' and 'Violations of the Laws or Customs of War'.[5] As will be discussed in this chapter, in detail – that is, the division of war crimes based on the nature of armed conflicts as international or non-inter-national does not reflect the modern concept of international humanitarian law since human rights violations, whether occurring in an international armed conflict or not, must not be tolerated and the characterisation of armed conflicts must not take precedence over the protection of innocent civilians. However, as long as the Statutes of the *ad hoc* tribunals and their practice with regard to the concept of war crimes, and more importantly the latest practice of the international community in the adoption of the ICC Statute are concerned, the examination of war crimes under two different categories is inescapable, since all these instruments mainly accept this artificial distinction between international and non-international armed conflicts and the law applic-able to these cases.[6]

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4. Meron, T., 'War Crimes Law Comes of Age', in Theodor Meron, *War Crimes Law Comes of Age Essays* (Oxford: Clarendon Press, 1998), p. 297.
5. Wexler, L.S., 'Committee Report on Jurisdiction, Definition of Crimes, and Complemantarity' (1997), 25 *Denv. J. Int'l L. & Pol'y*, p. 227; *Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3* (Dario Kordic, Mario Cerkez, Case No: IT-95-14/2-PT, 2 March 1999) (hereinafter *Kordic & Others*), paras. 22–5. However, some scholars divide war crimes, as far as the ICTY Statute is concerned, into two as 'the law of Geneva' and 'the law of the Hague' (*see* Morris, V. and M.P. Scharf, *An Insider's Guide to The International Criminal Tribunal for The Former Yugoslavia: A Documentary History and Analysis*, Vol. I (Irvington-on-Hudson, New York: Transnational Publishers, 1995) (hereinafter *An Insider's Guide*), p. 63. However, this categorisation cannot be perceived as reflecting the regulation of international humanitarian law. As will be discussed in light of the practice of the *ad hoc* tribunals, the so-called Hague Law is much broader than some scholars, and defence before the ICTY argued, and much broader than its name. *See infra* notes 382, 400, 412 and accompanying text.
6. *See infra*, p. 182. The Practice of the *Ad Hoc* Tribunals and Their Contribution to International Humanitarian Law and Their Impact on the ICC.

The Grave Breaches System

Article 2 of the ICTY Statute[7] under the heading of '[g]rave breaches of the Geneva Conventions of 1949' provides that:

> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, 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.

The legal base for Article 2 of the ICTY Statute is the grave breaches provisions of the four Geneva Conventions[8] that are set out in Articles 50, 51, 130 and 147 of each Convention respectively. In fact, not all of these acts are mentioned in all four Conventions, just the first three categories of offences are included in all four Conventions. When drafting the ICTY Statute, the main guideline was Article 147 of the Fourth Geneva Convention for the Protection of Civilian Persons in time of war, together with Article 130 of the Third Geneva Convention for the Prisoners of War.[9] Although the clear impact of the Fourth Convention on the Statute is examined, one notable improvement is made in Article 2 of the Yugoslavian Tribunal's Statute by way of replacing the notion of 'protected persons' with a specific designation of

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7. The ICTR Statute is not relevant here, because it does not include such a provision.
8. For references to these Conventions, *see supra* Chapter 3, note 21. For background information about the Geneva Conventions, *see* Gutteridge, J.A.C., 'The Geneva Conventions of 1949' (1949), 26 *BYIL*, pp. 294–326; Yingling, R.T. and R.W. Ginnane, 'The Geneva Conventions of 1949' (1952), 46 *AJIL*, pp. 393–427.
9. Greenwood, C., 'The International Tribunal for Former Yugoslavia' (1993), 69 *Int.'l Aff.*, p. 560. For the explanation of Article 2 of the ICTY Statute, *see Secretary-General's Report*, paras. 37–40.

   Article 147 of the Fourth Geneva Convention states:

   'Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of

'civilians' in the provision.[10] As will be discussed later in detail, the usage of the term 'civilians', plays a crucial role in indicating the development of international humanitarian law and the interpretation of the conditions of the grave breaches system that are to be an international armed conflict and the concept of protected persons or property.[11]

The distinguishing feature of the grave breaches system from other breaches of the Geneva Conventions and other violations of the laws or customs of war is that it imposes an obligation on States parties to the Convention to prosecute or extradite (*aut dedere aut judicare*) persons responsible for the grave breaches of the Conventions regardless of their nationality,[12] in other words, the concept of universal jurisdiction is accepted for the grave breaches system. Until the practice of the *ad hoc* tribunals with regard to the interpretation and application of the norms of international humanitarian law, the concept of universal jurisdiction could be regarded as one of the major achievements of the international community after the Second World War as far as national criminal jurisdiction systems and the principle of sovereignty of States are concerned. However, today the international community has two *ad hoc* tribunals and one ICC that came into operation on 1 July 2002. In light of these developments, the notion of universal jurisdiction at international level should be perceived as changed and accepted for all serious violations of international humanitarian law.[13]

The 1977 Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts[14] supplemented the provisions of the Geneva Conventions relating to the grave breaches,

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fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.'

Article 130 of the Third Geneva Convention states:

'Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.'

10. Joyner, C.C., 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1996), 59 *LCP*, p. 157; Joyner, C.C., 'Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia' (1995), 6 *Duke J. Com. & Int'l L.*, p. 83.
11. For the analysis and practice of the *ad hoc* tribunals in this context, *see infra* notes 160–1 and accompanying text.
12. Articles 49, 50, 129 and 146 of the Geneva Conventions respectively.
    Article 146 (2) of the Fourth Geneva Convention states:

    'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.'
13. How this conclusion was reached in light of the practice of *ad hoc* tribunals, *see infra*, p. 135. The Nature of Armed Conflicts Must Not Have Any Significance in International Humanitarian Law.
14. For the reference, *see supra* Chapter 3, note 22. In this context, *see* Bothe, M., K.J. Partsch, and W.A. Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols*

and also extended the application of that system of repression to breaches of the Protocol. By means of Protocol I, acts committed against new categories of persons and objects protected were accepted as grave breaches.[15] From the perspective of the ICTY Statute, the important point is whether the ICTY has jurisdiction over the grave breaches of Additional Protocol I, although it is not expressly included in its Constitution. Since the ICTY applies 'rules of international humanitarian law which are beyond any doubt part of customary law', the significant criterion is the nature of its provisions in terms of whether it is being regarded as part of customary international law.[16] On this point, some scholars indicate that the ICTY does not have jurisdiction over the grave breaches of Additional Protocol I on the basis that it cannot be perceived as a part of customary international law.[17] From the point of view of international humanitarian law, in many respects, such a view does not have any basis for the following reasons:

First, many provisions of Additional Protocol I are related to the protection of civilians and reflect the customary international law at the time it was adopted.[18]

Second, the argument that since there is no State practice,[19] which is one of the main conditions for accepting a rule as a customary law principle, has no base as far as the practice of international humanitarian law is concerned. Until the practice of the *ad hoc* tribunals, the international community has witnessed very few international judicial decisions on

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Additional to the Geneva Conventions of 1949, (The Hague, Boston, London: Martinus Nijhoff Publishers, 1982). For the significance of the Additional Protocols in International Humanitarian Law, *see* Gasser, H-P., 'Negotiating the 1977 Additional Protocols: Was It a Waste of Time?', in Delissen, A. J. M. and G. J. Tanja (eds), *Humanitarian Law of Armed Conflict, Challenges Ahead: Essays in Honour of Frits Kalshoven* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1991), pp. 81–92.

15. Wyngaert, C., 'The Suppression of War Crimes under Additional Protocol I', in Delissen, A. J. M. and G. J. Tanja (eds), pp. 198–9. For example, refugees and stateless persons in the power of an adverse party (Art. 73 of the Protocol I), medical or religious personnel, medical units or medical transports which are under the control of the adverse party and protected under the Protocol (Arts. 15–31 of the Protocol), combatants and prisoners of war (Art. 44 of the Protocol I), protection of persons who have taken part in hostilities (Art. 45 of the Protocol I). In particular, Article 85 (3–4) of Protocol I has a specific importance in terms of providing protection for civilian population.
16. In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law …' (*Secretary-General's Report*, para. 34).
17. Shraga, D. and R. Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' (1994), 5 *EJIL*, p. 364.
18. Cassese, A., 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' (1984), 3 *UCLA Pac. Bas. L. J.*, p. 86, in particular, pp. 86–97; Greenwood, p. 644; Penna, L.R., 'Customary International Law and Protocol I: An Analysis of Some Provisions' in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva, The Hague: International Committee of the Red Cross, Martinus Nijhoff Publishers, 1984), p. 201, in particular, pp. 210–24.
19. Lopez, L., 'Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts' (1994), 69 *New. U. L. Rev.*, p. 951. Although the view taken by the author is related to the civil war concept and Additional Protocol II of 1977, if the matter is State practice to become a customary international law rule, it has to be valid for all Geneva Conventions and Additional Protocols thereto.

international humanitarian law indicating that conventional law rules have become customary law rules. For example, the International Military Tribunal at Nuremberg in relation to the Hague Regulations on Land Warfare of 1907, similarly the United States Military Tribunal in *United States v. Von Leeb (*the *High Command Case)* with regard to the many provisions of the 1929 Geneva Convention of Prisoners of War decided that they were part of customary international law[20] without examining the actual practice of States. In the same vein, this time, a different international organ, the ICJ in the *Nicaragua Case,*[21] decided that common Articles 1 and 3 of the 1949 Geneva Conventions had become part of customary law,[22] even though in its decision the ICJ did not examine one of the essential conditions for being a customary rule[23] through provisions of a multilateral treaty, State practice.[24] The reason why international judicial decisions in relation to humanitarian law rules mostly ignore State practice can be explained by giving two reasons: Firstly, it is difficult to find State practice in this field of international law. Secondly, and significantly, international 'tribunals have been guided, and may continue to be guided, by the degree to which certain acts are offensive to human dignity. The more heinous the act, the more willing the tribunal will be to assume that it violates not only a moral principle of humanity but also a positive norm of customary law.'[25] Under this guidance, there is no doubt that many provisions of the Geneva Conventions, including both grave breaches and other breaches, and Additional Protocol I together with Additional Protocol II, constitute part of customary international law beyond any doubt, as far as the protection of innocent civilians in armed conflict situations is concerned.

Thirdly, during the process of the establishment of the ICTY, there was no doubt that many provisions of grave breaches of Additional Protocol I were regarded as part of customary international law. The issue at that time was under which Article of the ICTY Statute, the Tribunal could have jurisdiction for such acts. The general intention was not Article 2, but

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20. Trial of German Major War Criminals, 1946, Cmd. 6964, at 65, 11 Trials of War Criminals before the Nuremberg Military Tribunals under CCL No. 10 (1948) at 462. For references, *see* Meron, T., 'Geneva Conventions as Customary Law' in Theodor Meron, *War Crimes Law* …, pp. 154–5.
21. *Nicaragua v. U.S., Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Merits*) (1986), *ICJ Rep.*, p. 14.
22. Ibid., paras. 218–20, at pp. 113–14.
23. In the *Nicaragua Case*, the ICJ took a different path from the one it followed in *the North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands*) (1969, *ICJ Rep.*, p. 3) in which the Court had strictly looked for the two elements of customary law rule: State practice and *opinio juris*. *See*, in particular, paras. 70–92 of the Judgement of the Court. Abi-Saab regards the ICJ's practice in *the Nicaragua Case* as a moving forward from the concept of the custom to general international law. Abi-Saab, G., 'The 1977 Additional Protocols and General International Law: Some Preliminary Reflexions' in A. J.M. Delissen and G. J. Tanja (eds), pp. 121–2.
24. For a relationship between multilateral treaties and customary international law, *see* Baxter, R.R., 'Multilateral Treaties as Evidence of Customary International Law' (1965–66), 41 *BYIL*, pp. 275–300; and also *see* Greenwood, C., 'Customary Law Status of the 1977 Geneva Protocols' in Delissen and Tanja (eds), pp. 96–9.
25. Meron, 'Geneva Conventions …', p. 157.
26. 'It must be noted that the statute of the International Tribunal refers to grave breaches of the Geneva Conventions of 1949 in article 2 and to violations of the laws or customs of war in

Article 3 of the Statute under the heading of 'violations of the laws or customs of war'.[26]

Lastly and most importantly, two recent international instruments give a significant place to provisions of Additional Protocol I. The 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind, in Article 20 under the heading of war crimes, although it does not divide war crimes into two as grave breaches and other violations of the laws or customs of war,[27] employs almost the same regulation with Article 85 (3 and 4) of the 1977 Additional Protocol I.[28] Similarly, the ICC Statute includes the same provisions among a large number of acts constituting serious violations of the laws and customs applicable in international armed conflicts.[29]

In sum, the ICTY has jurisdiction over the grave breaches of Additional Protocol I for the aforementioned reasons as well as the grave breaches of the Geneva Conventions of 1949. The practice of the ICTY in this regard will be examined in detail below.

The Practice of the *Ad Hoc* Tribunals and Their Contribution to International Humanitarian Law and Their Impact on the ICC

Since the four Geneva Conventions and Additional Protocols are now being applied for the first time at the international level by the *ad hoc* tribunals, the interpretation and application that they place on them undoubtedly has a significant place in the development of international humanitarian law. In this context, as to subject-matter jurisdiction of the *ad hoc* tribunals, their contribution to international humanitarian law and their impact on the ICC can be examined in two ways. Firstly, the ICTY and the ICTR, to ensure that they do not violate the principle of legality (*nullum crimen sine lege*), examine the conditions of the applicability of different categories of crimes, such as under which conditions are war crimes or the crime of genocide applicable to a

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article 3. It does not refer explicitly to grave breaches of Additional Protocol I. Many of the grave breaches of Additional Protocol I also constitute violations of the laws and customs of war' (*Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)* (hereinafter *Final Report*), para. 51): 'it is understood that the "laws or customs of war" referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common Article 3 of the 1949 Geneva Convention, and the 1977 Additional Protocols to these Conventions' (Statement by Mrs Albright on behalf of the USA in voting for Resolution 827/1993), Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, S/PV. 3217 (25 May 1993); in V. Morris and M.P. Scharf, *An Insider's Guide* …, Vol. II, pp. 187–8. In the same way, *see* also statement by Sir David Hannay on behalf of the UK, in V. Morris and M.P. Scharf, *An Insider's Guide* …, Vol. II, p. 190; Statement by Mr Merimée on behalf of France, in V. Morris and M.P. Scharf, *An Insider's Guide* …, Vol. II, p. 184.

27. For its importance, *see infra*, p. 135. The Nature of Armed Conflicts Must Not Have Any Significance in International Humanitarian Law.
28. 1996 ILC Draft Code, Art. 20 (b, c, d). Article 20 (a) of the Draft Code includes the acts regarded as grave breaches of the 1949 Geneva Conventions without referring to them as grave breaches.
29. Art. 8 (2) (b) of the ICC Statute. Although the ICC Statute in Article 8 (2) (a) regulates the grave breaches system, it does not give any place to grave breaches of the Additional Protocol I in that part. As will be discussed later, this division is just symbolic in nature. As far as the concept of jurisdiction of the ICC is concerned, there is no difference between Article 8 (2) (a) and 8 (2) (b) of the Statute. *See infra* notes 136–9 and accompanying text.

specific event, and in this way, give guidance on the conditions for the applicability of international crimes. Secondly, the *ad hoc* tribunals specifically deal with each act regarded as a crime and examine the elements of specific acts; for example, is rape an act of torture or inhuman treatment under Article 2 (b) of the ICTY Statute. The importance of the practice of the *ad hoc* tribunals in this sense lies in determining the scope of international crimes.

From the perspective of the grave breaches system, the practice of the ICTY has the same effects and its contribution to international humanitarian law and most likely its impact on the ICC can be followed in this direction.

The Conditions for the Applicability of the Grave Breaches System

The conditions which apply to the grave breaches system can be examined by dividing them into two categories: General Conditions and Specific Conditions.

General Conditions

Before explaining the specific conditions for the applicability of the provisions of grave breaches system, it is necessary to address general requirements for the application of the norms of international humanitarian law to a particular situation as far as the concept of war crimes is concerned.[30] These are: The existence of an armed conflict, whether international or not, and the link (nexus) between the acts of the accused and the armed conflict.[31]

The Existence of an Armed Conflict

To apply the concept of war crimes (grave breaches system and other violations of the laws or customs of war) to a particular event, there has to be an armed conflict either international or non-international in nature.

The criteria for the law of armed conflict and to what extent it can be applied was for the first time set up in the case of *Prosecutor v. Dusko Tadic* by the Appeals Chamber of the ICTY in its '*Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*'.[32] The Appeals Chamber adopted the following formula to determine whether an armed conflict exists or not.

> … 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. International humanitarian law applies from the initi-

30. For the crime of genocide and crimes against humanity conditions are different from war crimes. *See infra* Chapter 5 and Chapter 6, p. 209. The Elements of the Crime of Genocide, and p. 245. The Conditions for the Applicability of the Concept of Crimes Against Humanity, respectively.

31. These conditions are the same for the application of the other violations of laws or customs of war (Art. 3 of the ICTY Statute) as the applicability of the grave breaches system.

> ation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[33]

The significance of the view taken by the Appeals Chamber can be found in its effect on the creation of a guideline for the following cases of the *ad hoc* tribunals and for the ICC considering its case law. As clearly being witnessed, the ICTY in each case refers to the *Jurisdiction Decision on the Tadic Case* to decide whether a state of armed conflict exists or not.[34]

From the perspective of international humanitarian law, it is not difficult to decide whether there is an international armed conflict. The issue lies in the determination of whether there is a non-international armed conflict. The basic norms regulating internal armed conflicts can be found in Common Article 3 to the Geneva Conventions and the 1977 Additional Protocol II thereto. Common Article 3 does not have a clear criterion setting out when it was applicable, what level of hostilities are required to trigger its protection on civilians. Common Article 3 just mentions a standard of 'armed conflict not of an international character'[35] that gives a broad discretion to governments in terms of determining whether the Article is applicable or not.[36] In other words, although the level of conflict is sufficient to trigger the application of the Article, governments can claim that the conflict is just an internal disturbance with tension such as riots. To resolve this problem, the international community adopted the 1977 Additional Protocol II for the applicability of Common Article 3 to the Geneva Conventions. Under this Protocol, the level of armed conflict to apply norms regulating non-international conflicts is defined as follows:

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32. *The Prosecutor v. Dusko Tadic*, Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No: IT-94-1-AR72 (2 October 1995) (hereinafter *Jurisdiction Decision*).
33. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 70.
34. *Prosecutor v. Dusko Tadic*, Trial Chamber, *Opinion and Judgement*, Case No: IT-94-1-T (7 May 1997) (hereinafter, *Tadic Case, Judgement*), para. 561. The *Tadic Case* was considered as very significant in international humanitarian law due to its being the first detailed decision of an international criminal tribunal since the Nuremberg Trials. In this sense, *see* Scharf, M.P. and V. Epps, 'The International Trial of the Century? a "Cross-Fire" Exchange on the First Case before the Yugoslavia War Crimes Tribunal' (1996), 29 *Corn. Int.'l L. J.*, pp. 635–63; Scharf, M., 'The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg' (1997), 60 *Alb. L. Rev.*, pp. 861–82; *Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as 'Pavo', Hazim Delic, Esad Landzo also known as 'Zenga'*, Trial Chamber, *Judgement*, Case No: IT-96-21-T (16 November 1998) (hereinafter *Celebici Camp Case, Judgement*), para. 183; *Prosecutor v. Anto Furundzija*, Trial Chamber, *Judgement*, Case No: IT-95-17/1-T10 (10 December 1998) (hereinafter *Furundzija Case, Judgement*), para. 59.
35. Common Article 3 (1) to the Geneva Conventions states: 'In the case of armed conflict not of an international character occurring in the territory of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions.'
36. Nier III, C.L., 'The Yugoslavian Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World' (1992), 10 *Dick. J. Int'l L.*, p. 316.

> … which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[37]

Then the Protocol II, different from Common Article 3, clearly provides that it 'shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'.[38] However, this detailed adoption still leaves a discretionary power to governments to distinguish armed conflicts from internal disturbances,[39] in the absence of an independent international body that can solve the problem.

At first sight, it may be thought that the Additional Protocol II resolves many problems with regard to the threshold of applicability of norms to internal conflicts, but in fact it introduces a higher threshold than found in Common Article 3. According to Protocol II, there has to be '(a) two sets of armed forces, (b) responsible command, and (c) sufficient control over territory to carry out sustained operations'[40] for the application of its provisions. However, the requirements of Additional Protocol II are not consistent with the latest international humanitarian law instruments. Firstly, the 1996 ILC Draft Code does not give any place for such requirements and just employs the phrase 'armed conflict not of an international character' which is similar to the vague standard of Common Article 3[41] and it does not mention internal disturbances and tensions. Secondly, the ICC Statute again does not require the conditions of Additional Protocol II, while it deploys the provisions of Common Article 3 to the Geneva Conventions and of Article 1 (2) of the Protocol II.[42] In addition to this regulation, the ICC Statute introduces a new criterion for the acts indicated in Article 8 (2) (e) under the heading of '[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, …'[43] by means of adopting Article 8 (2) (f) of the Statute. It provides:

> [p]aragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. *It applies to armed conflicts*

37. Art. 1 (1) of the Additional Protocol II.
38. Art. 1 (2) of the Additional Protocol II.
39. Nier III, p. 317.
40. Ratner, S.R. and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997), p. 94; Kooijmans, P.H., 'In the Shadowland Between Civil War and Civil Strife: Some Reflections on the Standard-Setting Process' in Delissen and Tanja (eds), pp. 231–2.
41. Art. 20 (f) of the 1996 ILC Draft Code.
42. Art. 8 (2) (c) (d) of the ICC Statute.
43. For the acts constituting other serious violations of the laws or customs applicable in armed conflicts not of an international character, *see* Art. 8 (2) (e) of the ICC Statute.

> *that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups* (emphasis added).

Although this new criterion is regarded as 'reflecting recent developments of the law',[44] it can be considered as the ICC Statute creating different standards for the violations of Article 3 common to the four Geneva Conventions by way of Article 8 (2) (c) (d) and for other serious violations of the laws or customs applicable in internal armed conflicts by way of Article 8 (2) (e) (f) as far as the literal meaning and the way of its drafting are concerned. Undoubtedly, such a division and different standards as to the threshold for non-international armed conflicts cannot be explained and cannot be accepted from the perspective of international humanitarian law.

The criteria for protracted armed conflict between governmental authorities and organised armed groups or between such groups indicated in Article 8 (2) (f) of the ICC Statute, for the first time in international law, were interpreted and applied by the Appeals Chamber of the ICTY in the *Tadic Case* in relation to Common Article 3 to the Geneva Conventions.[45] In its decision, the Trial Chamber concentrated on two aspects of a conflict to distinguish an internal armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities; the intensity of the conflict and the organisation of the parties to the conflict.[46] To avoid applying different standards for violations of Common Article 3 to the Geneva Conventions and for other violations of the laws or customs of war applicable to non-international armed conflicts, the way adopted by the ICTY should guide the ICC on the premise that the concept of protracted armed conflict or violence between governmental authorities and organised armed groups or between such groups within a State, which cannot be found either in Common Article 3 or in the Additional Protocol II, must be considered as one of the major impacts of the practice of the *ad hoc* tribunals on the ICC Statute. This is an important achievement of the international community to clarify the vagueness of the threshold of applicability of international humanitarian law norms to internal conflicts. The practice of the *ad hoc* tribunals can clearly guide the ICC in this respect, and the existence of the ICC as an independent international criminal judicial body does not leave any room for broad discretion to governments in determining when the rules of international humanitarian law are applicable.

The Link (Nexus) between the Acts of the Accused and the Armed Conflict

To apply the rules of international humanitarian law to a specific event, the existence of an armed conflict is not enough. At the same time, there has to be a clear link (nexus) between the criminal act and the armed conflict. This

44. Meron, *War Crimes Law* …, p. 309.
45. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 70, see *supra* note 33 and accompanying text; Trial Chamber, *Tadic Case, Judgement*, paras. 562–7.
46. Trial Chamber, *Tadic Case, Judgement*, para. 562.

criterion was described by the Appeals Chamber of the ICTY as follows: '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.'[47] Similarly, the Trial Chamber in the *Tadic Judgement* decided that '[f]or a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law'[48] and then clarified this element as follows:

> It would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties … It is not … necessary [that the crime] be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict.[49]

As has clearly been understood, the reason why the element of nexus is required is to exclude purely domestic crimes committed during an armed conflict from the jurisdiction of the *ad hoc* tribunals.

The interpretation and the application of this element has already taken its place in the ICTY's cases that were decided after the *Tadic Case*,[50] and there is no doubt that this practice will create a guideline for the ICC in terms of determining its jurisdiction over the crimes which are not domestic crimes in nature.

Specific Conditions Applying to the Grave Breaches System

In addition to the general conditions, specific requirements that are necessary to apply the concept of grave breaches system will be discussed and their consistency with the development of international humanitarian law in light of the practice of the ICTY and of the latest international humanitarian law instruments such as the 1996 ILC Draft Code and the ICC Statute will be analysed in detail below.

The Existence of an International Armed Conflict

The nature of the armed conflict in the former Yugoslavia, whether international or non-international and whether the internationality of an armed conflict is a jurisdictional prerequisite for the application of the grave breaches system under Article 2 of the ICTY Statute were the biggest issues to be dealt with by the ICTY.

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47. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 70.
48. Trial Chamber, *Tadic Case, Judgement*, para. 572.
49. Ibid., para. 573. For the application of this element to the specific event of the *Tadic Case* and its discussion by the Trial Chamber, *see Tadic Case, Judgement*, paras. 573–6.
50. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 193–8; Trial Chamber, *Furundzija Case*, *Judgement*, para. 65.

The matter of the nature of the armed conflict first arose with the defence in the *Tadic Case* as an interlocutory appeal. The defence in its argument contended that Article 2 of the Statute was only applicable to the situations of an international armed conflict and the armed conflict in which the offences had allegedly been committed by *Dusko Tadic* could not be defined as an international armed conflict. Thus the International Tribunal had no jurisdiction over grave breaches of the Geneva Conventions.[51]

On the other hand, the Prosecutor argued that the grave breaches system was applicable to the case on the premise that the conflict in the former Yugoslavia was an international armed conflict.[52] To support its case, the Prosecutor mainly depended upon the Security Council's treatment of the conflict in Bosnia-Herzegovina as an international armed conflict by way of referring to the grave breaches of the Geneva Conventions.[53] The clear involvement of the JNA (Yugoslav People's Army) in the conflict in 1992 when the alleged crimes had been committed made the conflict international,[54] together with the agreements made by the parties to the conflict during the course of the conflict.[55] In relation to the jurisdiction of the International Tribunal, the United States submitted an *amicus curiae* brief indicating that the conflict in the former Yugoslavia, in particular in Bosnia-Herzegovina was an international armed conflict in character[56] and grave breaches provisions of Article 2 of the Statute were applicable; moreover, the grave breaches provisions of that Article can be applied to armed conflicts of a non-international character.[57]

The Trial Chamber in relation to its jurisdiction over the grave breaches system held that 'the element of internationality forms no jurisdictional criterion of the offences created by Article 2 of the Statute of the International Tribunal'[58] on the grounds that Article 2 has been drafted as to be self-contained,[59] the element of internationality cannot be found in its wording[60] and the Tribunal applies international law rules, 'beyond any doubt part of customary law' under which there cannot be any 'ground for

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51. *Brief to Support the Motion on the Jurisdiction of the Tribunal, Prosecutor v. Dusko Tadic*, Case No: IT-94-1-T (23 June 1995) (hereinafter *Defence Brief on Jurisdiction*), paras. 9.3, 9.6.
52. *Prosecutor's Response to the Defence's Motion file on 23 June 1995, Prosecutor v. Dusko Tadic*, Case No: IT-94-1-T (7 July 1995) (hereinafter *Prosecutor's Response*), p. 36.
53. *Prosecutor's Response*, pp. 37–8. The Prosecutor along with a number of Security Council Resolutions especially quoted SC/RES/764 of 13 July 1992,'… [r]ecalling the obligations under international humanitarian law, in particular the Geneva Conventions of 12 August 1949 … [r]eaffirms that all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commissions of grave breaches of the Conventions are individually responsible in respect of such breaches. …' (*Prosecutor's Response*, p. 38).
54. *Prosecutor's Response*, pp. 39–42.
55. Ibid., pp. 44–5. For other evidence submitted by the Prosecutor, *see Prosecutor's Response*, pp. 43, 45–6.
56. *Amicus Curiae Brief Presented by the Government of the United States of America* (*Dusko Tadic*, Case No: IT-94-1-T) (25 July 1995) (hereinafter *Amicus Curiae Brief*), pp. 26–35.
57. *Amicus Curiae Brief*, p. 35.
58. Trial Chamber, *Decision on the Defence Motion (Jurisdiction of the Tribunal), Prosecutor v. Dusko Tadic*, Case No: IT-94-1-T, (10 August 1995) (hereinafter *Jurisdiction Decision*), para. 53.
59. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 49.
60. Ibid., para. 50.

treating Article 2 as in effect importing into the Statute all the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention to international conflicts',[61] which is a requirement for a national court to have jurisdiction over grave breaches because of the principle of State sovereignty, not a requirement for an international tribunal or court.[62] Having indicated these facts, the Trial Chamber did not decide the nature of the conflict in Bosnia-Herzegovina, although it indicated that there were 'clear indications in the great volume of material before the Trial Chamber that the acts alleged in the indictment were in fact committed in the course of an international armed conflict'.[63]

On appeal, the Appeals Chamber treated the issue quite differently from the Trial Chamber. Firstly, the majority of the Chamber[64] regarded the conflict in the former Yugoslavia as a 'mixed conflict' having both internal and international characteristics.[65] In its decision, the Appeals Chamber depended mainly upon the agreements made by the parties to stand by certain rules of humanitarian law,[66] the Security Council's Resolutions, reflecting an awareness of the mixed character of the conflicts[67] and the nature of the rules of international humanitarian law in respect to grave breaches and in particular the concept of 'protected persons' that can create an illogical result for the civilians especially for the Bosnian Serbian civilians.[68] The decision of the Appeals Chamber in this regard was clearly against the majority opinion amongst international lawyers and the *Report of the Commission of Experts* that the conflict should be treated as a single conflict and international in nature.[69]

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61. Ibid., para. 51.
62. Ibid., para. 52.
63. Ibid., para. 53.
64. Judge Li was of the opinion that the Tribunal should consider the conflict in the former Yugoslavia as a single and international armed conflict. *See Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction*, paras. 17–19.
65. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 77.The related part of the decision to reach such a conclusion can be quoted as follows: 'The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992.To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless the direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven)' (para. 72).
66. Ibid., para. 73.
67. Ibid,, para. 74.
68. '… serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality' (Appeals Chamber, *Tadic Case, Jurisdiction Decision,* para. 76). For criticism of such an interpretation, *see* Greenwood, C., 'International Humanitarian Law and the Tadic Case' (1996), 7 *EJIL*, pp. 272–4.
69. O'Brien, J.C.,'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia' (1993), 87 *AJIL*, p. 647; Meron, T., 'International Criminalization of Internal

Secondly, the majority of the Appeals Chamber[70] held that the element of internationality was a jurisdictional requirement for the applicability of the grave breaches system under Article 2 of its Statute[71] on the ground that the internationality requirement was a necessary limitation on the grave breaches system due to the principle of State sovereignty,[72] and the concept of protected persons or property could be applicable only if there was an international armed conflict.[73]

The view taken by the Appeals Chamber with regard to the requirement of the internationality of a conflict to apply Article 2 of the Statute has created a guideline for the International Tribunal's practice, as having been witnessed in the cases of Rule 61 proceedings[74] and in Final Judgements; the *Tadic Judgement,*[75] *Celebici Camp Case Judgement,*[76] the *Aleksovski Judgement*.[77]

To be in accordance with the Appeals Chamber *Decision on Jurisdiction*, the nature of the armed conflict has to be decided by the ICTY in every

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Atrocities' (1995), 89 *AJIL*, p. 556; Meron, T., 'The Case for War Crimes Trials in Yugoslavia' (1993), 72 *Foreign Affairs*, p. 128; Bassiouni, M.C. and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, New York: Transnational Publishers, 1996), p. 453; Roch, M.P., 'Forced Displacement in the Former Yugoslavia: A Crime under International Law?' (1995), 14 *Dick. J. Int'l L.*, p. 7; Joyner, C.C., 'Enforcing Human Rights Standards …', p. 247; *Amicus Curiae Brief*, pp. 26–35; *Final Report*, para. 44. For the criticism and whether the element of internationality is required in terms of grave breaches and the concept of 'protected persons and its relationship with the internationality of the conflict', *see infra* notes 119–64 and accompanying text.

70. Judge Abi-Saab was of the opinion that Article 2 of the ICTY Statute (grave breaches) was also applicable to internal armed conflicts. *See Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction*, p. 5.
71. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 84.
72. Ibid, para. 80.
73. Ibid., para. 81; and also *see supra* note 68. For the criticism and assessment *see infra* notes 159–64 and accompanying text.
74. Article 21 (4) (d) of the ICTY Statute prohibits trials *in absentia,* but judges of the Tribunal while drafting the Rules of Procedure and Evidence of the Tribunal the first time at the international level created a procedure that is known as 'Rule 61 Proceedings' for the situations where arrest warrants had not been executed within a reasonable time. For the conditions of the Rule 61 proceedings and its consequences, *see* Rule 61 of the Rules of Procedure and Evidence; *Decision of Trial Chamber I – Review of Indictment Pursuant to Rule 61 (Vukovar Hospital Case*), Case No: IT-95-13-R61 (3 April 1996), ('The general conditions for application of Article 2 of the Statute are the existence of an international armed conflict and the classification of victims as protected persons. …', para. 25); *Decision of Trial Chamber II – Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Prosecutor v. Ivica Rajic and Victor Andric*, Case No: IT-95-12-R61 (13 September 1996), para. 21; *Decision of Trial Chamber I – Review of Indictment Pursuant to Rule 61, Prosecutor v. Radovan Karadzic and Ratko Mladic*, Case No: IT-95-5-R61 and IT-95-18-R61 (11 July 1996), para. 88.
75. Trial Chamber, *Tadic Case, Judgement*, paras. 561–608.
76. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 204–35.
77. Trial Chamber, *Prosecutor v. Zlatko Aleksovski, Judgement* (25 June 1999) (hereinafter *Aleksovski Case, Judgement*), par.a 46. With regard to the applicability of the grave breaches system the Judgement was rendered by the majority of the Trial Chamber. *See Joint Opinion of the Majority, Judge Vohrah and Judge Nieto-Navia, on the Applicability of Article 2 of the Statute Pursuant to Paragraph 46 of the Judgement* (hereinafter *Aleksovski Case, Joint Opinion*), para. 1. The Presiding Judge, Almiro Simoes Rodrigues, dismissed in this regard with the majority of the Trial Chamber. *See Dissenting Opinion of Judge Rodrigues, Presiding Judge of the Trial Chamber* (hereinafter *Aleksovski Case, Dissenting Opinion of Judge Rodrigues*).

case including any alleged crimes regarded as grave breaches under Article 2 of its Statute. As a result, the ICTY has to devote lots of its time to decide whether the Article 2 crimes are committed in an international armed conflict, since every defendant accused of committing grave breaches has contended that the crimes with which he/she was accused had not been committed in an international armed conflict situation.[78]

The nature of the armed conflict in the former Yugoslavia has been discussed by the ICTY in the *Tadic Case* for the first time in a level of final judgement. The finding of the International Tribunal can be considered as in compliance with the Appeals Chamber *Decision on Jurisdiction* in terms of accepting the date of 19 May 1992 as the crucial moment changing the character of the conflict from an international to internal one that should be determined under the specific circumstances of each case. Firstly, the majority of the Trial Chamber[79] held that the conflict in question was, at least from the beginning of 1992 to 19 May 1992, an international armed conflict.[80] Secondly, the majority of the Chamber decided that to regard the conflict as either international or internal 'the degree of the involvement of the VJ [the new name for the army of the FRY after the withdrawal of JNA] and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) after the withdrawal of the JNA on 19 May 1992'[81] should be examined. At this point, the Trial Chamber again followed the same procedure with the Appeals Chamber *Decision on Jurisdiction* so as to determine the nature of the conflict and made its decision dependent upon the

78. As will be discussed later, in *the Tadic, Celebici Camp and Aleksovski Cases*, one of the major issues was the nature of the armed conflict to be dealt with by the ICTY. *The Furundzija Case* in this regard is not relevant since in that case there was no allegation against the defendant constituting grave breaches of the Geneva Conventions. Apart from these cases, for examples *see Form of the Indictment Motion #4 – Joint Defence Motion to Strike all Counts Arising under Article 2 or Article 3 for Failure to Allege a Nexus between the Conduct and an International Armed Conflict (Prosecutor v. Dario Kordic and Mario Cerkez*, Case No: IT-95-14/2-PT, 22 January 1999) (hereinafter *Kordic & Others*), paras. 4–7; *Jurisdictional Motion #2 – Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3 (Kordic & Others*, 22 January 1999), paras. 11–12; *Prosecutor's Response to Joint Defence Form of the Indictment #4 Motion to Strike All Counts Arising under Article 2 or Article 3 for Failure to Allege a Nexus Between the Conduct and an International Armed Conflict (Kordic & Others*, 5 February 1999), paras. 2–13; *Kordic Defence Pre-Trial Brief*, Volume II – Legal Issues (*Kordic & Others*, 6 April 1999), paras. 3–26; *Pre-Trial Motion by the Prosecution Requesting the Trial Chamber toTake Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina (Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic and Simo Zaric*, Case No: IT-95-9-PT, 6 December 1998) (hereinafter *Simic & Others*), paras. 10–20; *Defence Response to Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, Simic & Others* (3 February 1999); *Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the Conflict in Bosnia-Herzegovina, Simic & Others* (25 March 1999).

79. The Presiding Judge, Gabrielle Kirk McDonald, in this case was dismissed in this respect with the majority of the Trial Chamber. *See Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute (Prosecutor v. Dusko Tadic*, Case No: IT-94-1-T, 7 May 1997) (hereinafter *Separate and Dissenting Opinion of Judge McDonald*). For a view in compliance with the *Dissenting Opinion of Judge McDonald, see* Beane, D., 'After the Dusko Tadic War Crimes Trial: A Commentary on the Applicability of the Grave Breaches Provisions of the 1949 Geneva Conventions' (1997), 27 *Stet. L. Rev.*, pp. 589–627.

80. Trial Chamber, *Tadic Case, Judgement*, para. 569.

81. Ibid., para. 571.

concept of protected persons, according to the Appeals Chamber and the Trial Chamber, that can only be found in an international armed conflict.[82] To determine whether there is an agency relationship between the VJ and the Government of the Federal Republic of Yugoslavia, on the one hand, and the VRS (the army of the Bosnian *Republika Srpska*) and the entity of *Republika Srpska*, on the other hand, was discussed by the Chamber, in detail, in light of the *Nicaragua Case* which was decided by the ICJ.[83] By comparing the *Nicaragua Case* with the situations of Bosnia-Herzegovina in the *Tadic Case*, the majority of the Tribunal decided that 'after 19 May 1992 the armed forces of the *Republika Srpska* could not be considered as *de facto* organs or agents of the Federal Republic of Yugoslavia (Serbia and Montenegro), either in opstina Prijedor [where the alleged crimes occurred] or more generally'[84] for the following reason: the VJ and the government of the FRY did not exercise 'effective control', which was the essential element in determining whether there is an agency relationship between the sides mentioned – according to the Trial Chamber – that criterion was set up by the ICJ in the *Nicaragua Case*, over the VRS and the authorities of *Republika Srpska*.[85] Although the Trial Chamber referred to the involvement of the JNA and the FRY in the conflict in Bosnia-Herzegovina by means of equipping, supplying, maintaining and staffing the VRS,[86] keeping co-ordination with the VRS and *Republika Srpska*[87] and sharing the same goal with these political and military organisations in the sense of creating a Greater Serbia,[88] none of them were regarded as sufficient to establish an agency relationship between both sides by the Trial Chamber.

However, the *Tadic Judgement* was appealed by the Prosecution Service of the ICTY in this regard[89] and the Appeals Chamber reversed the *Tadic Judgement* by deciding that the conflict in question was an international armed conflict and in consequence the grave breaches system was applicable.[90] To reach this conclusion the Chamber did not regard the *Nicaragua Test* as a guideline since that test would not seem to be consonant with the logic of the law of State responsibility[91] and is at variance with judicial and

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82. Ibid., para. 583. For the criticism of this concept, *see infra* notes 159–64 and accompanying text.
83. *See supra* note 21; Trial Chamber, *Tadic Case, Judgement*, paras. 585–8.
84. Trial Chamber, *Tadic Case, Judgement*, para. 607.
85. Ibid., para. 605.
86. Ibid., paras. 592, 594–5.
87. Ibid., para. 598.
88. Ibid., para. 606. To establish 'effective control' the Trial Chamber concentrated on whether the Government of the FRY and JNA/VJ directed or influenced the actual military operations of the VRS. The decision of the Chamber was negative about this issue (*see* para. 605).
89. In this context, *see The Notice of Appeal of the Prosecution on the Trial Chamber's Judgement Filed on 6 June 1997* (*Tadic Case*, Case No. IT-94-1-A); *The Respondent's Brief of Argument of the Prosecution (Cross-Appeallant) of 12 January 1998* (*Tadic Case*, Case No. IT-94-1-A, 24 July 1998); *The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 19, 1999* (*Tadic Case*, Case No. IT-94-1-A, 19 January 1999).
90. Appeals Chamber, *Prosecutor v. Dusko Tadic, Judgement*, Case No: IT-94-1-A, 15 July 1999, paras. 162, 167–9.
91. Appeals Chamber, *Tadic Case, Judgement*, paras. 116–23.

State practice.[92] Instead, the International Tribunal applied a different test, namely overall control that constitutes the legal criteria for determining when armed forces participating in an armed conflict which is *prima facie* internal may be regarded as acting on behalf of a foreign power, thereby rendering the conflict international. According to the International Tribunal such control 'go[es] beyond the mere financing and equipping of such forces [in this context, Bosnian Serb forces] and involv[es] also participation in the planning and supervision of military operations'.[93] However, it should not be perceived as 'such control should extend to the issuance of specific orders or instructions relating to single military actions'.[94] In applying these criteria to the conflict, the Appeals Chamber shared the factual findings of the Trial Chamber's Judgement by indicating that it disagreed with the legal interpretation to be given to those facts.[95] In accordance with this guideline the Tribunal held that the Government of the FRY and its army, JNA/VJ, exercised overall control over *Republika Srpska* and VRS, both of whom were acting *de facto* organs of the FRY, and such finding was sufficient to classify the conflict as an international armed conflict.[96]

Even before the ruling of the Appeals Chamber in the *Tadic Judgement*, the ICTY in another case, the *Celebici Camp Case,* had taken a completely different view from that taken in the *Tadic Judgement* and held that the *Nicaragua Case* could not guide the Tribunal due to having been decided by a very different judicial body (the ICJ) and had been considering a completely different issue of international law – State responsibility.[97] The Trial Chamber also concluded that the conflict in Bosnia-Herzegovina must be regarded as an international armed conflict throughout 1992 and there must not be any doubt about the involvement of the JNA (later VJ) and the authorities of the FRY in the conflict, even after 19 May 1992, since the withdrawal of the JNA from Bosnia-Herzegovina leaving staff and equipment to the Bosnian Serbs, creating the VRS from the JNA and so on, could

92. Ibid., paras. 124–45.
93. Ibid., para. 145. In addition to the test of overall control, the Appeals Chamber referred to the two further tests establishing individual criminal responsibility as well as State responsibility in international law. The first one is related to the crimes committed under specific instructions (or subsequent public approval) by single individuals or militarily unorganised groups. The second one 'is the assimilation of individuals to State organs *on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions)* (para. 141, emphasis in original).
94. Ibid., para. 145. This is the main point that makes the decision of the Appeals Chamber different from the Trial Chamber's Judgement in which the test of 'effective control' was applied and directing or influencing the actual military operations of the VRS by the Government of the FRY and VJ was considered as the decisive criterion to set up such a test. *See supra* note 88.
95. Ibid., para. 148. The only difference between the decision of the Appeals Chamber from the Trial Chamber's Judgement was the examination of the Dayton Peace Accord, to which the FRY was signatory and represented *Republika Srpska,* to prove the overall control of the FRY and its army, JNA/VJ, over the entity of *Republika Srpska* and VRS (*see* paras. 157–60).
96. Ibid., para. 162.
97. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 230–1. It should be noted that the *Celebici Camp Case* was rendered before the Appeals Chamber *Decision on Tadic Judgement*. As far as the conclusion is concerned the Appeals Chamber *Decision on Tadic Judgement* and the *Celebici Camp Case Judgement* are in compliance with each other apart from some differences with regard to the content and interpretation of the events.

be considered as a deliberate attempt to cover up their participation in the conflict.[98]

The view taken by the International Tribunal in the *Celebici Camp Case* is completely consistent with the *Separate and Dissenting Opinion of Judge McDonald* in the *Tadic Case*.[99]

From the point of view of this study, it should be noted that the most important point in international humanitarian law and human rights law is the protection of the rights of individuals, thus, as will be pointed out below, the nature of the armed conflict should not have a role to play in the application of the rules of international humanitarian law to armed conflicts and the grave breaches system, if it is still regarded as a different concept of war crimes from other violations of the laws or customs of war – we are not of this opinion – must be applicable to both armed conflicts either international or non-international in character.[100] However, it is necessary to discuss to some extent the nature of the armed conflict in the former Yugoslavia, in particular, the conflict in Bosnia-Herzegovina, since the Appeals Chamber *Decision on Jurisdiction* held that the internationality of an armed conflict was a prerequisite for the application of Article 2 of its Statute (grave breaches) in light of the final judgements rendered by the ICTY so far.

First, at first sight, both decisions of the Trial Chambers may seem to be in compliance with the Appeals Chamber *Decision on Jurisdiction* in which the nature of the armed conflict in the former Yugoslavia was considered as having both international and internal dimensions. In this sense, the *Tadic* and the *Celebici Camp Cases' Judgements* do not create any controversy on the premise that the first one regards the conflict as internal and does not apply the grave breaches system, and the second one accepts the conflict as international and applies the grave breaches system. However, what creates the controversy is that both cases deal with the alleged crimes committed in Bosnia-Herzegovina throughout 1992.[101] Under the principles of international humanitarian law and the decision of the Appeals Chamber on Jurisdiction, 'international humanitarian law [rules] … apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there'.[102] Unless it is proven that the conflict in question (for a

98. Ibid., para. 234. For how this conclusion was reached, *see* paras. 208–27.

99. *See Tadic Case, Separate and Dissenting Opinion of Judge McDonald*. Actually, the Trial Chamber refers to this fact in its decision para. 233.

100. *See infra*, p. 135, The Nature of Armed Conflicts Must Not Have Any Significance in International Humanitarian Law.

101. *See Prosecutor v. Dusan/Dusko Tadic Goran Borovnica, Initial Indictment*, Case No. IT-94-1-T (February 1995). This Indictment was amended twice in September and December 1995. It charges the accused with events alleged to have occurred in the *Omarska Camp*, located in the *opstina of Prijedor*, Bosnia-Herzegovina, *between about 23 May and about 31 December 1992*. (*See Initial Indictment*, paras. 2.1–2.6, 3.1–3.9; *Second Amended Indictment*, paras. 2.1–2.7, 3.1–3.9; *Prosecutor v. Zejnil Delalic, Zdravko Mucic, also known as 'Pavo', Hazim Delic and Esad Landzo, also known as 'Zenga', Indictment*, Case No. IT-96-21-T (19 March 1996).) The Indictment is concerned with events alleged to have occurred in the *Celebici Prison Camp*, located in the *Konjic* municipality, Bosnia-Herzegovina, *from May 1992 to December 1992* (*see* paras. 1–15).

102. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 70 and also *see* para. 68.

specific case) is a separate armed conflict, the rules applicable to the conflict must be the same. On this ground, the cases occurring in the same year, involving similar circumstances and evidence should not be treated completely differently from one another. In this context, when both decisions of the Trial Chambers of the ICTY are examined, the natural result must be that at least throughout the year 1992, the conflict in Bosnia-Herzegovina must be regarded as an international armed conflict for the reasons explained in the *Celebici Camp Case* and in the *Separate and Dissenting Opinion of Judge McDonald in the Tadic Case*.[103] As has already been indicated above, at the appeal level, the Appeals Chamber reversed the Trial Chamber's Judgement in the *Tadic Case* and rightly held that the conflict in question was an international armed conflict. The view taken by the Appeals Chamber should be perceived as in compliance with the development of international humanitarian law and most importantly with the structure of the Yugoslavian case.[104]

Second, the definition of aggression adopted by the UN General Assembly in 1974 supports the view that the conflict in Bosnia-Herzegovina was an international armed conflict in the sense that the JNA (later VJ) and the Government of the FRY left arms and military staff to the Bosnian Serbs and also financed them through the payment of salaries in order to create a 'Greater Serbia' in that part of Europe. This was sufficient evidence to regard the involvement of any State in any conflict as a part of aggression as under Article 3 (g) of the definition of aggression.[105] If the involvement of the authorities of the FRY cannot be perceived as a sort of aggression against the State of Bosnia-Herzegovina, how can the act of handing over staff, troops, weapons and so on by the JNA while it was withdrawing from Bosnia-Herzegovina to the Bosnian Serbs instead of to the responsible government, that is internationally recognised as a State Bosnia-Herzegovina, be explained under international law? The only explanation for this must be that the withdrawal of the JNA was fictitious and was a cover-up for their participation in the conflict as decided by the ICTY in the *Celebici Camp Case* and explained by Judge McDonald in her *Separate and Dissenting Opinion in the Tadic Case*.[106]

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103. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 208–27; *Separate and Dissenting Opinion of Judge McDonald in the Tadic Judgement*.

104. The Appeals Chamber with regard to the conditions of the applicability of the grave breaches system as to be an international armed conflict and protected persons or property refers to the Appeals Chamber *Jurisdiction Decision* (*see* Appeals Chamber, *Tadic Case, Judgement*, paras. 80–2). However, it does not examine the possibility of the applicability of the system to all conflicts. For these reasons, the same criticism is also valid for the Appeals Chamber's *Tadic Judgement*.

105. UN GA Res. 3314 (XXIX), (14 December 1974). Article 3 (g) of the Resolution states:

> 'Any of the following acts regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression: …
> (g) The sending by on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts … or its substantial involvement therein.'

106. *See supra* note 103 and accompanying text. The Supreme Court of Bavaria in the case of *Public Prosecutor v. Djajic* (No. 20/96, 23 May 1997) also took the same view in its judgement with regard to the application of the Geneva Conventions to the Yugoslavian conflict at a national level, in C.J.M. Safferling, 'Case Note with Commentary' (1998), 92 *AJIL*, pp. 530–1.

Thirdly, the practice of domestic criminal courts with regard to the application of the grave breaches system for the Yugoslavian situation again supports the view that the conflict was an international armed conflict.[107] Undoubtedly, the jurisdictional base for the application of the grave breaches system by a national criminal court is the concept of universal jurisdiction and that does not create a breach of the principle of State sovereignty. As far as the practice of domestic criminal jurisdiction is concerned, the requirement of armed conflict that it be international in nature is a *sine qua non* element to apply the system not to violate sovereignty of States. For an International Tribunal, as will be explained below, to apply the grave breaches system such a requirement must not be a prerequisite jurisdictional element. However, the Appeals Chamber in the *Jurisdiction Decision*, as indicated above, decided that the internationality of armed conflict was a prerequisite jurisdictional element for the applicability of the grave breaches system as a result of the principle of State sovereignty.[108] In this sense, to be in compliance with the State practice, the ICTY should decide that the conflict has international aspects. From the perspective of international humanitarian law, it is not easy to explain while a national court describes the conflict as an international armed conflict, how the International Tribunal can consider it as non-international on the premise that the interpretation and application of the rules of international humanitarian law by the Tribunals or the ICC must be more flexible than their domestic counterparts as far as the protection of innocent civilians and the jurisdictional base of the international judicial bodies are concerned.

Lastly, the point in respect to what the criterion must be to determine whether an armed conflict is international or internal and the applicability of the *Nicaragua Case* by the International Tribunal should be examined. The decision of the ICJ in the *Nicaragua Case* cannot be regarded as guiding the ICTY to determine the nature of the conflict in the former Yugoslavia, more specifically in Bosnia-Herzegovina, on the ground that the jurisdictional base of the ICJ and the International Tribunal are completely different and, in the *Nicaragua Case*, the major problem was the concept of State responsibility, not individual criminal responsibility.[109] However, even if it is regarded as a guideline to determine the nature of armed conflicts, its interpretation and application by the majority of the Trial Chamber in the *Tadic Case* must be considered as misinterpreted and misapplied by the Tribunal on the following basis: To determine that an armed conflict has an international aspect as a result of an agency relationship between the State in question, on the one hand, and the armed forces and authorities of the Party to the conflict, on the

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107. Ibid.; *In Re G.*, Military Tribunal, Division 1, Lausanne, Switzerland, 18 April 1997, in Ziegler, A. R., 'Case Note with Commentary' (1998), 92 *AJIL*, p. 78; and also *see* Fischer, H., 'Some Aspects of German State Practice Concerning IHL' (1998), 1 *YHIL*, p. 380.

108. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 80.

109. *Separate and Dissenting Opinion of Judge McDonald in the Tadic Judgement*, paras. 27–8; *Celebici Camp Case, Judgement*, paras. 230–1; Meron, T., 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout' (1998), 92 *AJIL*, pp. 236–7; Fenrick, W., 'The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', in Schmitt, M. N. and L. C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium*, Vol. 71 (Newport, Rhode Island: Naval War College, 1998), p. 83.

other hand, the *Nicaragua Case* did not establish the criterion of 'effective control' to decide whether there exists an agency relationship; the concept of dependency for the war necessities and control (not necessary to be effective) in this sense should be enough to characterise the conflict as having an international dimension.[110] In the appeal stage of the *Tadic Judgement,* the Appeals Chamber has applied the concept of overall control, which should be regarded as supporting this view, to determine whether there existed an international armed conflict in the period of Yugoslav conflict in question.[111] It is very clear that the view taken by the Appeals Chamber will be authoritative in the practice of the ICTY and will create the main guideline for the following cases of this Tribunal in relation to this specific point.

Moreover, it should not be forgotten that finding a State responsible for its wrongful acts and the nature of the conflict are totally different concepts and to find the State responsible, there is no need to find out the nexus between attribution and the nature of the armed conflict[112] that constitutes further evidence why the *Nicaragua Case* must not create a precedent for the International Criminal Tribunal. In relation to the Yugoslavian conflict, the ICJ was again faced with the issue of determining State responsibility, in this case the responsibility of Yugoslavia (Serbia and Montenegro) for acts of unlawful intervention as argued by Bosnia-Herzegovina that Yugoslavia violated Articles 2 (1–4) and 31 of the UN Charter, and customary international law in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter the *Genocide Case*).[113] In this case, the ICJ did not discuss the nature of the conflict at the provisional measures stage. The Case is still under examination by the Court. As will be discussed in the following chapter, as far as the application of the Genocide Convention is at issue, the nature of the armed conflict does not have any role to play in the sense that 'genocide, whether committed in time of peace or in time of war, is a crime under international law'.[114] The ICJ in the *Genocide Case* referred to this fact as follows:

> the Convention [Genocide Convention] is applicable, without reference to the circumstances linked to the domestic or international nature of the conflict, provided the acts to which it refers in Articles II and III have been perpetrated. In other words, irrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical.[115]

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110. *Separate and Dissenting Opinion of Judge McDonald in the Tadic Judgement*, para. 4. If the *Nicaragua Case* is considered as a precedent, the view taken by Judge McDonald in her *Separate and Dissenting Opinion in the Tadic Judgement* must be accepted as authoritative for the interpretation and application of the Case into the Yugoslavian situation.
111. *See supra* notes 90–6 and accompanying text.
112. Meron, 'Classification of Armed Conflict …', pp. 240–1.
113. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Request for the Indication of Provisional Measures* (1993), *ICJ Rep.*, pp. 3, 325; *Jurisdiction and Admissibility* (1996), *ICJ Rep.*, p. 595. For background to the Case and all relevant documents, *see* Boyle, F.A., *The Bosnian People Charge Genocide* (Amherst, MA: Aletheia Press, 1996).
114. Art. 1 of the Genocide Convention.

In light of this fact, and the reasons explained above, even if the ICJ in its final judgement holds that the nature of the armed conflict is either international or non-international, although it is not necessary for the Case, it should not guide the ICTY. Moreover, the ICJ does not have jurisdiction over the establishment of individual criminal responsibility.[116] Given this background, there is no way to accept the opinion that the determination of the nature of the conflict in the former Yugoslavia is a vital issue and thus it should be decided by the ICJ, not by the ICTY which has a limited jurisdiction and mandate.[117]

In sum, for the reasons explained above, the conflict in question must be regarded as having international aspects more than having internal dimensions.[118]

The Nature of Armed Conflicts Must Not Have Any Significance in International Humanitarian Law

Having indicated the practice of the ICTY in relation to the existence of an international armed conflict to apply the grave breaches system and presented our view that if this condition is still important why the conflict must be considered as international in nature, now one of the major purposes of the study is to show why the characterisation of armed conflicts must not affect the application of different laws to individual armed conflicts as far as the protection of innocent civilians in a wartime situation is concerned.

Firstly, the nature of armed conflicts has increasingly changed from international to internal or internationalised in the last decades of the twentieth century. In this sense, the laws of war codified in the Geneva Conventions have become irrelevant.[119] As indicated earlier,[120] the Geneva Conventions were one of the major results of the Second World War and the intention behind them was to codify rules governing international armed conflicts. At that time, the principle of sovereignty of States was dominant and there was no possibility of accepting criminal jurisdiction of other States due to it being considered as infringement of States' sovereignty. In the Geneva Conventions just one Article (Common Article 3 to the Geneva Conventions) was drafted to regulate internal armed conflicts and it was not included in the grave breaches system of the Conventions which could only be applied to the conflicts that have international character. However,

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115. *The Genocide Case, Jurisdiction and Admissibility*, para. 31.
116. *See supra* Chapter 1, note 106 and accompanying text.
117. Alvarez. J.E., 'Rush to Closure: Lessons of the Tadic Judgement' (1998), 96 *Mich. L. Rev.*, pp. 2099–100.
118. Some scholars regard the conflict in the former Yugoslavia as an internal armed conflict. Amongst them: Gray, C., 'Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterization and Consequences' (1996), 67 *BYIL*, pp. 178–9; Nier III, p. 313; Hayden, R.M., 'Bosnia's Internal War and the International Criminal Tribunal' (1998), 22 *Flet. For. World Aff.*, p. 50.
119. Lopez, p. 916; O'Connell, M.E., 'New International Process' (1999), 93 *AJIL*, p. 346.
120. *See supra* Chapter 3, note 21 and accompanying text.

the developments being witnessed by the international community since 1950 have shown that distinguishing armed conflicts as either international or internal has been becoming increasingly difficult, and the differences between the grave breaches system and other war crimes in terms of which law and under which conditions will be applied have been becoming irrelevant[121] as far as the protection of innocent civilians in wartime circumstances or more generally, the protection of human rights is concerned. For these reasons, the artificial distinction[122] should not have any role in determining which law will be applied to which type of conflict. The view taken by the ILC with regard to war crimes in its 1996 Draft Code reflects the desire of the international community at least in terms of abandoning the distinction between the grave breaches system and other violations of the laws or customs of war.[123] However, the ICC Statute separately regulates the concept of the grave breaches system from the other violations of the laws or customs of war under the law applicable to international armed conflicts[124] that is not consistent with the development of international humanitarian law and that can create some problems due to having two different categories of war crimes for international armed conflicts in specific, instead of having one governing all armed conflicts in general (the ICC Statute regulates internal armed conflicts in a similar way as well).[125] To avoid such problems, Article 8 of the ICC Statute should not have constituted different laws for different categories of armed conflicts and, in particular, should not have included the grave breaches system just for international armed conflicts. For this reason, the ICC Statute in this respect should have been drafted as follows: 'The Court shall have jurisdiction in respect of war crimes irrespective of the nature of the armed conflict.'[126] Although the ICC Statute includes such a different law applicable to international armed conflicts from internal armed conflicts, as will be indicated below, in terms of the grave breaches system or other violations

121. McDonald, A., 'The Year in Review' (1998), 1 *YIHL*, p. 120.
122. Abi-Saab, R., 'Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern', in Delissen and Tanja (eds), p. 209; Meron, 'War Crimes in Yugoslavia …', p. 81; Von Sternberg, M.R., 'Yugoslavian War Crimes and the Search for a New Humanitarian Order: The Case of Dusko Tadic' (1997), 12 *St. John's J. L. Comm.*, p. 382; *Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction* (Appeals Chamber, *Tadic Case, Jurisdiction Decision*), p. 5.
123. Art. 20 of the ILC Draft Code.
124. Art. 8 of the ICC Statute.
125. Cassese, A., 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999), 10 *EJIL*, p. 150.
126. Article 8 (1) of the ICC Statute states: 'The Court shall have jurisdiction in respect of war crimes *in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes*' (emphasis added), then in Art. 8 (2) (a) the grave breaches system and in Art. 8 (2) (b) other violations of the laws and customs applicable in international armed conflict are regulated. Art. 8 (2) (c, d, e, f) governs internal armed conflicts. At this point, it should be noted that the ICC Statute for war crimes introduces a new element that 'in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes' which cannot be found in the Nuremberg Charter, the Geneva Conventions and Additional Protocols thereto, and that causes some problems as to mixing war crimes with the concept of crimes against humanity described in Article 7 of the ICC Statute as 'any of the following acts *when committed as part of a widespread or systematic attack* directed against any civilian population …' (emphasis added). This type of

of the laws or customs of war applicable to international armed conflicts, on the one hand, and of its internal counterpart regulations, on the other hand, if this does not constitute a different concept of jurisdiction such as universal jurisdiction for the grave breaches.

Secondly, the grave breaches system must be applicable to all conflicts irrespective of the nature of the armed conflict, and for its applicability, the element of internationality must not be a precondition for international tribunals or the ICC on the ground that the grave breaches system was introduced into international humanitarian law in order to provide the enforcement of the system by States parties to the Conventions by way of adopting the concept of universal jurisdiction.[127] At the international level, the development of international humanitarian law and the practice of the *ad hoc* tribunals proved that the notion of universal jurisdiction could not be only devoted to the grave breaches system, as will be indicated below. The ICC Statute also indicates this fact by establishing the conditions of the exercise of jurisdiction regardless of whether the acts constitute grave breaches or other violations of the laws or customs of war or whether they are committed in an international armed conflict or non-international armed conflict.[128] From the point of view of war crimes, as indicated earlier, the main distinction of the grave breaches system from other war crimes is the recognition of the concept of universal jurisdiction which brings an

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regulation must be assessed as unfortunate in terms of determining the conditions of the crimes under which the ICC can deal with such crimes. This way of adoption of the ICC Statute should be regarded as a drawback as far as the customary international humanitarian law is concerned for that considered that each act can constitute a war crime, regardless of being committed as part of a plan or policy or as part of a large-scale commission. In addition, the problem with the new element lies in its interpretation. Does it mean that an individual who committed a single crime in a wartime situation will not be prosecuted and punished as long as it was proved that such offence was committed as part of a plan or policy or as part of a large-scale commission? If so, the regulation of the ICC Statute cannot be accepted as reflecting the customary international law in this regard. As long as it is understood that the main purpose of the ICC is to prosecute major criminals, in other words, high-ranking military and political individuals responsible for the commission of war crimes, the interpretation of new elements in this way may be understandable, but this cannot be the conclusion that can be drawn from the provisions of the ICC Statute. Cassese regards the new element as 'relat[ing] to the Court's jurisdiction and must not affect the existing notion of war crimes' (Cassese, 'The Statute of the International Criminal Court …', p. 149). If this view is right, it should have been indicated in some other Articles, not under war crimes. Hopefully, the ICC will solve this problem through its case law. The practice of the *ad hoc* tribunals will clearly guide the ICC in this respect.

127. Trial Chamber, *Aleksovski Case, Dissenting Opinion of Judge Rodrigues*, para. 38.

128. Article 12 of the ICC Statute brings the condition of State consent to have a jurisdiction over war crimes, genocide, crimes against humanity and the crime of aggression. One of the consents of the related States – the State where the act occurred or the State of nationality of the accused or a third State which is not party, but accepts the jurisdiction of the ICC with regard to the crime in question – is enough to exercise jurisdiction. Apart from this general principle, if the Security Council acting under Chapter VII of the UN Charter refers to the Prosecutor pursuant to Article 13 (b) of the ICC Statute that a situation in which war crimes, genocide, crimes against humanity or the crime of aggression has occurred, to exercise jurisdiction over such crimes, the ICC does not need the consent of related States. This way of regulation must be considered as the impact of the establishment of the ICTY and the ICTR on the ICC Statute (Cassese, 'The Statute of the International Criminal Tribunal …', p. 161).

obligation (*erga omnes* in nature) on States to punish or extradite the persons responsible for committing such acts. As long as the 1949 Geneva Conventions and States parties to these Conventions are concerned, for domestic enforcement of international humanitarian law, the distinction in this regard can be accepted. However, for the *ad hoc* tribunals or the ICC, the system as including the universal jurisdiction concept cannot be imported into the international level. The international community today has two *ad hoc* tribunals and the ICC that should not tolerate any more human rights law violations just because of the artificial distinction of armed conflicts and of different concepts of jurisdiction for different types of crimes. This is because they were created in the 1950s in the absence of an international criminal court and under the completely different situations that were faced by the international community at that time. For these reasons, the *ad hoc* tribunals or the ICC must interpret and apply the international humanitarian law instruments, in this context the Geneva Conventions, in compliance with the development of international law and the situations in the world that have increasingly changed since 1950.

Thirdly, as will be discussed later, the view taken by the Appeals Chamber in the *Tadic Jurisdiction Decision* in relation to the interpretation of Article 3 (violations of the laws or customs of war) of its Statute as a very broad category of crimes 'cover[ing] all violations of 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)',[129] covering Common Article 3 to the Geneva Conventions and Additional Protocol II and applicable to *all conflicts regardless of the nature of the conflict* on the basis that they are minimum fundamental customary law rules,[130] is not consistent with the view taken by the Appeals Chamber with regard to the applicability of the grave breaches system that was created as only applicable to international armed conflicts in the Geneva Conventions. If the ICTY had strictly interpreted Common Article 3, as Article 2 of its Statute, it would not have been possible to apply the Article to international armed conflicts since Common Article 3 clearly deploys the phrase 'armed conflict not of an international character'. In this context, there is a clear controversy in the interpretation and application of Articles 2 and 3 of the ICTY Statute. It is not understandable that while the ICTY applied the grave breaches system without mentioning the customary nature of these rules, and why it interpreted Common Article 3 to the Geneva Conventions under Article 3 of its Statute, it concluded that the nature of armed conflict was not important to apply it.[131] There is no doubt that the grave breaches system is part of the fundamental norms of international humanitarian law that are customary

129. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 87.

130. Ibid., paras. 91, 102, 103, 117, 137. The Final Judgements of the ICTY: *Tadic Case, Judgement*, paras. 609–17; *Celebici Camp Case, Judgement*, paras. 316–17; *Furundzija Case, Judgement*, paras. 132–3.

131. Meron, T., 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996), 90 *AJIL*, p. 242; Meron, T., 'War Crimes Law for the Twenty-First Century', in Schmitt and Leslie (eds), p. 328; *Separate Opinion of Judge Abi-Saab in the Jurisdiction Decision on Appeal*, p. 4; O'Connell, p. 348.

law rules in nature and must be applicable to all types of armed conflicts.[132] In this sense, the ICC Statute must be perceived as a step backward from customary international law since considering the grave breaches system only applicable to international armed conflicts.

Fourthly, the international community has been witnessing the criminalisation of internal atrocities[133] which creates the same effect as the grave breaches system on the premise that once the international community recognises the criminalisation of internal conflicts and the individual criminal responsibility for that it should be considered as giving a right to every State to prosecute or extradite the persons responsible. In other words, acts constituting non-grave breaches but violations of the laws or customs of war can fall within universal jurisdiction.[134] The practice of the international community leads to this conclusion for the following reasons: Firstly, for example with regard to crimes against humanity and the crime of genocide, the notion of universal jurisdiction was accepted in the absence of a provision, in particular in the Genocide Convention. In this sense, why should not violations of Common Article 3 and Additional Protocol II be regarded as leading to the universal jurisdiction inherent it?[135] Secondly, although violations of Common Article 3 and Additional Protocol II were not included in the grave breaches system, they are of concern to the international community and must be subject to universal condemnation and States' duty in this respect must be characterised as *erga omnes* in nature.[136] The latest developments in international humanitarian law support such a result. In light of the practice of the *ad hoc* tribunals (in relation to the applicability of Common Article 3 and Additional Protocol II to the Yugoslavian and Rwandan cases),[137] the regulations of the 1996 ILC Draft Code[138] and the ICC Statute,[139] it can be concluded that although, at first sight, it may seem that there is a big difference between the grave breaches system and other violations of international humanitarian law, such as violations of Common Article 3 and Additional Protocol II, this difference does not create any obstacle to holding individuals criminally responsible, as long as the jurisdiction of the ICC and legal instruments in this regard are concerned. In particular, the ICC Statute does not introduce a special jurisdiction for the grave breaches system, even though it is designed as a separate category of crimes. With regard to the jurisdiction of the ICC over international crimes, there is no distinction between the grave breaches and other serious violations of the laws or customs of war, regardless of whether they are committed in an international or non-international armed conflict, as far as

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132. *Simic & Others, Prosecution's Pre-Trial Brief* (31 March 1999), paras. 53–5; *Decision on the Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3 (Kordic & Others*, Case No: IT-95-14/2-PT, 2 March 1999), para. 25. Trial Chamber, *Aleksovski Case, Dissenting Opinion of Judge Rodrigues*, paras. 39–41.
133. Meron, T., 'International Criminalization of Internal Atrocities' (1995), 89 *AJIL*, p. 554.
134. Ibid., p. 569.
135. Ibid.
136. Ibid., p. 576.
137. *See infra*, p. 190, Common Article 3 to the Geneva Conventions and the Additional Protocol II.
138. Art. 20 of the 1996 ILC Draft Code.
139. Art. 8 of the ICC Statute.

the concept of universal jurisdiction and its applicability are concerned. For these reasons, the traditionally and artificially accepted distinction between this category of crimes with regard to whether providing universal jurisdiction is outdated today, and the Conventions in this regard must be interpreted as consistent with the development of international humanitarian law, in particular consistent with the developed customary international law, and the needs of the international community.

Lastly, it should be noted that the substantive content of the grave breaches system and Common Article 3 is similar to each other.[140] Both regulations mainly consist of guaranteeing minimum human rights standards in an armed conflict situation and innocent persons are protected against horrendous crimes of concern to the international community such as murder, rape, torture, inhuman treatment and hostage taking.[141] They can all be committed in international or internal armed conflicts.[142] Although grave breaches of the Conventions resemble the offences in Common Article 3 and Additional Protocol II, the application of these rules as differing from international to internal conflicts can create illogical results. For example, as indicated above, one of the conditions of the applicability of the grave breaches system to an armed conflict is that it be an international armed conflict, which can cause some problems. Under such circumstances, if the Yugoslavian case is considered as just simply an internal armed conflict, charges of torture, murder or rape cannot be brought before the ICTY as grave breaches of the Conventions. They can be presented as violations of the laws or customs of war (Article 3), genocide (Article 4) or crimes against humanity (Article 5), however, all other categories of crimes require different elements to set up individual criminal responsibility and, as a consequence, some of the worst crimes can go unpunished as a result of the artificial distinction between the classification of armed conflicts as either international or internal in character.[143] From the point of view of international humanitarian law, such an outcome cannot be justified on any ground. The question of what makes these crimes (grave breaches of the Conventions) so special and only applicable to international armed conflicts, not applicable to internal conflicts, cannot be answered as far as the protection of human rights and of innocent lives in wartime situations are concerned.

The Concept of Protected Persons or Property

The concept of the grave breaches system and the offences enumerated in Article 2 of the ICTY Statute can only be applicable when the acts are

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140. Meindersma, C., 'Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia' (1995), 42 *Neth. Int'l L. Rev.*, pp. 391–2; Paust, J., 'Applicability of International Criminal Laws to Events in the Former Yugoslavia' (1994), 9 *Am. U. J. Int'l L & Pol'y*, p. 511; Paust, J.J. and A.P. Blaustein, 'War Crimes Jurisdiction and Due Process: The Bangladesh Experience' (1978), 11 *Van. J. Trans'l L.*, p. 28.
141. *See* Common Article 3 to the Geneva Conventions and grave breaches provisions of the Conventions.
142. John, R.W.D.J., *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (Irvington-on-Hudson, NY: Transnational Publishers, 1998), p. 12.
143. *See infra* Chapter 5 and Chapter 6.

perpetrated against persons or property considered as 'protected' by the Geneva Conventions. Article 4 of the Fourth Geneva Convention on Civilians defines protected persons as 'those who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.[144] The Geneva Conventions do not only protect persons in a wartime situation, but also protect the property that mainly includes hospitals and the personal property of civilians.[145] In the case of the dissolution of the former Yugoslavia the international community witnessed how the hospitals, schools, cultural or religious places and individual property of civilians were targeted. To avoid such a horrendous outcome, the inclusion of the protection of property under the grave breaches system has a significant place in international humanitarian law, but in the practice of the ICTY, this concept can be examined at a secondary level since the ICTY has mainly concentrated on the notion of protected persons.[146]

The concept of protected persons for the first time by the ICTY was interpreted in the *Tadic Jurisdiction Decision* as an interlocutory appeal. The Appeals Chamber[147] in its decision examined the concept of protected persons in connection with the nature of the armed conflict and held that 'provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict'.[148] According to the Chamber the requirement of internationality was a *sine qua non* element for the application of the grave breaches and its second requirement of being protected persons or property for the following reason: If the conflict between the forces of the Bosnian Government and of the Bosnian Serbs had been regarded as international in

144. Art. 4 (1) of the Fourth Geneva Convention. The content of the protected persons can be summarised for each Convention as follows: Articles 13 (wounded or sick members of the armed forces), 24 (protection of permanent medical personnel), 25 (protection of auxiliary personnel) and 26 (personnel of aid societies) of the First Geneva Convention; Articles 13 (wounded, sick or shipwrecked members of the armed forces), 36 (protection of the personnel of hospital ships) and 37 (medical and religious personnel of other ships) of the Second Geneva Convention; Article 4 of the Third Geneva Convention (prisoners of war); Articles 4 (definition of protected persons) and 20 (hospital staff) of the Fourth Geneva Convention.

145. Related Articles of the Conventions can be indicated as follows: Articles 19 (medical units and establishments), 33 (buildings and stores in relation to the medical units and establishments) and 34 (property of aid societies) of the First Geneva Convention; Articles 22 (notification and protection of military hospital ships), 24 (hospital ships utilised by relief societies and private individuals of parties to the conflict), 25 (hospital ships utilised by relief societies and private individuals of neutral countries) and 27 (coastal rescue craft) of the Second Geneva Convention; Articles 18 (protection of hospitals), 19 (discontinuance of protection of hospitals), 21 (land and sea transport), 22 (air transport), 33 (pillage, reprisals), 53 (prohibited destruction of property belonging to individuals, State or any other organisation), 57 (requisition of hospitals) of the Fourth Convention.

146. The main practice of the ICTY with regard to the concept of protected property can be found in a Rule 61 decision in the *Rajic Case*: *Decision of Trial Chamber II – Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Prosecutor v. Ivica Rajic and Victor Andric*, Case No: IT-95-12-R61 (13 September 1996), paras. 38–43.

147. The Trial Chamber did not interpret the concept of protected persons in its *Jurisdiction Decision*; it just referred to the definitions of the concept in the Geneva Conventions. Trial Chamber, *Tadic Case, Jurisdiction Decision*, paras. 49, 51.

148. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 81.

particular after the withdrawal of the JNA under the assumption that the Bosnian Serbs acted as *de facto* agents or organs of the FRY, it would have created an unjustifiable conclusion that atrocities committed by the Bosnian Serbs against the Bosnian Muslims in their hands would be regarded as grave breaches, because such civilians would be regarded as protected persons while atrocities committed by the Bosnian forces against the Bosnian Serbs in their hands would not be regarded as grave breaches, because such civilians would not be considered as protected persons under the Convention due to sharing the same nationality with the Bosnian Muslims.[149]

The ruling of the Appeals Chamber was followed by the Trial Chamber in the *Tadic Judgement* that was the first and detailed examination of the notion at a final judgement level. The majority of the Chamber[150] – as parallel to the Appeals Chamber *Decision on Jurisdiction* and the nature of the armed conflict – held that the victims of the alleged offences were not protected persons in the hands of a party to the conflict or occupying power of which they were not nationals on the grounds that the conflict in Bosnia and Herzegovina after the withdrawal of the JNA on 19 May 1992 could be regarded as an internal armed conflict and the armed forces of the *Republika Srpska* could not be considered as *de facto* organs or agents of the FRY under the guidance of the *Nicaragua Case*.[151] The criterion for the determination of whether victims of the alleged offences were protected persons under the Fourth Geneva Convention was the same as with the requirement of internationality discussed by the Chamber in its decision.[152] The same view was also deployed by the ICTY in the *Aleksovski Judgement*.[153] However, in the appeal stage, the Appeals Chamber in relation to the *Tadic Judgement* has taken a completely different view from that of the Trial Chamber. Having decided that the conflict was an international one, the International Tribunal held that victims of the alleged crimes were protected persons on the ground that the Bosnian Serb forces were acting *de facto* organ of the FRY and the Geneva Conventions (in this context Article 4 of the Fourth Geneva Convention) should be interpreted in light of its purpose which is the protection of civilians to the maximum extent.[154]

Even before the ruling of the Appeals Chamber in the *Tadic Judgement*, the other Trial Chamber of the ICTY in the *Celebici Camp Case* had taken a completely different view from those of the *Tadic* and *Aleksovski Judgements* of the Trial Chamber and decided – in addition to the characterisation of the armed conflict in Bosnia and Herzegovina- that for the purposes of the application of the grave breaches system under Article 2 of

149. Ibid., para. 76. For quotation *see supra* note 68.

150. Presiding Judge McDonald was dissident on this point. *See Separate and Dissenting Opinion of Judge McDonald in the Tadic Judgement*.

151. Trial Chamber, *Tadic Case, Judgement*, para. 607.

152. *See* paras. 578–607 of the *Tadic Judgement*. For the criticism of the decision with regard to the concept of protected persons, the same assessment and criticism are valid. In this sense, *see supra*, p. 135, The Nature of Armed Conflicts Must Not Have Any Significance in International Humanitarian Law.

153. Trial Chamber, *Aleksovski Case, Judgement*, para. 46; *Aleksovski Case, Joint Opinion*, paras. 1, 14–27, 28–35. In this sense, also *see* Press Release, 'Aleksovski Case: The Judgement of the Trial Chamber' (JL/PIU/400-E, 7 May 1999); Press Release, 'The Aleksovski Judgement' (CC/PIS/413-E, 30 June 1999).

154. Appeals Chamber, *Tadic Case, Judgement,* paras. 167–8.

the Statute, the victims of the alleged offences – in this case the Bosnian Serbs – must be regarded as having been in the hands of a party to the conflict or occupying power of which they were not nationals, the Government of Bosnia and Herzegovina[155] on the basis that the conditions of Article 4 of the Geneva Convention on Civilians must be interpreted in a more flexible manner to meet the necessities of the international community and also to be in accordance with the development of the human rights doctrine.[156] In this sense, domestic legislation of a State on citizenship in a situation of disintegration of the State which leads to the creation of new States and the concept of State succession cannot be the convenient criterion to decide whether victims of grave breaches of the Conventions can enjoy the protected person status or not as far as the purpose of the Convention that is the protection of individuals not to protect State interests in this regard is concerned.[157]

In addition to the interpretation of nationality in this way, one of the other important points in the *Celebici Camp Case* that should be noted is that the characterisation of the armed conflict and the concept of protected persons or property are significantly different elements, although they have close link in most cases.[158]

From the perspective of international humanitarian law, the view taken by the Trial Chamber in the *Celebici Camp Case* and by the Appeals Chamber in the *Tadic Case (Judgement)* must be regarded as more convenient than other views for the following reasons: Firstly, the Geneva Conventions, which were drafted to mainly regulate international armed conflicts after the Second World War, must be interpreted and applied flexibly to be in accordance with the development of international humanitarian and human rights law that has rapidly changed since 1950. Secondly, the protection of individuals' rights in a wartime situation must not be violated by way of literally interpreting and applying the norms of international humanitarian law, as witnessed in the *Tadic* and *Aleksovski Judgements* of the Trial Chamber with regard to the concept of nationality.

In light of the practice of the ICTY and of the development of international humanitarian law, it must be noted that the concept of protected persons or property should be interpreted and applied in compliance with the following principles:

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155. Trial Chamber, *Celebici Camp Case, Judgement*, para. 274.
156. Ibid., paras. 263, 266.
157. Ibid., para. 263; Appeals Chamber, *Tadic Judgement,* para. 168.
158. Trial Chamber, *Celebici Camp Case, Judgement*, para. 210; 'there arises a connection with the issue of the nature of the armed conflict, for clearly showing that individuals "in the hands of" a party of foreign nationality would generally lead to the conclusion that the conflict is international in nature. Conversely, if individuals are deemed not to be protected by the Fourth Geneva Convention on the grounds that they are of the same nationality as their captors, it may well be, although it does not necessarily follow, that the relevant conflict is an internal one' (para. 245). Unfortunately, in the *Tadic Case* the Appeals Chamber ignores this fact, and explains the connection between the nature of armed conflicts and the concept of protected persons as follows: 'Only if the Appeals Chamber finds that the conflict was international at all relevant times will it turn to the second question of whether the victims were to be regarded as "protected persons" ' (Appeals Chamber, *Tadic Case, Judgement,* para. 82).

First, there should not be a connection between the nature of the armed conflict and the concept of protected persons or property. If the concept of protected persons or property as a condition for applying the grave breaches system is examined in connection with the nature of conflicts, as the Appeals Chamber on *Jurisdiction Decision*, the Trial Chambers on the *Tadic Judgement* and the *Aleksovski Judgement* did, in other words, its application depended upon the existence of an international armed conflict, how can it be explained that for the application of the grave breaches system two different elements are required? The determination of the concept of protected person status by means of depending on the internationality of the conflict makes this element ineffective since it is inherited in the results of international armed conflicts, as being witnessed in the application of the notion by way of interpreting the phrase 'in the hands of a party' by the Appeals Chamber's *Jurisdiction Decision* and the Trial Chambers' *Tadic* and *Aleksovski Judgements*. Such an outcome cannot be welcomed from the point of view of international humanitarian and human rights law on the grounds that the internationality of a conflict and the concept of protected persons are quite different concepts.[159] Of course, it is clear that if the conflict is an international one, it is easy to establish the second element of the grave breaches system. There is no doubt that international armed conflicts bring the protected persons notion into the international law field at the same time. However, this way of interpretation and application of the norms of international humanitarian law do not meet the needs of the international community, and as has been witnessed, the nature of the conflicts has increasingly changed from international to internal or internationalised one. In particular, in a situation of disintegration of a Federal State like the former Yugoslavia and in a situation of conflict within a State that has different ethnic origins, religious beliefs, culture and so on, such as the Rwanda and Kosovo cases, is it possible to say that different groups or communities cannot be regarded as protected persons? For these reasons, the provisions of the grave breaches system of the Geneva Conventions must be interpreted and applied by taking into account the reality of the structure of an international humanitarian law.

Moreover, it should be noted that Article 2 of the ICTY Statute replaced the notion of 'protected persons' by a specific designation of 'civilians'. As a result of adopting Article 2 in this way, it was provided that the grave breaches system can be applied by the International Tribunal whenever they are committed against civilians regardless of the nature of the conflict as international or non-international in nature.[160] In this sense, it is not even necessary to interpret and apply the grave breaches system of the Geneva Conventions in the way already indicated above. The wording of the ICTY Statute must be carefully examined and interpreted. However, when the entire Article is taken into account, a clear controversy can be noted

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159. Trial Chamber, *Celebici Camp Case, Judgement*, para. 210; *Prosecution's Pre-Trial Brief (Simic & Others*, Case No: IT-95-9-PT, 31 March 1999), para. 73.

160. Joyner, 'Arresting Impunity …', p. 157. This way of adoption of the ICTY Statute also supports the view that there must not be any artificial distinction between international or internal armed conflicts and other conflicts and different laws for different types of conflicts.

between the first paragraph deploying the phrase 'acts against persons or property protected' and the scope of the grave breaches system deploying the term 'civilian' or 'civilians'. The ICTY should interpret and overcome this controversy in favour of the use of the term 'civilians' which is in compliance with the development of inter-national humanitarian and human rights law and more importantly is consistent with the Yugoslavian situation. In general, the way of drafting the ICTY Statute indicates the trend in international law as to protecting human rights violations, but the most recent and significant development in international humanitarian law, the adoption of the ICC Statute, is not in compliance with the ICTY Statute with regard to the adoption of the grave breaches system.[161] It uses literally the same phrases as the Geneva Conventions. That is why, it must be considered as avoiding these important achievements of the international community.

On this point, it must be noted that in accepting the concept of protected persons as a separate element from the nature of armed conflicts it is vitally important to provide its applicability to internal armed conflicts and also constitutes a great deal of evidence to prove why the grave breaches system must be applicable to all conflicts irrespective of their characteristics.

Second, the notion of protected persons must not be interpreted by way of using the concept of nationality that derives from the domestic legislation on citizenship on the basis that the Geneva Conventions and literal interpretation of its provisions are not sufficient for the needs of the international community that has occurred since 1950. For this reason, the interpretation and application of the grave breaches system, in particular, of the protected person status must be flexible[162] as the Trial Chamber was in the *Celebici Camp Case* for the purposes of the applicability of the system. The use of the term 'civilians' in the provisions of Article 2 of the Statute also indicates the necessity for flexible interpretation of the concept of nationality, in particular for the cases of dissolution of Federal States. In such circumstances, the concept of nationality should be taken into account in accordance with the notion of 'community' which was clearly defined by the Permanent Court of International Justice in 1930.[163] In terms of interpreting nationality, there must not be any problem using the concept of 'community' to guide the International Tribunal on this issue when the circumstances are not in compliance with the domestic legislation on citizenship and the facts of events, such as the Bosnian Serbs had the citizenship of Bosnia and Herzegovina, but they did not accept it, and took part in the conflict against the State of Bosnia and Herzegovina.

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161. *See* Article 8 (2) (a) of the ICTY Statute.
162. Paust, 'Applicability of International Criminal Law …', pp. 512–13.
163. *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration (Question of 'Communities')*, Section B, No. 17 (31 July 1930). The notion of 'community' is defined as '… a group of persons living in a given country or locality, having race, religion, language and traditions of their own, and united by [those factors] in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another', in Roch, p. 21. The author prefers the definition of 'community' to the definition of 'group' indicated in the Genocide Convention with regard to the applicability of the Convention to the Yugoslavian case.

In the same vein, the Appeals Chamber in the *Tadic Judgement* decided that in modern inter-ethnic armed conflicts, which the international community has been dealing with since the 1950s, ethnicity is more important than the concept of nationality and it is sufficient to define the concept of protected persons.[164] The view taken by the Appeals Chamber should be perceived as in compliance with the reality of international humanitarian law and the Yugoslavian case. It is also important to indicate how the Geneva Conventions should be interpreted and applied to the events that are not international armed conflicts known from history. However, if the Appeals Chamber have used the concept of 'community' instead of 'ethnicity' to determine whether victims of armed conflicts were protected persons or not, it would have been more convenient since the concept of community is broader and more suitable than the concept of ethnicity for defining a group of people as protected persons under the Geneva Conventions.

The Substantive Content of the Grave Breaches System

One of the other major contributions of the practice of the *ad hoc* tribunals to international humanitarian law and its impact on the ICC can be examined in the determination of the scope of the grave breaches system and the definition of the elements of each crime regarded as falling within the grave breaches system.

Before analysing the practice of the *ad hoc* tribunals, in this context, the principle of legality (*nullum crimen sine lege*) in international law and the interpretation and application of it by the International Tribunals need to be briefly indicated.

As is well known from the national criminal justice systems, the principles of *nullum crimen sine lege* and *nulla sine lege*, are basic pillars of the enforcement of individual criminal responsibility. However, the application of these rules in the international criminal justice system is quite different from its domestic counterparts since the method of criminalisation of conduct is different for national and international criminal institutions.[165] While the criminalisation of an act relies upon legislation at the national level, there is not any institution making law for the international criminal justice systems and the principles can be drawn from conventions or customary international law.[166] As a result of this situation, crimes in international humanitarian and criminal law are regulated as a broad category such as war crimes, crimes against humanity without providing any detailed definitions of crimes and their elements.[167] For example, acts that wilfully cause great suffering or serious injury to body or health constitute a crime punishable under the grave breaches system, but what such acts are not clear. There is no doubt that rape or any other sexual violence can be

164. Appeals Chamber, *Tadic Case, Judgement*, para. 166.
165. Trial Chamber, *Celebici Camp Case, Judgement*, para. 403.
166. Ibid., para. 404.
167. Cassese, 'The Statute of the International Criminal Court …', pp. 148–9; Murphy, S.D., 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1999), 93 *AJIL*, p. 87.

punishable under this category, although they are not explicitly included in the grave breaches system.[168] Should such an interpretation and application of the norms of international humanitarian law be perceived as a violation of the principle of legality? The same criticism is also valid for the Statutes of the *ad hoc* tribunals which have the same characteristics. The Commentary to the ICTY Statute, not to violate the principle of *nullum crimen sine lege*, states that the International Tribunal 'should apply rules of international humanitarian law which are beyond any doubt part of customary law'.[169] With regard to the way of adoption of the Statutes of the Tribunals, the view that the principle of legality was violated since in the definitions of crimes there should have been included the elements of offences[170] does not have any ground in international law. As far as the Statutes of the ICTY and the ICTR are concerned, from the perspectives of technical and domestic law, their regulations can be regarded as not sufficient. However, for the reasons explained above, in the international field, one cannot expect to find a detailed criminal code consisting of the elements of crimes that is also not required by international law[171] although it is desirable. Non-inclusion of the crimes and their elements do not mean that the principle of legality is violated. At this point, the practice of the international criminal institutions has a very significant role to play in interpreting and applying the elements of offences, in other words, more generally for determining the scope of crimes and their elements. One of the most important aspects of the practice of the *ad hoc* tribunals lies in this fact and it will create guidance for the ICC.[172]

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168. *See infra*, p. 156. Rape and Any Other Forms of Sexual Violence as Torture under the Grave Breaches System.
169. *Secretary-General's Report*, para. 34. The *Secretary-General's Report* specifies the customary law applicable by the Tribunal as: 'the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945' (para. 35 footnotes omitted).
170. Blakesley, C.L., 'Jurisdiction, Definition of Crimes, and Triggering Mechanisms' (1997), 25 *Denv. J. Int'l L. & Pol'y*, p. 243.
171. Paust, J.J., 'Nullum Crimen and Related Crimes' (1997), 25 *Denv. J. Int.l L. & Pol'y*, p. 321; Wexler, L.S., 'Committee Report on Jurisdiction, Definition of Crimes, and Complementarity' (1997), 25 *Denv. J. Int'l L. & Pol'y*, p. 224; Wise, E.M., 'General Rules of Criminal Law' (1997), 25 *Denv. J. Int.'l L. & Pol'y*, pp. 313–19.
172. As different from the Statutes of the ICTY and the ICTR, the ICC Statute, for the first time at the international level, includes general principles of criminal law in a detailed way such as *nullum crimen sine lege* (Art. 22), *nulla poena sine lege* (Art. 23), *non-retroactivity ratione personae* (Art. 24), *mens rea* (Art. 30). Moreover for the elements of crimes, Article 9 (1) of the ICC Statute provided: 'Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8 [genocide, crimes against humanity and war crimes respectively]. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.' The Preparatory Commission for the ICC prepared the draft text of the Elements of Crimes before 30 June 2000, and the Assembly of States Parties to the ICC Statute at its 3rd meeting, on 9 September 2002, adopted by consensus the Elements of Crimes. For the text, *see Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of Crimes,* UN Doc. PCNICC/2000/1/Add.2 (2 November 2000). In this context, also *see* Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Res. E, UN Doc. A/CONF.183/10 (1998). There cannot be any doubt that the Commission benefited from the practice of the *ad hoc* tribunals to prepare the draft text of the Elements of Crimes.

Wilful Killing

The crime of wilful killing is regarded as a grave breach under the four Geneva Conventions[173] and there cannot be any doubt that it is one of the most heinous crimes prohibited in the customary and conventional international law rules. The counterpart of this crime in internal armed conflicts, the crime of murder, derives from Common Article 3 to the Geneva Conventions. As rightly concluded by the Trial Chamber of the ICTY in the *Celebici Camp Case*, there is no difference between these terms, as far as the elements of the offence are concerned.[174]

Since the crime of wilful killing and murder is well understood and defined in national criminal justice systems, it is thought that there is no need to define it at an international level. For the same reason, in the practice of the ICTY, the definition of this crime has not been made, while the elements of the offence are examined. However, the ICTR in connection with the concept of crimes against humanity defined murder as 'the unlawful, intentional killing of a human being'.[175]

In accordance with this definition, the elements of the crime of wilful killing or murder can be briefly explained and analysed in light of the practice of the *ad hoc* tribunals as follows:

In order to establish individual criminal responsibility, first of all, the element of *actus reus* (physical element) is required. In the case of this crime, it is the death of the victim resulting from an unlawful act or omission of the accused.[176] In connection with this element, of course, it is necessary that there must be a causal link between the acts or omissions of the accused and the death of the victim. This was the requirement that was strictly applied by the Trial Chamber in the *Tadic Case*. The event was whether the accused, *Tadic*, together with a group of armed men, involved in calling out civilians from their homes, had killed some of these people, beaten up the others and taken them away. After the accused, along with the group, had left the village, five men were found dead there. The matter of causal link arose in relation to these five men. Although the Trial Chamber found that the accused participated in the aforementioned acts,[177] he was not found guilty of killing the five men or any of them on the ground that nothing was known as to who shot them or in what circumstances they were killed.[178] In other words, the Chamber was not satisfied that the accused had played any role in these murders. The ruling of the Chamber was appealed by the Prosecution Service on this point and the Appeals Chamber reversed the Trial Chamber's Judgement. In its Judgement, the Appeals Chamber referred to the fact that there were no witnesses suggesting that any other armed group might have been responsible for the killing of the five men, and decided that in light of the evidence the armed group

173. *See* Arts. 50, 51, 130 and 147 of the Geneva Conventions respectively.
174. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 421–3.
175. *The Prosecutor v. Jean-Paul Akayesu, Judgement*, Case No.: ICTR-96-4-4 (2 September 1998), para. 6.4.103.
176. Trial Chamber, *Celebici Camp Case, Judgement*, para. 424; Trial Chamber, *Akayesu Case, Judgement*, para. 6.4.104.
177. Trial Chamber, *Tadic Case, Judgement*, para. 369.
178. Ibid., para. 373.

to which the appellant belonged could have been responsible for the death of the five men, and as a result of this ruling the appellant, *Tadic* was found guilty of such event.[179] From the perspective of international humanitarian law, the interpretation of the requirement of causal link by the Appeals Chamber being, in a way, more flexible than the Trial Chamber's view should be welcomed.

The other ingredient of the wilful killing or murder is the mental element or *mens rea* that is the central issue in this crime for both national and international criminal justice systems. Before the *ad hoc* tribunals, the defence and the Prosecution Service have mainly concentrated on the term 'wilful' in their arguments for establishing individual criminal responsibility for wilful killing or murder. According to the defence, the mental element of the offence is the intent to commit the act which causes the death, and it excludes any form of recklessness from its scope.[180] To support its argument, the defence referred to the practice of national courts.[181] On the other hand, according to the Prosecution Service, the element of *mens rea* is set out when the accused has the intent to kill, or inflict grievous bodily harm on the victim and the word 'wilful' encompasses 'reckless acts as well as a specific desire to kill, whilst excluding mere negligence'.[182] The International Tribunal shared the same view with the Prosecution Service and rightly held that the mental element of the crime, intention, includes the notion of recklessness that can be inferred from the circumstances of each case.[183]

The importance of the practice of the *ad hoc* tribunals in this context can be found in making clear the vagueness of the requirement of *mens rea*, which was an unresolved issue in the Geneva Conventions,[184] of the wilful killing or murder. In particular, it should be noted that the criminal concepts at international level might be different from their domestic application. This was the case emphasised by the International Tribunal in relation to the examination of the mental element of wilful killing. According to the Tribunal, the most important point in the Geneva Conventions was to prevent the taking of lives of innocent persons.[185] This was the principle

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179. Appeals Chamber, *Tadic Case, Judgement*, paras. 182–3. In this case, although it was not clear that the accused (appellant) killed the five men or, indeed, any of them (victims might have been killed by the other members of the armed group), *Tadic* was found guilty of this event. The legal base for the decision was the application of the notion of common purpose to the event. For the detailed explanation of this concept, *see* Appeals Chamber, *Tadic Case, Judgement*, paras. 185–233.
180. Trial Chamber, *Celebici Camp Case*, *Judgement*, paras. 427–9; *Kordic & Others*, *Kordic Defence Pre-Trial Brief*, Vol. II – Legal Issues (6 April 1999), paras. 33–7.
181. *Kordic & Others, Kordic Defence Pre-Trial Brief*, Vol. II – Legal Issues (6 April 1999), para. 38.
182. Trial Chamber, *Celebici Camp Case, Judgement*, para. 426; *Kordic & Others, Prosecutor's Pre-Trial Brief* (25 March 1999), p. 43.
183. Trial Chamber, *Celebici Camp Case, Judgement*, para. 437. The ICTR applies the *mens rea* requirement in compliance with the ICTY practice. In the *Akayesu Judgement* this issue was indicated as follows: 'at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not' (para. 6.4.104).
184. Gross, O., 'The Grave Breaches System and the Armed Conflict in the Former Yugoslavia' (1995), 16 *Mich. J. Int'l L.*, p. 799.
185. Trial Chamber, *Celebici Camp Case, Judgement*, para. 431. One scholar expresses this view with regard to the offence of wilful killing as '[t]he term "wilful killing" covers all cases in

that guided the International Tribunals in terms of interpreting and applying the rules of international humanitarian law. In this sense, it should be emphasised that international criminal tribunals or courts are not mainly dealing with single murder cases. Crimes in the international field have their own characteristics as different from their domestic counterparts. Of course, murder as a crime is murder either at the international or national level, but it must be separated from national context on the basis that international tribunals have to deal mainly with mass scale crimes whose elements need to be interpreted and applied in a flexible manner[186] that may not be consistent with the practice of many national courts.

In sum, the practice of the International Tribunals has a unique importance in terms of indicating that the concept of recklessness is sufficient to establish the mental requirement of the crime of wilful killing or murder as a grave breach or serious violation of Common Article 3, more generally as a war crime. However, in this context, the ICC Statute seems to be departing from the customary international law rules and from the practice of the *ad hoc* tribunals by excluding responsibility in the cases of recklessness for war crimes.[187] The way adopted in the ICC Statute should be assessed as a step backward in international humanitarian law. Hopefully, the ICC will overcome this issue in its case law by way of interpreting and applying the mental element of 'intent and knowledge'[188] in light of the practice of the *ad hoc* tribunals.

Torture or Inhuman Treatment Including Biological Experiments

Article 2 (b) of the ICTY Statute refers to the crimes of torture or inhuman treatment including biological experiments as grave breaches of the Geneva Conventions. However, in the Conventions there is no mention of their definitions and elements. For this reason, to apply these offences to the events, the International Tribunal has to define and make clear their contents and elements in light of the customary international law rules.

Although the ICTY Statute regulates these crimes as if they constitute a single crime, in fact there are three different crimes inherent in it and all of them need to be separately examined.

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which a protected person is killed'. Wolfrum, R., 'Enforcement of International Humanitarian Law', in Fleck, D. (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995), p. 532. The logical extension of this view for murder cases under Common Article 3 to the Geneva Conventions should be that it covers all cases in which persons not taking any active part in hostilities in an internal armed conflict are killed.

186. The best example explaining this case can be found in the Appeal Chamber's Judgement in the *Tadic Case*. While explaining the notion of common purpose, the Chamber decided the responsibility of individuals for the crimes committed by a group, although he/she did not commit the crime. The criteria and the *mens rea* element was indicated as follows: '(i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*' (para. 228, emphasis in original).

187. *See* Art. 30 of the ICC Statute. For its disadvantages, *see* Cassese, 'The Statute of the International Criminal Court …', pp. 153–4.

188. Art. 30 (1) of the ICC Statute.

Torture

There is no doubt that torture is a crime prohibited by conventional and customary law rules in international human rights and humanitarian law. There are a great many international law instruments prohibiting torture in times of peace and war.[189] In compliance with its extensive prohibition, the crime of torture has acquired the status of *jus cogens* and the obligation of States to prosecute, punish or extradite responsible persons for torture is *erga omnes* in nature.[190] On this ground there cannot be any room or any kind of privilege not to be held criminally responsible for torture. The best example proving this fact can be found in the British practice in relation to the *Pinochet Case* in which the issue was whether General *Pinochet* was entitled to immunity, since he was the Head of State of Chile at the time that the alleged acts of torture and conspiracy to torture had been committed, from arrest and extradition proceedings in the United Kingdom with respect to these acts. In both hearings, the House of Lords (three to two)[191] and (six to one)[192] decided that *Pinochet* was not entitled to immunity for the alleged acts of torture and conspiracy to torture.[193]

Although, the crime of torture is universally prohibited, it is not possible to find its definition, apart from the ICC Statute, in international humanitarian law. However, international human rights instruments include the

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189. Some of them can be indicated as follows: The Universal Declaration of Human Rights (Art. 5); The United Nations Covenant on Civil and Political Rights (Art. 7); The European Convention on Human Rights (Art. 3); The American Convention on Human Rights (Art. 5 (2)); The African Charter on Human and Peoples' Rights (Art. 5); The Inter-American Convention to Prevent and Punish Torture (Art. 1); The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 1) (adopted by the UN General Assembly Resolution on 9 December 1975); The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Art. 1). The regulations for armed conflicts can be found in the Geneva Conventions and in the Additional Protocols to the Conventions. *See* Common Art. 3, Arts. 12 and 50 of the First Geneva Convention; Arts. 12 and 51 of the Second Geneva Convention.; Arts. 13, 14 and 130 of the Third Geneva Convention; Arts. 27, 32 and 147 of the Fourth Geneva Convention; Art. 75 of the Protocol I; Art. 4 of the Protocol II. As clearly understood from these regulations, torture is prohibited by the Geneva Conventions for both international and non-international armed conflicts.

190. *Prosecutor v. Anto Furundzija*, Trial Chamber, *Judgement*, Case No: IT-95-17/1-T10 (10 December 1998), paras. 151–7; Trial Chamber, *Celebici Camp Case, Judgement*, para. 454.

191. *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (Amnesty International and Others Intervening)* [1998], 4 *All E R*, 897.

192. *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (1999), 2 *WLR*, 827.

193. In particular, *see* the opinion of Lord Browne-Wilkinson that is common to the majority and it is important to indicate the *jus cogens* nature of the crime of torture, universal jurisdiction, and reflecting the impact of the ICTY and the ICTR practice on domestic law, pp. 832–48; Graves, D. and J. Steele, 'Law lords verdict on Gen Pinochet puts the ball back in Straw's court', *The Daily Telegraph* (25 March 1999); Bale, J. and F. Gibb, 'Judgement on Pinochet sets dilemma for Straw', *The Times* (25 March 1999). For a detailed discussion of the case, *see* Bianchi, A., 'Immunity versus Human Rights: The Pinochet Case' (1999), 10 *EJIL*, pp. 237–77. In addition to the uniqueness of the British practice, the American practice should also be noted, but it only concerns civil suits, not criminal action. In this context, *see Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir.1980), 77 *ILR*, 169; *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir.1995), 104 *ILR*, 136, summarised in (1996), 90 *AJIL*, p. 658; and also *see* Eckert, A.E., 'Kadic v. Karadzic: Whose International Law' (1996), *25 Denv. J. Int.'l L. & Pol'y*, p. 173.

definition of torture. The first is in the Declaration on Torture.[194] The second one is in the Inter-American Convention.[195] The third one is in the 1984 Torture Convention which defines the offence as follows:

> … the 'term' torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not involve pain or suffering arising only from, inherent in or incidental to lawful sanctions.[196]

On the other hand, the only international humanitarian law instrument describing torture is the ICC Statute in which torture is defined under the category of crimes against humanity as follows:

> 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.[197]

In some aspects, the approach taken in the ICC Statute is different from the international human rights instruments and, as will be indicated later, it is possible to create some confusion to distinguish torture from other offences of mistreatment such as from cruel or inhuman treatment.[198]

The definition in the Torture Convention was regarded as reflecting and crystallising the customary international law and was found applicable to armed conflict situations by the *ad hoc* tribunals.[199] Nevertheless, in the *Akayesu Case* the ICTR and in the *Celebici Camp Case* the ICTY did not explain the legal grounds for reaching this conclusion; just in the later case

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194. Article 1 of the Declaration on Torture provides:

> '1. ... torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons … 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading punishment.'

195. Article 2 of the Inter-American Convention provides:' ...[t]orture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.'

196. Art. 1 (1) of the Torture Convention.

197. Art. 7 (2) (e) of the ICC Statute.

198. *See infra* note 214 and accompanying text.

199. Trial Chamber, *Celebici Camp Case*, *Judgement*, para. 459; Trial Chamber, *Furundzija Case*, *Judgement,* para. 160; Trial Chamber, *Akayesu Case, Judgement*, paras. 6.4.111–12.

it was mentioned that the definition of torture in the Convention was 'representative of customary international law'.[200] The reasons why this definition should be perceived as reflecting customary law rules were rightly explained by the International Tribunal in the *Furundzija Judgement*.[201] The assessment of this conclusion and its importance in international humanitarian law will be now indicated in examining the elements of torture which consist of three requirements for a crime to be torture.

(i) The Element of Severe Pain or Suffering

First of all there must be severe pain or suffering, whether physical or mental, inflicted on the victim.[202] The problem with this element occurs when torture is compared with the other offences of mistreatment such as inhuman, cruel or degrading treatment. At this point, the issue is what level of severe pain or suffering makes inhuman or cruel treatment the crime of torture since it is well recognised as an aggravated form of such offences.[203] As rightly decided by the Trial Chamber in the *Celebici Camp Case*, it is too difficult to establish any criteria indicating the required level of pain or suffering for torture,[204] but it can be inferred from the specific circumstances of each case. International tribunals or courts should use their discretionary powers in light of the practice of the other international judicial institutions and of scholarly writing to solve this problem.[205]

In relation to this element, it should be noted that severe pain or suffering can be inflicted by the accused as an act or omission. The significant point is that the act or omission must be intentional,[206] mere negligence is not enough to set up individual criminal responsibility for torture.

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200. Trial Chamber, *Celebici Camp Case, Judgement*, para. 459. In the *Akayesu Judgement*, there is even no such indication.
201. Trial Chamber, *Furundzija Case, Judgement*, para. 160.
202. Trial Chamber, *Celebici Camp Case, Judgement,* paras. 461–9, 494; Trial Chamber, *Furundzija Case, Judgement*, para. 162; Trial Chamber, *Akayesu Case, Judgement*, para. 6.4.114. The ICC Statute's definition also includes this element, *see* Art. 7 (2) (e) of the ICC Statute.
203. The Declaration on Torture explains torture in this way. *See supra* note 194. The European Court of Human Rights in the *Northern Ireland Case* in relation to the use of five techniques of interrogation, which includes wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink, decided that they did not constitute torture, but inhuman treatment, although the European Commission of Human Rights had accepted those acts as constituting a practice of torture and inhuman treatment. In this context, *see* [1976] *Y. B. Eur. Conv. on H. R.*, pp. 788–94.
204. Trial Chamber, *Celebici Camp Case, Judgement*, para. 469.
205. The ICTY in the *Celebici Camp Case* followed this approach and to reach its conclusion relied upon the practice of the Human Rights Committee, the European Commission and European Court of Human Rights. *See* paras. 461–6. *The Greek Case* ([1969], 12 *Y. B. Eur. Conv.H. R.,* 186), the *Northern Ireland Case* (for reference *see supra* note 201), *Aksoy v. Turkey*, *Judgement*, 18 December 1996 (1997), 23 *EHRR*, p. 553 and *Aydin v. Turkey*, *Judgement*, 25 September 1997 (1997), 25 *EHRR*, p. 251 can be referred to in this sense. For a recent and detailed study on the concepts of torture and inhuman or degrading treatment, *see* Evans, M.D. and R. Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Clarendon Press, 1998), in particular, *see* pp. 79–98. In this context, also *see* Rodley, N.S., *The Treatment of Prisoners under International Law*, Second Edition (Oxford: Clarendon Press, 1999), in particular, pp. 18–133.
206. Trial Chamber, *Celebici Camp Case, Judgement*, para. 468; Trial Chamber, *Furundzija Case*, *Judgement,* para. 162; Trial Chamber, *Akayesu Case, Judgement*, para. 6.4.114; Art. 7 (2) (e) of the ICC Statute; Gross, p. 804.

(ii) The Element of Prohibited Purpose

Secondly, for the offence of torture there must be a prohibited purpose[207] which is indicated in the Torture Convention as follows:

> … *for such purposes* as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or *for any reason based on discrimination of any kind* (emphasis added).

This element is the main issue in the practice of the *ad hoc* tribunals. According to the defence argument the requirement of prohibited purpose is limited to the obtaining of information, which is the major characteristic of torture in customary international law, and it should be interpreted narrowly so as not to violate the principle of legality.[208] On the other hand, the Prosecution Service depends on the definition of torture in the Torture Convention that regulates the requirement of prohibited purpose much more broadly than just obtaining information.[209]

As rightly indicated by the Trial Chamber in the *Celebici Camp Case*, the Torture Convention's definition represents the customary law rule in this sense, and the use of the words 'for such purposes' and 'for any reason based on discrimination of any kind' indicates that the regulation of the Convention consists of merely examples, the list of purposes is not exhaustive in nature.[210]

The importance of the interpretation of the requirement of prohibited purpose in torture lies in the application of this crime to the crimes of rape or any other forms of sexual violence as part of the grave breaches system due to the non-inclusion of such crimes in the system. As the international community witnessed the commission of massive rape or any other forms of sexual violence in the former Yugoslavia and in Rwanda, these offences were not mainly committed for obtaining information or confession, or just for private reasons,[211] but for 'secondary purpose'[212] such as punishment, intimidation, forcing people to flee from their places as a part of ethnic

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207. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 470–2; Trial Chamber, *Furundzija Case*, *Judgement*, para. 162; Trial Chamber, *Akayesu Case, Judgement*, para. 6.4.114.
208. For the defence argument in brief, *see Celebici Camp Case, Judgement*, paras. 449–50.
209. For the Prosecution Service argument in brief, *see Celebici Camp Case, Judgement*, paras. 447–8; and also *see Prosecution's Pre-Trial Brief, Simic & Others*, Case No.: IT-95-9-PT (31 March 1999), paras. 110, 119–21.
210. Trial Chamber, *Celebici Camp Case, Judgement*, para. 470; Trial Chamber, *Furundzija Case*, *Judgement*, para. 162; Trial Chamber, *Akayesu Case, Judgement*, para. 6.4.114.
211. If the commission of rape is merely for private reasons, it cannot be regarded as torture and can be considered under national law, not international criminal law, at least as far as the grave breaches system and violations of the laws or customs of war are concerned. This fact was indicated by the ICTY in the *Celebici Camp Case, see* para. 471.
212. Professor Bassiouni deploys this phrase to explain prohibited purposes in torture other than for obtaining information or confession. *See* Bassiouni and Manikas, pp. 564–5. The Prosecution service also uses Bassiouni's comment on torture to support its argument. *See Celebici Camp Case, Judgement*, paras. 447–8.

cleansing.[213] The other significant point with regard to the interpretation of this element can be examined in distinguishing torture from other offences like inhuman treatment and wilfully causing great suffering or serious injury to body or health which do not require a purpose to establish individual criminal responsibility.

From the foregoing explanation it can be clearly seen that the practice of the *ad hoc* tribunals will definitely guide the ICC in terms of providing precedents that examine the required elements of torture. In this context, it should be noted that despite the fact that the ICC Statute provides a definition of torture under the category of crimes against humanity in Article 7 (2) (e), it is not possible to see the requirement of prohibited purpose in that definition. This way of adoption in the Statute should be perceived as insufficient on the grounds that it creates some problems in relation to the issue of how torture can be differentiated from inhuman or cruel treatment, and from wilfully causing great suffering or serious injury to body or health.[214] To solve this issue, the ICC when it comes into operation has to interpret the provisions relating to torture as consisting of the element of prohibited purpose inherent in the definition and the interpretation and application of the element by the International Tribunals will undoubtedly play a crucial role for the ICC in reaching this natural result.

(iii) The Element of Official Involvement

The third and last requirement of torture is that there must be an official involvement in a crime to be considered as torture.[215] As decided by the International Tribunal in compliance with the Torture Convention in the *Celebici Camp Case*, 'an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity'.[216] This way of interpretation makes it possible to charge persons who are officials of non-State parties to a conflict with the crime of torture. In particular, its importance can be examined in the cases of internal or international armed conflicts involving non-State entities.[217]

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213. In this sense, for the detailed explanation and analysis of rape as torture in accordance with the requirement of prohibited purpose, *see infra*, p. 156. Rape and Any Other Forms of Sexual Violence as Torture under the Grave Breaches System.
214. In terms of providing means to charge the perpetrators of rape or any other forms of sexual violence as torture under the grave breaches system, the interpretation of the requirement of prohibited purpose in a broader manner is not necessary with regard to crimes of this nature, since the ICC Statute gives a separate place and regulates sexual crimes in detail under the heading of war crimes. They are also accepted as a new category of grave breaches system in Article 8 (2) (b) (xxii).
215. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 473–4, 494; Trial Chamber, *Furundzija Case, Judgement*, para. 162; Trial Chamber, *Akayesu Case, Judgement*, para. 6.4.114.
216. Trial Chamber, *Celebici Camp Case, Judgement*, para. 473; Trial Chamber, *Akayesu Case, Judgement*, para. 6.4.114. The requirement of official involvement was interpreted in the *Furundzija Judgement* as follows: 'at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity' (para. 162).

The approach taken by the *ad hoc* tribunals in the *Celebici Camp, Furundzija* and *Akayesu Cases* can be assessed as it is in compliance with the customary rules of international humanitarian law and the events that occurred in the former Yugoslavia and in Rwanda on the basis that many crimes of torture have been committed by paramilitary groups, some of which have no connection with the Government and where no official link in literal meaning can be found. At the same time, it should never be forgotten that the main purpose of international humanitarian law is to protect innocent civilians. If the *ad hoc* tribunals should have interpreted and applied the requirement of official involvement in a different or strict manner, many perpetrators or responsible persons would have gone unpunished, a result which could not be explained from the aspects of international humanitarian law. In this sense, the latest development that can be perceived as an emerging new customary law rule in the ICC Statute should be addressed here – that is, the definition of torture without limiting its application to the acts of public officials, due to the possibility of the commission of this crime by non-State actors.[218] Undoubtedly, this way of adoption of the ICC Statute constitutes more evidence proving the correctness of the practice of the *ad hoc* tribunals.

Rape and Any Other Forms of Sexual Violence as Torture under the Grave Breaches System

The crimes of rape and any other forms of sexual violence were not expressly indicated in the Conventions as a grave breach and even not in Common Article 3 to the Geneva Conventions to be applied to internal armed conflicts.

However, there is no doubt that rape and any other forms of sexual violence were prohibited in international humanitarian law. For example, its prohibition can be found in Lieber's Code promulgated in 1863,[219] the 1899 Hague Convention on the Laws and Customs of War and the 1907 Hague Regulations,[220] Article 27 of the Fourth Geneva Convention,[221] Article 76 of the Additional Protocol I,[222] and in Article 4 of the Additional Protocol II.[223]

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217. Trial Chamber, *Celebici Camp Case, Judgement*, para. 473.
218. Art. 7 (2) (e) of the ICC Statute.
219. Art. 47 of the Lieber's Code (Instructions for the Government of Armies of the United States in the Field), reprinted in Schindler and Toman (eds), pp. 3–23. *See* Meron, T., 'Shakespeare's Henry the Fifth and the Law of War' (1992), 86 *AJIL*, p. 30.
220. Articles 46 of the Convention and the Regulation states: 'Family honours and rights, individual lives … must be respected'.
221. Article 27 (1–2) of the Fourth Geneva Convention provides: 'Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights. …
Woman shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.'
222. Article 76 (1) of the Additional Protocol I provides: 'Woman shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.'
223. Article 4 (2) (e) of the Additional Protocol II expressly prohibits rape as follows: 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any other form of indecent assault'. As clearly understood from this provision, the prohibition of 'outrages upon personal dignity, in particular humiliating and degrading treatment' in Common Article 3 to the Geneva Conventions can be interpreted as implicitly providing the prohibition of rape or any other forms of sexual violence.

Despite the extensive prohibition of sexual crimes, until the practice of the ICTY and the ICTR, the international community has not paid real attention to the prosecution of responsible individuals for such offences.[224] They were not included in the Nuremberg Charter and subsequently were not prosecuted in the Nuremberg trials.[225] Nevertheless, in the Tokyo trials, rape was regarded as a violation of international humanitarian law, although it was not extensively prosecuted.[226]

Despite the fact that rape and any other forms of sexual violence are prohibited by conventional and customary rules of international law, none of the regulations provides a definition of rape or sexual violence in international law. This is a historical opportunity to witness the definitions and elements of such crimes that has to be cleared by the *ad hoc* tribunals not to violate the principle of *nullum crimen sine lege*. For the first time in international law, the ICTR in the *Akayesu Case* defined rape and sexual violence under the concept of crimes against humanity, which expressly includes rape,[227] as follows:

> rape [is] … a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.[228]

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224. Cleiren, C.P.M. and M.E.M. Tijsen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues' (1994), 5 *Crim. L. F.*, pp. 471–2; MacKinnon, C.A., 'Rape, Genocide and Women's Human Rights', in Stiglmayer, A. (ed.), *Mass Rape: The War Against Women in Bosnia Herzegovina* (Lincoln, London: University of Nebraska Press, 1994), pp. 183–4; Copelon, R., 'Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War', in Stiglmayer, A. (ed.), p. 197; Aydelott, D., 'Mass Rape During War: Prosecuting Bosnian Rapists under International Law' (1993), 7 *Emory Int'l L. R.*, pp. 585–6.

225. On the other hand, CCL No. 10 expanded the list of crimes against humanity as including rape. Article II (c) of the CCL No. 10 defines crimes against humanity as follows: 'Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, …' (emphasis added).

226. Aydelott, p. 592; Parks, W.H., 'Command Responsibility for War Crimes' (1973), 62 *Mil L. Rev.*, pp. 69–73. Author in this article explains the case of Admiral Toyoda in which the accused was charged with violations of the laws and customs of war, including rape, under the concept of command responsibility and was acquitted of all charges; Laviolette, N., 'Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (1998), 36 *Can. Y. Int.'l L.*, pp. 118–20. For the application of the command responsibility to cases of wartime sexual assault in light of the practice of the ICTY in the *Celebici Camp Case*, *see* Laviolette, pp. 140–7.

227. Art. 3 (g) of the ICTR Statute.

228. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.4.120–21; Rape and sexual violence were again defined in this case in paras 7.7.130–31 and the concept of sexual violence was made clearer as follows: 'Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.' The Tribunal cites as an example of this nature the forcing of a student to do gymnastics naked in front of a crowd. Moreover, the Court explained coercive circumstances in the following terms: '… coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict …'.

In relation to this case, sexual violence was defined by the Prosecution Service in a way that can be perceived as elaboration of the acts of sexual violence as follows: '… acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity' (*Prosecutor v. Jean-Paul Akayesu, Amended Indictment*, Case No.: ICTR-94-4-I, para. 10A).

The view taken by the ICTR should be perceived as 'a broad, progressive international definition of both rape and sexual violence'.[229] Due to being the first definition of rape and sexual violence in international law, it undoubtedly plays a crucial role for guiding the ICTY and the ICTR in the following cases. In this sense, the practice of the Rwanda Tribunal has already taken its place in the cases before the *ad hoc* tribunals and has been regarded as a precedent in the *Celebici Camp* and the *Furundzija Cases* by the Yugoslavian Tribunal.[230] Even in the *Furundzija Judgement*, the definition of rape was made clearer and the objective elements of rape were indicated as follows:

> (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[231]

The way of elaboration of elements of rape by the ICTY in the *Furundzija Judgement* should be, in a sense, seen as a regression from the broad and progressive definition of rape in the *Akayesu Judgement*.[232] This is because, the *Furundzija Judgement* limits the crime to the notion of sexual penetration while the *Akayesu Judgement* defines it as a physical invasion of a sexual nature. In wartime situations, rape should not be restricted to the concept of penetration on the basis that no one can guess the future perpetrators of rape who will employ different methods of committing sexual violence that may also be considered as rape. On this ground, the practice of the ICTR should be accepted as authoritative and more convenient in international law since providing a definitional framework for rape and sexual violence, as the same logic deployed for the definition of torture in the Torture Convention that does not enumerate specific acts constituting torture.[233] In this context, when the practice of the ICTY in the *Furundzija Judgement* is taken into account all together, it is clear that the Tribunal in this case mainly deals with whether forced oral penetration or sex can be regarded as rape or not.[234] The Tribunal reaches the conclusion that 'forced oral penetration should be classified as rape'.[235] For this reason, the application of the crime in this Judgement should be perceived as explaining the concept of forced oral sex as a form of rape and as providing an example of the substantive content of rape in accordance with the framework drawn by the Rwanda Tribunal in the *Akayesu Judgement*.

More importantly, the practice of the *ad hoc* tribunals and their contribution to international humanitarian law in this context will guide the ICC

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229. Askin, K.D., 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' (1999), 93 *AJIL*, p. 107.
230. Trial Chamber, *Celebici Camp Case*, *Judgement*, paras. 478–9; Trial Chamber, *Furundzija Case, Judgement*, paras. 176–7.
231. Trial Chamber, *Furundzija Case, Judgement*, para. 185.
232. Askin, p. 113.
233. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.4.118–19.
234. Trial Chamber, *Furundzija Case, Judgement*, paras. 182–4.
235. Ibid., para. 183.

in terms of providing a definition of rape and sexual violence and of making clear their elements and substantive content since the ICC Statute does not define such crimes,[236] although crimes of a sexual nature, for the first time at the international level are taking their place in the ICC Statute in a detailed way.[237]

Apart from the definition of rape and sexual violence, the issue regarding these offences before the *ad hoc* tribunals was that although they were not expressly mentioned in the grave breaches system and in its extension to internal armed conflict in Common Article 3, Article 4 of the Additional Protocol II explicitly includes these crimes as an act constituting an outrage upon personal dignity, whether it was possible to charge persons responsible for sexual crimes either with the grave breaches of the Geneva Conventions under the category of torture, inhuman treatment or wilfully causing great suffering or serious injury to body or health, or with violations of Common Article 3 to the Geneva Conventions under the category of torture, cruel treatment or outrages upon personal dignity.

At this point, from the perspective of international humanitarian law, there cannot be any doubt about when the requirements of other offences such as torture, inhuman or cruel treatment, wilfully causing great suffering or serious injury to body or health, or outrages upon personal dignity are met, rape and any other forms of sexual violence can be tried as constituting a form of aforementioned class of crimes by the ICTY and the ICTR. This way of interpretation and application of international humanitarian law rules cannot be regarded as a violation of the principle of *nullum crimen sine lege*. For example, as far as the crime of torture and its elements are concerned,[238] it is very clear that firstly, rape and sexual violence causes severe pain or suffering on the victim, secondly, they can be committed for such purposes as intimidation, degradation, humiliation, punishment, discrimination, control or destruction of the victim, thirdly, they can be inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity. In fact, this was the way adopted by the *ad hoc* tribunals in the cases of *Celebici Camp* (rape as a torture under the grave breaches system)[239] and of *Furundzija* (rape as torture and outrages upon personal dignity under the concept of violations of the laws or customs of war).[240] In reaching this conclusion, the International Tribunal extensively reviewed international humanitarian and human rights law and mainly depended upon the recent decisions of international and regional judicial bodies in which rape was considered as a form of torture. In particular, two of them guided the Tribunal which were

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236. In the ICC Statute just the crime of 'forced pregnancy' is defined under the concept of crimes against humanity in Article 7 (2) (f) as follows: '… the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law'.
237. *See* Arts. 7 (1) (g), 8 (2) (b) (xxii), 8 (2) (e) (vi) of the ICC Statute.
238. For other categories of crimes and the applicability of rape and any other forms of sexual violence in this context, *see infra* note 257 and accompanying text. For the crime of genocide, crimes against humanity and sexual crimes, *see infra* Chapters 5 and 6, pp. 222–5 and p. 260+.
239. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 475–96.
240. Trial Chamber, *Furundzija Case, Judgement*, paras. 165–86.

the cases of *Fernando and Raquel Mejia v. Peru*[241] handed down by the Inter-American Commission on Human Rights, and of *Aydin v. Turkey*[242] decided by the European Court of Human Rights. Although it is not indicated in the decisions of the International Tribunal, undoubtedly, the writings of international lawyers have affected the practice of the *ad hoc* tribunals in terms of interpreting and applying the rules of international humanitarian law in a way that makes it possible to try sexual crimes as grave breaches of the Geneva Conventions, or as a violation of the laws or customs of war or as an act constituting the crime of genocide.[243]

The practice of the *ad hoc* tribunals with regard to the crimes of rape or any other forms of sexual violence has a significant place in international humanitarian law on the premise that it provides more protection for innocent civilians and makes it possible to charge individuals responsible with these horrendous crimes that had never been given real attention by the international community until the present time. More importantly, sexual crimes were able to be regarded as war crimes either under the grave breaches system or under violations of the laws or customs of war. Even more, the international community has been witnessing the indictments merely dealing with crimes of a sexual nature[244] that should be considered as a major achievement of the application of the norms of international humanitarian law by the *ad hoc* tribunals and as giving a clear signal to possible future perpetrators that such crimes will not go unpunished any longer.

On the other hand, as far as the ICC Statute is concerned, the ICC will not have to apply war crimes law in the same manner as the *ad hoc* tribunals have been interpreting and applying them, since the ICC Statute includes a detailed regulation of sexual crimes under the categories of crimes against humanity

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241. *Fernando and Raquel Mejia v. Peru*, Report No. 5/96, Case No. 10.970, 1 March 1996, in (1996) 1 *Inter-American Yearbook on Human Rights*, p. 1120 (referred to in the *Celebici Camp Case, Judgement*, paras. 481–6, in the *Furundzija Judgement*, para. 163).
242. *Aydin v. Turkey*, Judgement of 25 September 1997, in (1997), 25 *EHRR*, p. 251 (referred to in the *Celebici Camp Case, Judgement*, paras, 487–9, in the *Furundzija Judgement*, para. 163). The decision of the Court was taken by majority (14 votes to 7). Those judges who were against the decision were not convinced about whether the events alleged actually occurred. At this point, the view taken by the European Court can be strongly criticised on the ground that without sufficient evidence and proof rendering such a decision which can be considered as blaming officials or security services of a sovereign State by relying on a case that is brought before the European Commission and Court of Human Rights to raise some political views of a terrorist organisation (PKK: so-called Kurdish Workers Party) against Turkey seriously damages the credibility of these international organisations. In terms of international humanitarian, human rights or criminal law, it cannot be explained how such a court decides in this way while one-third of its members are not even sure whether such an event occurred.
243. Meron, T., 'Rape as a Crime under International Humanitarian Law' (1993), 87 *AJIL*, pp. 426–8; Chinkin, C., 'Rape and Sexual Abuse of Woman in International Law' (1994), 5 *EJIL*, pp. 330–4; Aydelott, pp. 598–621; Bassiouni and Manikas, pp. 555–93; Krass, C.D., 'Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court' (1994), 22 *Denv. J. Int'l L. & Pol'y*, pp. 340–2; Blatt, D., 'Recognizing Rape as a Method of Torture' (1992), 19 *Rev. L. & Soc. Ch.*, pp. 853–64; Daes, E-I.A., 'New Types of War Crimes and Crimes Against Humanity: Violations of International Humanitarian and Human Rights Law' (1993), 7 *Int.'l Gen. Y.*, pp. 59–64.
244. *See* the indictments of *Prosecutor v. Gagovic and Others* (26 June 1996), and of *Prosecutor v. Kunarac*, Case No.: IT-96-23-I (13 July 1998).

and of war crimes.[245] Despite the fact that the ICC Statute does not include any provision regarding the crimes of rape and any other forms of sexual violence as a grave breach in Article 8 (2) (a) under the grave breaches title, it indicates in Article 8 (2) (b) under the serious violations of the laws or customs of war applicable in international armed conflict that such offences do constitute grave breaches of the Geneva Conventions.[246] It is very clear that the practice of the ICTY and the ICTR has created a historic guideline to set up a precedent for the prosecution of individuals responsible for rape or any other form of sexual violence in the cases of armed conflicts whether international or non-international in nature. The approach taken by the *ad hoc* tribunals in relation to events such as mass rapes, enforced prostitution, forced pregnancy and so on that occurred in the former Yugoslavia and in Rwanda made it possible to include such crimes in the ICC Statute as grave breaches of the Geneva Conventions and as a serious violation of Common Article 3 to the Geneva Conventions on the basis that the *ad hoc* tribunals in their cases indicated that although such acts were not explicitly included as a grave breach or serious violation of Common Article 3 in their Statutes (in this context, just the ICTY Statute), they may qualify the elements of other crimes such as torture, inhuman or cruel treatment, wilfully causing great suffering or serious injury to body or health, or outrages upon personal dignity, and can be regarded as a form of these crimes. In this sense, the regulation in the ICC Statute also proves how the *ad hoc* tribunals rightly interpret and apply the norms of international humanitarian law. On this ground it should not be wrong to say that the practice of the *ad hoc* tribunals has played the central role for the creation of a new category of grave breaches in relation to rape and any other forms of sexual violence and for the inclusion of these crimes into serious violations of Common Article 3 by means of the ICC Statute.

Lastly, one more point with regard to the regulation of sexual crimes in the ICC Statute should be noted since being the first in international law. That is the reference to 'gender' in Article 7 (1) (h) and its definition in Article 7 (3). Traditionally, gender-based crimes refer to women and the use of this term may have wrongly guided the ICC. In a sense, rape and other forms of sexual violence should not have been regarded as gender-based crimes, but as crimes of violence of a sexual nature.[247] As being witnessed by the international community, the victims of these offences may be both male and female. To indicate this fact and to prevent any misunderstanding or misinterpretation of the ICC Statute, the term 'gender' was defined as referring to the two sexes, male and female.[248] For this reason, the provision of the Statute should be welcomed in international humanitarian law.

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245. *See supra* notes 236–7 and Art. 7 (1) (g) of the ICC Statute.

246. Article 8 (2) (b) (xxii) provides: 'Committing rape, sexual slavery, enforced prostitution, forced pregnancy, … enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions'. The same regulation was also adopted by the international community with regard to internal armed conflicts and Article 8 (2) (e) (vi) provided that the same category of sexual crimes was also regarded as a serious violation of Article 3 common to the four Geneva Conventions.

247. Cleiren and Tijsen, pp. 474–5.

248. Article 7 (3) of the ICC Statute provides: 'For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.'

Inhuman Treatment

As with torture, the offence of inhuman treatment is prohibited by conventional and customary rules of international humanitarian and of human rights law. Under the grave breaches system, all four Geneva Conventions give a place to this crime[249] and also human rights instruments contain similar provisions together with torture.[250] However, the definition of inhuman treatment was not made in those instruments. In the cases involving charges of inhuman treatment before the *ad hoc* tribunals this was the main legal argument upon which the defence relied. According to the defence, the crime of inhuman treatment 'lacks sufficient specificity to form the basis of a criminal prosecution' and its application 'potentially violates the principle of *nullum crimen sine lege*'.[251] As has already been indicated, the prohibition of inhuman treatment is a part of the grave breaches system and undoubtedly forms a part of the customary rules of international humanitarian law. Its parallel regulation by way of the same international instruments with torture makes the offence reach the level of *jus cogens* and the resulting obligations on States *erga omnes* in nature. Given this ground, the defence argument has no basis in international law.[252]

For the first time in international humanitarian law, the offence of inhuman treatment was defined by the Trial Chamber in the *Celebici Camp Case* as: '… an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity'.[253] In reaching this definition, the Tribunal extensively reviewed all four Geneva Conventions, including Common Article 3 and the Additional Protocols to the Geneva Conventions[254] and the decisions of other international bodies such as the decisions of the European Court and the European Commission of Human Rights, and of the Human Rights Committee in which a variety of inhuman treatments can be found as examples and gives an idea to the Tribunal about what acts

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249. Arts. 50, 51, 130 and 147 of the Geneva Conventions respectively.
250. For references, *see supra* note 189. For example Article 7 of the ICCPR states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'
251. Trial Chamber, *Celebici Camp Case, Judgement*, para. 515; *Kordic & Others, Kordic Defence Pre-Trial Brief*, Vol. II – Legal Issues (6 April 1999), paras. 39–40.
252. For other reasons why it should not be considered as a violation of the principle of *nullum crimen sine lege, see supra* notes 165–72 and accompanying text.
253. Trial Chamber, *Celebici Camp Case, Judgement*, para. 543. This definition is also consistent with the Prosecution Service's argument. The Prosecution Service indicates the specific elements of inhuman treatment as follows: '1. The occurrence of acts or omissions causing serious mental or physical suffering or injury or constituting a serious attack on human dignity; 2. The acts or omissions were committed wilfully' (*Simic & Others, Prosecution's Pre-Trial Brief*, Case No. IT-95-9-PT, 31 March 1999, para. 129; *Celebici Camp Case, Judgement*, para. 513; *Kordic & Others*, *Prosecutor's Pre-Trial Brief*, Case No. IT-95-14/2-PT, 25 March 1999, p. 44).
254. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 521–32.

constitute inhuman treatment.[255] When the practice of the *ad hoc* tribunals is compared with the other practice of the international judicial bodies, the importance of the practice of the *ad hoc* tribunals and their contribution to international humanitarian law as well as to human rights law or their possible impact on the ICC lies in setting up the framework of inhuman treatment by way of providing a general definition of the offence that does not enumerate specific acts which has to be judged in accordance with the circumstances of each case. For this reason, concluding that the International Tribunals play a crucial role for codifying and clarifying the norms of international humanitarian law should not be seen as extraordinary.

As has been clearly inferred from the definition of inhuman treatment, the crimes of torture, wilfully causing great suffering or serious injury to body or health can also constitute inhuman treatment. However, making clear its difference from other offences is not a difficult task if the interpretation and application of the norms by the *ad hoc* tribunals are regarded as a guideline. For example, an act to be considered as inhuman treatment does not need to have a purpose behind it and there is also no need for official involvement. In the same vein, the offence of inhuman treatment mainly protects human dignity and covers all acts which do not fall within the crimes of torture or wilfully causing great suffering or serious injury to body or health.[256] For example if rape or any other forms of sexual violence cannot be regarded as torture or wilfully causing great suffering or serious injury to body or health, it can be tried under the offence of inhuman treatment.[257] There cannot be any doubt that determination of acts either as torture or wilfully causing great suffering or serious injury to body or health, on the one hand, or as inhuman treatment, on the other hand, is significant in particular for the development of international humanitarian and human rights law specifically for the future cases of the *ad hoc* tribunals. More importantly, it creates an immense precedential value for the ICC in its case law.

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255. Ibid., paras. 534–50. In fact, in the human rights law practice a definition of inhuman treatment is made by the European Commission of Human Rights in the *Greek Case* as 'at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable' (*Greek Case*, (1969), 12 *Y. B. Eur. Conv. on H. R.,* 186). In the case of *Kordic & Others*, the argument of the defence concentrated on this definition and in particular focused on the infliction of severe suffering (*Kordic & Others, Kordic Defence Pre-Trial Brief*, Vol. II – Legal Issues, 6 April 1999, para. 41). In terms of international humanitarian law, the definition made by the European Commission of Human Rights in light of Article 3 of the European Convention on Human Rights does not fit the purposes of international humanitarian law for the following reasons: Firstly, infliction of severe suffering is not the central element of inhuman treatment in international humanitarian law. If it was the case, the concept of wilfully causing great suffering or serious injury to body or health, another category of crime under the grave breaches system, would be pointless. Secondly, there is no doubt that wilfully causing great suffering or serious injury to body or health can be regarded as inhuman treatment since the offence of inhuman treatment is an umbrella charge, but the main difference when these two categories are compared lies in the protection of human dignity as far as inhuman treatment is concerned.

256. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 442, 542, 544; and also *see* the argument in the previous note.

257. Bassiouni and Manikas, pp. 565–7.

In this context, it should also be noted that as rightly concluded by the *ad hoc* tribunals in the *Tadic* and *Celebici Camp Cases*, the concepts of inhuman treatment, cruel treatment and inhuman acts are consistent with each other, in other words, their substantive contents are the same.[258] The approach taken by the International Tribunal should be considered as a significant step in terms of providing one definition for these categories of offences that are in fact the same, but the name is different for different categories of crimes. As is well known, the concept of inhuman treatment is used for the grave breaches system and for the international armed conflict situations. The concept of cruel treatment is used for serious violations of Common Article 3 to the Geneva Conventions as a reflection of inhuman treatment for internal armed conflicts. The notion of inhuman acts is used for the categories of crimes against humanity. In this sense, the concept of humiliating and degrading treatment that is not included in the grave breaches system, but in Common Article 3 and the Additional Protocol II,[259] should also be considered as constituting inhuman treatment.[260] This way of understanding the interpretation and application of the norms of international humanitarian law should be welcomed since it provides clear guidance and simplifies the application of norms for the same substantive content of crimes which were named different for different categories of crimes in international humanitarian law.

Lastly, with regard to the offence of inhuman treatment, one of the other contributions of the practice of the *ad hoc* tribunals to international humanitarian law and possible impact on the ICC can be examined in introducing and defining the concept of 'inhuman conditions'. For the first time in international law, it was defined as 'is a factual description relating to the nature of the general environment in which detained persons are kept and the treatment which they receive',[261] and regarded as a form of inhuman treatment, although there is no such offence in international humanitarian law.[262] The inclusion of inhuman conditions as a variety of inhuman treatment is significant in particular with regard to the prison camps and transportation of civilians, as was witnessed in the former Yugoslavia in which conditions were inhuman in nature. The interpretation and application of the concept by the International Tribunal make it possible to charge the individuals responsible for inhuman conditions and thus it should be considered as consistent with the main objective of international humanitarian law – that is, to protect innocent lives and their dignity as well.

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258. Trial Chamber, *Tadic Case, Judgement*, para. 723. '… cruel treatment is a means to an end, the end being that of ensuring that persons taking no active part in the hostilities shall in all circumstances be treated *humanely*' (emphasis added); Trial Chamber, *Celebici Camp Case, Judgement*, para. 552. The Tribunal as with the offence of inhuman treatment defines cruel treatment as follows: '… cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity'. For the connection between inhuman treatment and inhuman acts, *see* para. 533 of the *Celebici Camp Case Judgement*.
259. Common Article 3 (c); Art. 4 (e) of the Additional Protocol II.
260. Gross, p. 808.
261. Trial Chamber, *Celebici Camp Case, Judgement*, para. 556.
262. Ibid., paras. 554, 558.

Biological Experiments

The prohibition of biological experiments derives from the terrible experience of the Second World War, and as a consequence it has taken its place in the Geneva Conventions as part of the grave breaches system.[263] Under Article 2 (b) of the ICTY Statute, the International Tribunal has jurisdiction over such acts considered as biological experiments – that is, 'experiments on the human body or health'.[264] By means of this regulation, innocent civilians and prisoners of war are protected from being used for scientific experiments in armed conflict situations. The problem with regard to biological experiments arises when the concepts of medical care and of medical experimentation are compared since medical care is allowed, even if it introduces new medical procedures.[265]

However, there have been no charges of biological experiments before the ICTY and the ICTR up until now, as far as the available indictments and decisions of the *ad hoc* tribunals are concerned. Undoubtedly, if the International Tribunals are faced with this offence, they will definitely play the same role for the concept of biological experiments as with other offences such as torture or inhuman treatment.

Wilfully Causing Great Suffering or Serious Injury to Body or Health

The offence of wilfully causing great suffering or serious injury to body or health is prohibited in all four Geneva Conventions and regarded as part of the grave breaches system.[266] Under Article 2 (c) of the ICTY Statute, the International Tribunal has jurisdiction over acts constituting the crime of wilfully causing great suffering or serious injury to body or health.

As with other offences of mistreatment, the concept of wilfully causing great suffering or serious injury to body or health was not defined in international law. It is too difficult to define in a way that provides a clear guidance as to which conducts can be punished under this category of offence. Before the International Tribunal, the Prosecution Service argued that under this category of offence, there were two independent crimes namely 'wilfully causing great suffering' and 'wilfully causing serious injury to body or health' and that recklessness was sufficient to establish the mental requirement of the crime.[267] On the other hand, the defence contended that the offence in question did not qualify the requirements of the principle of legality and its application would violate the principle of

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263. Arts. 50, 51, 130 and 147 of the Geneva Conventions respectively.
264. Wolfrum, p. 532.
265. Ibid., p. 533.
266. Arts. 50, 51, 130 and 147 of the Geneva Conventions, respectively.
267. For a brief explanation of the Prosecution's Service argument, *see Celebici Camp Case*, *Judgement*, paras. 499–500. In the case of *Simic & Others*, the Prosecution Service did not concentrate on the two separate crimes and indicated the specific elements of this offence as follows: '1. The occurrence of acts or omissions causing serious mental or physical suffering or injury; 2. The acts or omissions were committed wilfully' (*Simic & Others, Prosecution's Pre-Trial Brief*, Case No.: IT-95-9-PT (31 March 1999), para. 136); and also *see Kordic & Others*, *Prosecutor's Pre-Trial Brief*, Case No.: IT-95-14/2-PT (25 March 1999), p. 44.

nullum crimen sine lege,[268] and also alternatively, if this argument failed, the defence also argued that with regard to the specific element of the crime, the term wilful did not include recklessness[269] and moreover, in terms of serious injury to body or health, there had to be 'a protracted loss of use of a bodily member or organ'.[270]

The International Tribunal, firstly, made clear that the offence of wilfully causing great suffering or serious injury to body or health constituted only one crime and that to establish individual criminal responsibility, the occurrence of either great suffering, physical or mental, or serious injury to body or health was sufficient.[271] Secondly, with regard to the seriousness of the injury to body or health, the Tribunal defined the word 'great' as 'not slight or negligible'.[272] Although it is not clear in the *Celebici Camp Case, Judgement*, the argument of the defence regarding serious injury to body or health can be merely considered as a criterion for the evaluation of the seriousness of the injury, not as an additional element of the offence on the premise that serious injury to body or health does not always need to be in the form of losing the use of an organ, it may also occur as bodily harm. One more evidence of this fact can be found in the *Tadic Judgement* in which the Tribunal found that severe beatings of the victim could constitute cruel treatment under Common Article 3 (1) (a) and Article 4 (2) (a) of the Additional Protocol II,[273] both provisions of which should be regarded as the extension or reflection of the offence of wilfully causing great suffering or serious injury to body or health in internal armed conflicts. As clearly understood from the decision, severe beatings do not always cause losing the use of a bodily member or organ but do constitute the crime of wilfully causing great suffering or serious injury to body or health.

Finally, the International Tribunal defined the crime and distinguished it from torture as follows:

> ... the offence of wilfully causing great suffering or serious injury to body or health constitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence.[274]

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268. For a brief explanation of the defence argument, *see Celebici Camp Case, Judgement*, para. 503. For reasons why the defence argument has no basis in international humanitarian law, *see supra* notes 165–72 and accompanying text.
269. For this concept and the argument on this issue, *see supra* notes 180–8 and accompanying text.
270. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 504–5; *Kordic & Others, Kordic Defence Pre-Trial Brief*, Vol. II – Legal Issues, Case No.: IT-95-14/2-PT (6 April 1999), paras. 50–2.
271. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 506, 509.
272. Ibid., para. 510.
273. Trial Chamber, *Tadic Case, Judgement*, paras. 723–6. Common Article 3 (1) (a) prohibits the following acts: '*violence to life and person,* in particular murder of all kinds, mutilation, cruel treatment and torture' (emphasis added). Article 4 (2) (a) of the Additional Protocol II consists of the following prohibition in some detail: '*violence to the 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' (emphasis added).
274. Trial Chamber, *Celebici Camp Case, Judgement*, para. 511.

Undoubtedly, the definition of the offence of wilfully causing great suffering or serious injury to body or health, in a manner that provides all required elements of the offence solves the vagueness problem inherent in this crime, and the approach taken by the International Tribunal makes a great contribution to international humanitarian law and creates a precedential value for the ICC.

Extensive Destruction and Appropriation of Property, Not Justified by Military Necessity and Carried Out Unlawfully and Wantonly

Under the grave breaches system, not only persons, civilians, prisoners of war, wounded, sick, shipwrecked in the field and at sea, are protected, but also some category of property enjoy the same protection.[275] The prohibition of extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly in the Geneva Conventions[276] is one of the reflections of this protection. The acts of extensive destruction and of appropriation of property should be explained in conjunction with other acts constituting violations of the laws or customs of war, namely, 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity', 'attack, or bombardment, by whatever means of undefended towns, villages, dwellings, or buildings', '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'.[277] The reasons for examining these concepts together with the grave breaches of the Geneva Conventions can be indicated as follows: Firstly, to provide full protection of property, in some cases it is necessary to refer to other violations of the laws or customs of war. For example, Article 53 of the Fourth Geneva Convention regarding real or personal property covers property found in an occupied territory, but does not cover the destruction of property in enemy territory that can only be protected by the Hague Regulations which is the main part of the concept of violations of the laws or customs of war.[278] Secondly, the elements of these acts are mainly similar to each other and include some of the most controversial issues of the law of armed conflict such as military necessity which can justify the act as lawful.

First of all, with regard to the offence of extensive destruction and appropriation of property, it should be noted that the use of the term 'extensive' implies that an isolated incident of destruction or appropriation of property is not sufficient to be regarded as a grave breach as long as it is not carried out intentionally.[279]

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275. For the related Articles of the Geneva Conventions in relation to the protected property, *see supra* note 145.
276. Art. 50 of the First Geneva Convention; Art. 51 of the Second Geneva Convention; Art. 147 of the Fourth Geneva Convention. The Third Geneva Convention does not include such a provision since it deals with prisoners of war.
277. These regulations derive from Articles 23 (g), 24 and 27 of the 1907 Hague Regulations and they are included in Article 3 (b, c and d) of the ICTY Statute.
278. Article 23 (g) of the Hague Regulation prohibits 'destr[uction] or seiz[ure] [of] the enemy's property, unless such destruction be imperatively demanded by the necessities of war'.
279. Gross, p. 811.

To establish criminal responsibility for the acts of extensive destruction and appropriation of property, the concept of military necessity needs to be clarified. In this context, the important issue is how to judge whether military necessity existed and to what extent it may be applicable in international humanitarian law. Two concepts, military objective and the principle of proportionality, play a crucial role in the justification of an act whether it is committed in a situation that can be considered as a military necessity.

The notion of military objective is for the first time defined in Article 52 (2) of the 1977 Additional Protocol I as '… military objectives are limited to those objects which by their nature, location, purpose or use make an *effective contribution to military action* and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a *definite military advantage*' (emphasis added). The same Article in paragraph 1 defines civilian objects as '… all objects which are not military objectives'. In the light of these provisions, the issue of what the scope or extent of military objective is should be taken into account for each specific case. For example, destruction of a bridge, school, cathedral, mosque or museum is not normally justified by military necessity, but if those places are used for military purposes like using the bridge as a military supply line, establishing army headquarters in a school or storing arms in the school, they may become lawful military targets and be destroyed as long as its destruction is consistent with the principle of proportionality.[280] Of course, the justification of acts is made by the international tribunals or courts when they are faced with this offence[281] in accordance with the provisions of the Additional Protocol I that should be regarded as reflecting customary rules of international law in this respect and the requirements of these provisions such as '*effective contribution to military action*' and '*definite military advantage*' will be clarified by case law of the tribunals or courts.[282]

The other element of military necessity to be justified as lawful is the principle of proportionality which derives from the idea of balancing military necessity and humanity. The purpose of the principle is to reduce

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280. For the application of this concept and its analysis with regard to the destruction of some roads, bridges and electricity-generating plants in the Gulf-War, *see* Hampson, F.J., Remarks on 'Proportionality and Necessity in the Gulf Conflict' before American Society of International Law, reprinted in 'Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity' (1992), 86 *ASIL Proceedings,* pp. 45–54; 'Remarks by Yoram Dinstein', in (1992), 86 *ASIL Proceedings*, p. 55. For a detailed analysis of military objectives and its application in the Gulf-War, *see* Rogers, A.P.V., *Law on the Battlefield* (Manchester, New York: Manchester University Press, 1996), pp. 27–46.
281. For the practice of the *ad hoc* tribunals, *see infra* notes 290–5 and accompanying text.
282. Kalshoven is not in the opinion of the related Article of the Additional Protocol I reflecting customary rules of international humanitarian law. *See* 'Remarks by Frits Kalshoven', in (1992), 86 *ASIL Proceedings*, p. 43. We do not agree with the opinion of Kalshoven, for reasons *see supra* notes 15–29 and accompanying text. Moreover, the provisions of the Additional Protocol I in relation to the concept of military objectives were applied in the Gulf-War (*see* Rogers, pp. 41–6) and recently in the Kosovo conflict by the international community. These are sufficient to prove that these rules have achieved the customary rule status of international law with all requirements: *opinio juris* and State practice. Hampson in the opinion of the provisions of the Additional Protocol I relating to military objectives represents customary international law – *see* Hampson, p. 50.

incidental or collateral damage caused by military operations.[283] The notion of proportionality is defined in various Articles of the 1977 Additional Protocol I. Article 57 (2) (b) of the Protocol states that:

> an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to *the concrete and direct military advantage anticipated* (emphasis added).[284]

The principle set out in the Protocol I should be considered as representing customary rules of international humanitarian law.[285] The practice of the international community in the Gulf-War and in the Yugoslavia and Kosovo conflicts also provides sufficient evidence to support this conclusion. The choice of weapon in particular – for example, the use of smart missiles or bombs to attack military targets – reduced civilian casualties significantly. This was the clear application of the principle of proportinality in armed conflicts.

Moreover, the inclusion of the concept of proportionality in the ICC Statute by way of representing the customary status of the Additional Protocol I and reflecting the emergence of customary rule in relation to the severe damage to the natural environment also has to be taken into account, while the principle as applied to armed conflicts shold be seen as enough to establish that the provisions of the Additional Protocol I in this respect have reached the level of customary international law.[286] The notion of proportionality and its requirements such as the existence of '*the concrete and direct military advantage anticipated*' will be interpreted and applied by the International Tribunal.[287]

In accordance with these norms, one of the other issues is who is to determine whether military necessity existed. As known from military practice, military commanders are principally in a position to take such decisions. At this point, a significant problem arises when a case is brought before an international tribunal or court in relation to the determination of

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283. Rogers, p. 14; and also *see* Walzer, M., *Just and Unjust Wars – A Moral Argument with Historical Illustrations*, Second Edition (Basic Books, 1992), pp. 129–33; Kalshoven, F., 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974–1977' (1978), 9 *Neth. Y.B.I.L*, pp. 115–23; Best, G., *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Weidenfeld and Nicolson, 1980), p. 176. For general information about the protection of civilians in armed conflicts, *see* Gehring, R.W., 'Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I' (1980), 90 *Mil. L. Rev.*, pp. 49–87; Fenrick, W.J., 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982), 98 *Mil. L.Rev.*, p. 91.

284. Articles 48 and 57 (2) (a) (iii) of the Protocol I have similar provisions.

285. Hampson, p. 46. For general explanation about why many provisions of the Additional Protocol I should be regarded as representing customary rules of international humanitarian law, *see supra* notes 15–29 and accompanying text.

286. *See* Art. 8 (2) (b) (iv) of the ICC Statute.

287. For the practice of the *ad hoc* tribunals, *see infra* notes 290–5 and accompanying text.

military necessity. To establish any commander's individual criminal responsibility, the tribunal or court should use an objective criterion, that is, under the same circumstances, how a reasonable commander should have determined whether there existed military necessity.[288]

Given these grounds, the *ad hoc* tribunals have to clarify the elements of the offences of extensive destruction and appropriation of property and of unlawful attacks on civilians and civilian objects in light of the aforementioned norms of the Additional Protocol I. The practice of the Nuremberg and Tokyo Tribunals can also help the ICTY and the ICTR.[289]

When the practice of the *ad hoc* tribunals was examined in light of the principles referred to above, in a Rule 61 Decision in the *Rajic Case*, the Trial Chamber of the ICTY held that the destruction of the village of *Stupni Do*, which was populated by the Bosnian Muslims, and attacks on its residents could not be justified by military necessity on the premise that the village, which 'was located off the main road and its destruction was not necessary to fulfil any legitimate military objectives', did not have any military significance and military installations or any other legitimate military target.[290]

Moreover, in the *Kordic and Cerkez Case,* the Prosecution Service charged the accused with the destruction of property and of institutions dedicated to religion or education and unlawful attacks on civilians and civilian objects.[291] Having examined the arguments of the Prosecution Service and Defence, the related provisions of the Third and Fourth Geneva Conventions, Articles 43 and 51 (2) of the Additional Protocol I,[292] the Trial Chamber of the ICTY defined unlawful attacks on civilians and civilian objects as follows:

> ... prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population or extensive

288. In a sense, this criterion is similar to the establishment of the command responsibility of an individual for the acts of his/her subordinates. *See supra* Chapter 3, p. 84,. Individual Criminal Responsibility under Article 7 (3) of the ICTY Statute and Article 6 (3) of the ICTR Statute.

289. For the definition of military necessity and its elements in accordance with the Second World War war crimes trials, *see* Downey, W.G., Jr., 'The Law of War and Military Necessity' (1953), 47 *AJIL*, p. 251. In the Second World War war crimes trials, the concept of military necessity was considered in connection with the following two categories of offences: (a) the treatment of prisoners of war and unarmed enemy persons, (b) the deportation and devastation of property in occupied enemy territory. *See* Dunbar, N.C.H., 'Military Necessity in War Crimes Trials' (1952), 29 *BYIL*, pp. 446–52.

290. *Prosecutor v. Ivica Rajic, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence* (13 September 1996), paras. 42, 54–7.

291. *Prosecutor v. Dario Kordic and Mario Cerkez, (Amended Indictment*, 30 September 1998), paras. 40–1, 55–8. For the elements of these crimes, according to the Prosecution Service, *see Prosecutor's Pre-Trial Brief (Kordic & Others*, Case No.: IT-95-14/2-PT (25 March 1999), pp. 46, 48–50. On the other hand, for the defence argument, *see Kordic Defence Pre-Trial Brief*, Vol.II – Legal Issues (6 April 1999), paras. 54–6, 77–82, 86–90, 230–6; and also *see* other indictments including these offences: *Prosecutor v. Dorde Dukic* (*Indictmen*t, Case No: IT-96-20-I, 29 February 1996), para. 7; *Prosecutor v. Milan Kovacevic* (*Amended Indictment*, Case No.: IT-97-24-I, 23 June 1998), paras. 54–7; *Prosecutor v. Milan Martic* (*Indictment*), paras. 15–18; *Prosecutor v. Radovan Karadzic and Ratko Mladic* (*Indictment*), paras. 26–33, 36–45.

292. Trial Chamber, *Prosecutor v. Dario Kordic and Mario Cerkez, Judgement,* Case No: IT-95-14/2 (26 February 2001) (hereinafter *Kordic and Cerkez Case, Judgement*), paras. 326–7.

> damage to civilian objects. Such attacks are in direct contravention of the prohibitions expressly recognised in inter-national law including the relevant provisions of Additional Protocol I.[293]

Considering the crime of the destruction of property, the ICTY divided this crime into two separate crimes as '(a) extensive destruction of property not justified by military necessity' and '(b) wanton destruction not justified by military necessity'. According to the Trial Chamber, the crime of extensive destruction of property as a grave breach consists of the following elements, either:

> (i) where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or (ii) where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and (iii) the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[294]

The Trial Chamber in relation to the crime of wanton destruction not justified by military necessity indicated the necessary elements of this crime as follows:

> (i) the destruction of property occurs on a large scale; (ii) the destruction is not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[295]

Undoubtedly, the practice of the *ad hoc* tribunals relating to the offences of extensive destruction and appropriation of property, of attacks on civilian and civilian objects should be regarded as in accordance with the customary and conventional rules of international humanitarian law and will have a significant impact on the ICC since they clarify the required elements of such crimes.

Compelling a Prisoner of War or a Civilian to Serve in the Forces of a Hostile Power

The act of compelling a prisoner of war or a civilian to serve in the forces of a hostile power is prohibited in the Third and Fourth Geneva Conventions and regarded as part of the grave breaches system.[296] Article 2

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293. Trial Chamber, *Kordic and Cerkez Case, Judgement,* para. 328.
294. Ibid., para. 341. To reach such a definition, the Trial Chamber examined the relevant provisions of the Geneva Conventions and the Regulations attached to Hague Convention IV. In this sense, *see* paras. 335–9.
295. Ibid., para. 346.
296. Art. 130 of the Third Geneva Convention; Art. 147 of the Fourth Geneva Convention.

(e) of the ICTY Statute contains the same provision with one significant exception, which is the use of the term 'civilian' instead of 'protected person'. In practice, this difference should be interpreted and applied in such a way as to make possible the application of this rule to all armed conflicts regardless of the nature of the conflicts whether international or non-international.[297] This way of understanding is also supported by customary international law on the ground that the Hague Regulations considered as customary international law include similar prohibitions in armed conflict situations.[298]

However, when the practice of the ICTY is examined in this regard it can be seen that the International Tribunal does not pay real attention to this crime. Although in the indictments it is indicated that civilians in the hands of hostile power are used as forced labour in particular for digging trenches, the alleged accuseds are not charged with this offence.[299] In the *Kordic and Cerkez Case,* the Trial Chamber with regard to the acts of 'trench-digging and use of hostages and human shields' decides that such acts combined with the requisite discriminatory intent rises to the same level of gravity as other Article 5 crimes against humanity.[300] In other words, in the practice of the ICTY such acts are considered as consisting of persecution under crimes against humanity. The way adopted by the ICTY should not be regarded as in compliance with the rules of international humanitarian law, war crimes and the grave breaches system since 'compelling a prisoner of a war or a civilian to serve in the forces of a hostile power' constitutes an independent type of war crime in international law.

Wilfully Depriving a Prisoner of War or a Civilian of the Rights of Fair and Regular Trial

The Third and Fourth Geneva Conventions regard the act of wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial as a grave breach of the Conventions;[301] the same provision with the exception of the replacement of 'civilian' for 'protected person' is included in the ICTY Statute.[302]

The main reason for this regulation is to provide basic guarantees to a prisoner of war or a civilian to have a fair and regular trial in armed conflict circumstances such as having the right of being assisted by a lawyer in a trial.[303] During the course of or after the armed conflict if one of the rights

297. For reasons, *see supra* notes 160–1 and accompanying text.

298. The 1907 Hague Regulations in Article 23 (h) provides: '… A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war'.
Article 52 of the 1907 Hague Regulations again contains similar provision. The same prohibition can even be found in Article 44 of the 1899 Hague Regulations.

299. *See Prosecutor v. Dario Kordic and Mario Cerkez* (*Amended Indictment*, 30 September 1998), paras. 46, 49, 52, 54.

300. Trial Chamber, *Kordic and Cerkez Case, Judgement,* para. 204.

301. Art. 130 of the Third Geneva Convention; Art. 147 of the Fourth Geneva Convention.

302. Art. 2 (f) of the ICTY Statute. For the importance of the use of the term 'civilian', *see supra* notes 160–1 and accompanying text.

303. For detailed regulations, *see* Arts. 87, 99–108 of the Third Geneva Convention; Arts. 71–5, 126 of the Fourth Geneva Convention.

of a prisoner of war or a civilian in this context is denied by the Occupying Power, the cases including this offence can be brought before the ICTY and can be tried as grave breaches of the Geneva Conventions.

Unlawful Deportation or Transfer or Unlawful Confinement of a Civilian

In the grave breaches system, the acts of unlawful deportation or transfer or unlawful confinement of protected person (in the ICTY Statute, of a civilian) seem to constitute one offence, but in fact there are two separate crimes: Unlawful deportation or transfer of a civilian; and unlawful confinement of a civilian.

Unlawful Deportation or Transfer of a Civilian

The offence of unlawful deportation or transfer of a civilian is regarded as part of the grave breaches system only in Article 147 of the Fourth Geneva Convention and has taken its place in Article 2 (g) of the ICTY Statute with the exception of the replacement of 'protected person' by 'civilian'.[304] From the Geneva Convention it can be derived that the crime of unlawful deportation or transfer of civilians can only be applied to international armed conflicts. As indicated earlier, the grave breaches system must be applicable to all armed conflicts regardless of the nature of the armed conflicts.[305] One of the main reasons for that was the customary nature of the system and there cannot be any doubt that the prohibition of unlawful deportation or transfer of civilians has reached the level of *jus cogens*.[306] This is because, the offence was included in the Nuremberg Tribunal's Charter as a war crime and crimes against humanity as well.[307] The same adoption is also found in CCL No. 10 and in the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal which was adopted by the UN General Assembly in 1946 and by the ILC in 1950.[308] The inclusion of this crime in the Geneva Convention was the result of the German practice of deportation for labour policy in

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304. For its importance, *see supra* notes 160–1 and accompanying text.
305. *See supra* notes 127–8 and accompanying text.
306. For the customary nature of this crime, *see* Meron, T., 'Deportation of Civilians as a War Crime under Customary Law', in Theodor Meron, *War Crimes Law* …, pp. 142–53; Henckaerts, J-M., 'Deportation and Transfer of Civilians in Time of War' (1993), 26 *Van. J. Trans.l L.*, pp. 480–4.
307. Art. 6 (b) and (c) of the Nuremberg Charter.
308. Art. II (b) and (c) of the CCL No. 10; Principle VI (b) and (c) of the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal. However, in the Hague Regulations, there is no provision expressly prohibiting unlawful deportation or transfer of civilians. This case is mainly explained by scholars as this offence was not practised any more on a large scale at the time of the adoption of the Hague Regulations (*see* Meron, 'Deportation …', p. 143). The other view in this respect is that in the Hague Conferences of 1899 and 1907, the inclusion of the internment of civilians and of deportation were 'generally rejected as falling below the minimum standard of civilisation and, therefore, not requiring express prohibition. To raise the issue of the illegality of the deportation of the population of occupied territories was considered unnecessary; the illegality was taken for granted' (footnote omitted) (Schwarzenberger, G., *International Law as Applied by International Courts and Tribunals*, Vol. II (London: Stevens & Sons Limited, 1968), p. 227; Fried, J.H.E., 'Transfer of Civilian Manpower from Occupied Territory' (1946), 40 *AJIL*, pp. 307–8.

the Second World War.[309] The 1977 Additional Protocols I and II made even clearer the concept of deportation or transfer of civilians and made its application possible to internal armed conflicts too.[310] In addition to all these extensive regulations, two recent international humanitarian law instruments, the 1996 ILC Draft Code and the ICC Statute, need to be indicated as reflecting the customary nature of this offence and giving a place to it under the categories of war crimes and crimes against humanity for both international and non-international armed conflicts.[311]

Having indicated the customary nature and applicability of the norms of international humanitarian law to all types of conflicts with regard to the offence of unlawful deportation or transfer of civilians, its content will now be briefly explained.

The main regulation concerning the concept of unlawful deportation or transfer of civilians in the Fourth Geneva Convention is Article 49.[312] First of all, the use of the term 'unlawful' in this crime needs to be clarified since implying that some deportations can be perceived as lawful. The meaning to be given to the term 'unlawful' should be taken into consideration with Article 49 (2) of the Convention in which total or partial evacuation of civilians by the Occupying Power is made possible if *the security of the population* or *imperative military reasons* are at issue.[313] In addition to this exception, it should also be indicated that Article 49 does not prohibit voluntary deportations or transfers.[314] However, the nature of the voluntary deportations must be read in conjunction with the circumstances. For

309. *See* International Military Tribunal (Nuremberg), Judgement and Sentences (1 October 1946) in (1947), 41 *AJIL*, pp. 239–43; Dunbar, pp. 449–51.

310. Art. 85 (4) (a) of the Additional Protocol I; Art. 17 of the Additional Protocol II.

311. Art. 18 (g), 20 (a) (vii), 20 (c) (I) of the 1996 ILC Draft Code; Arts. 7 (d), 8 (2) (a) (vii) and 8 (2) (e) (viii) of the ICC Statute.

312. Article 49 of the Fourth Geneva Convention provides:

> 'Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
>
> The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.
>
> The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.
>
> The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.
>
> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'.

In this context, it should also be noted that Article 45 of the Fourth Geneva Convention deals with the transfer of protected persons to another power.

313. For the explanation of the notion of evacuation in detail, *see* Henckaerts, pp. 473–7.

314. Gross, p. 818.

example, if civilians want to leave the occupied territory because of persecution or discrimination against them, as the international community witnessed in the Yugoslavian, Rwandan and more recently Kosovo conflicts,[315] it must be considered as constituting the offence of deportation. Undoubtedly, this form of deportation is covered by the ICTY Statute.[316]

Secondly, the Geneva Convention and other international humanitarian law instruments use the term deportation together with forcible transfer or just transfer. This way of regulation may be perceived as implying some differences between these two terms. In fact, one opinion regards the transfers of civilians as relocating them within the occupied territory, while deportation is considered as relocating civilians outside the occupied territory.[317] From the perspective of international humanitarian law, the important point is to protect innocent civilians, and deportations or transfers of them is a violation of this protection. The place to which they are deported or transferred has no significance, the crucial physical element of the offence being the forced displacement of civilians from the place in which they are lawfully present. This was the view adopted by the international community in the ICC Statute and should be assessed as leaving no place for argument as to whether there is any difference between deportation or transfer of civilians on the grounds as in the ICC Statute, the use of the two terms has the same meaning.[318]

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315. *See United States' Reports, First, Second, Fourth, Fifth, Sixth, Seventh and Eighth Reports on War Crimes in the Former Yugoslavia* (for references, *see* Chapter 1, note 36); *Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 32 of Commission Resolution 1993/7 of 23 February 1993*, E/CN.4/1994/3, 5 May 1993, paras. 51–62; *Final Report of the Commission of Experts*, para. 173; *Report on the Situation of Human Rights in Rwanda Submitted by Mr R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994*, E/CN.4/1995/7, 28 June 1994, paras. 34–40; and also *see* E/CN.4/1995/12, 12 August 1994, paras. 14–17, E/CN.4/1995/50/Add.4, 16 February 1995, paras. 5–6. For the Kosovo conflict and massive deportations, *see* the indictment, *Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic and Vlajko Stojilkovic*, paras. 91–3, 96, 100; *Decision on Review of Indictment and Application for Consequential Orders (Prosecutor v. Slobodan Milosevic and Others*, 24 May 1999), paras. 6–8. Apart from these conflicts, the issue of whether deportations of civilians from occupied territories are legal or not has been discussed in detail with regard to the territories which were occupied by Israel after the 1967 War. In this context, *see* Roberts, A., 'What is a Military Occupation?' (1984), 55 *BYIL*, pp. 281–3; Henckaerts, pp. 500–16; and also *see* the practice of the Israeli courts rejecting the applicability of the Geneva Convention (Art. 49) in the case known as *Affo Judgement, Supreme Court Judgement in Cases Concerning Deportation Orders*, reprinted in (1990), 29 *ILM*, 139. On the other hand, it should not be forgotten that while the Israeli court was dealing with the *Eichmann Case*, it was referring to the crime of deportation as a legal base for its judgement. When these two cases are compared, it can be clearly seen that States are using and practising the international law rules in a manner that does not conflict with their own international and national policies. Hopefully, the ICC will overcome this way of one-sided application of the norms of international humanitarian law through its case law.

316. Roch, pp. 6, 15.

317. Henckaerts, p. 472.

318. Under the category of crimes against humanity, deportation or forcible transfer of population is defined as:'… forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law' (Art. 7 (2) (d) of the ICC Statute).

When the practice of the *ad hoc* tribunals is examined, it is seen that, at the moment, there is no final judgement dealing with the crime of unlawful deportation or transfer of civilians. Nevertheless, there are a number of indictments including this offence.[319] There cannot be any doubt about the contribution of the practice of the *ad hoc* tribunals to international humanitarian law and impact on the ICC in terms of providing clear guidance by virtue of interpreting and applying the elements of unlawful deportation or transfer of civilians when they deliver their final judgements dealing with this offence. This is very important, in particular for the establishment of a criterion relating to the concept of lawful deportation, which can be done only for *the security of the population* or *imperative military reasons* since all accused will try to defend themselves with this notion before the *ad hoc* tribunals.

Unlawful Confinement of a Civilian

The concept of unlawful confinement of civilians is under the subject-matter jurisdiction of the ICTY as a grave breach of the Geneva Conventions as recognised in Article 147 of the Fourth Geneva Convention. In compliance with all other grave breaches in the ICTY Statute, with regard to the offence of unlawful confinement, the term 'civilian' is also used for the replacement of 'protected person'. This way of adoption clearly implies its applicability to all armed conflicts regardless of their nature.[320]

The major protected value in the prohibition of this act is to provide the individual freedom of civilians even in the circumstances of armed conflict. There cannot be any more fundamental principle than the protection of freedom of movement of civilians in international law.[321]

Although this right can be restricted in cases of armed conflict, its limitation can only be in accordance with the rules of international humanitarian law. For the first time at international level, under what circumstances civilians can be confined and the requirements of a lawful confinement were examined by the ICTY in the *Celebici Camp Case*. In its Decision, the

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319. The most important one in this sense is the indictment against *Slobodan Milosevic and Others* in which the accused are charged with the forced deportation of approximately 740,000 Kosovo Albanian civilians (*Prosecutor v. Slobodan Milosevic & Others, Indictment*, paras. 97, 100); *Prosecutor v. Radovan Karadzic and Ratko Mladic, Indictment*, para. 25; *Prosecutor v. Simic & Others, Initial Indictment* (21 July 1995), para. 20, *First Amended Indictment* (25 August 1998), paras. 30–1, *Second Amended Indictment* (11 December 1998), paras. 36–9; *Prosecutor v. Radislav Brdanin, Indictment*, Case No.: IT-99-36-I (12 March 1999), paras. 15–16, 23, 34–5; *Prosecutor v. Milan Kovacevic, Amended Indictment*, Case No.: IT-97-24-I (23 June 1998), paras. 50–3.

320. For its importance, *see supra* notes 160–1 and accompanying text. Undoubtedly, the offence of unlawful confinement of civilians forms a part of customary international law. The concept of imprisonment as a crime against humanity in Article 2 (c) of the CCL No. 10, 3 (d) of the ICTR Statute, 5 (e) of the ICTY Statute and 7 (1) (e) of the ICC Statute should also be considered as a form of this offence. Article 7 (1) (e) of the ICC Statute regards '[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law' as an act constituting crimes against humanity. And also *see* Arts. 7 (1) (i), 7 (2) (i), 8 (2) (a) (vii) of the ICC Statute.

321. In this context, *see* Art. 9 of the Universal Declaration of Human Rights; Art. 9 of the ICCPR; Art. 5 of the ECHR; Art. 7 (3) of the ACHR.

International Tribunal extensively reviewed the related provisions of the Fourth Geneva Convention, which were Articles 5 and 27 as a general base for the confinement of civilians, on the grounds of the security of the occupying State, Articles 41 and 42 setting out the conditions of the confinement of civilians, Article 78 including similar regulations in relation to occupied territory, and Articles 43 and again 78 indicating some basic procedural rights of the detained persons.[322] The significant points of the *Celebici Camp Case Judgement* with regard to the offence of unlawful confinement of civilians can be indicated as follows: Confinement of civilians is an exceptional measure and can be practised by Occupying Power only if the security of the State makes it absolutely necessary and can be taken on an individual basis, not on a collective basis.[323] Having the same nationality as the enemy power cannot be regarded as justifying the confinement of a civilian.[324] Each individual's case should be independently taken into account and in order to deprive an individual of his/her freedom, activities, knowledge or qualifications, he/she must be considered a security risk to the Occupying Power.[325] Confinement of civilians taken as a measure by the Occupying Power under these strict conditions can become unlawful, if the detaining power does not provide the application of the basic procedural guarantees of civilians as indicated in Articles 43 and 78 of the Fourth Geneva Convention. The most important right of the detained civilian is the reconsideration of the confinement and of its legal base – being absolutely necessary for security reasons – as soon as possible by an appropriate court or administrative board.[326]

The view taken by the ICTY clearly affects future cases of the *ad hoc* tribunals[327] and will also have a significant impact on the ICC in terms of providing clear guidance indicating under what circumstances civilians can be confined and what the requirements of lawful confinement are.

Taking Civilians as Hostages

Taking civilians as hostages is a crime which falls into the subject-matter jurisdiction of the *ad hoc* tribunals either as part of the grave breaches system or as a violation of Common Article 3 to the Geneva Conventions.[328]

322. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 564–82.
323. Ibid., para. 583. In the Second World War, the practice of the confinement of civilians depended upon the justification of being a member of the enemy party, and it was taken on a collective basis. (*See Celebici Camp Case, Judgement*, para. 571.)
324. Ibid., para. 577.
325. Ibid.
326. Ibid., paras. 579–83.
327. For example, the ICTY in the *Kordic and Cerkez Case* considering the crime of unlawful confinement of civilians adopted the same view and held that: 'The offence of unlawful confinement is punishable under Article 2 (g) of the Statute as a grave breach of the Geneva Conventions. Two questions arise in considering the elements of this offence. Firstly, whether the initial confinement was lawful. Secondly, regardless of the legality of the initial confinement, whether the confined persons had access to the procedural safeguards regulating their confinement' (Trial Chamber, *Kordic and Cerkez Case, Judgement,* para. 279. For the analysis of two requirements of the offence by the Trial Chamber, *see* paras. 280–91).
328. Art. 2 (h) of the ICTY Statute; Art. 4 (c) of the ICTR Statute; Art. 147 of the Fourth Geneva Convention; Art. 3 (1) (b) common to the Geneva Conventions; Art. 34 of the Fourth Geneva Convention.

The act of taking civilians as hostages undoubtedly violates the international humanitarian law rules that form a part of customary law.[329] On this ground, the applicability of this offence to armed conflicts must be the same for both conflicts irrespective of the nature of the conflict. In fact, the use of the term 'civilians' instead of 'protected persons' should lead us to this conclusion.[330]

In the practice of the *ad hoc* tribunals considering the offence of taking civilians as hostages, the term 'civilians' has a significant place in terms of this crime as far as understood from the arguments of the parties to the cases involving such offence.[331] According to the defence argument, there is no difference between the offence of taking civilians as hostages as a grave breach under Article 2 of the ICTY Statute and as a violation of Common Article 3 to the Geneva Conventions under Article 3 of the ICTY Statute, but the meaning to be given to the term 'civilians' is very narrow and does not indicate the real content, in particular with regard to the provision of Common Article 3.[332] On the other hand, the argument of the Prosecution Service seems to be confusing the concepts of 'protected persons' and 'civilians' in a sense contending that for the applicability of Article 3 of the ICTY Statute (violations of the laws or customs of war, including violations of Common Article 3) the persons in question are not civilians, but persons taking no active part in the hostilities.[333] Similar to these arguments, the opinion that Article 2 (h) of the Statute only applies to hostage-taking of civilians, whereas the prohibition of Common Article 3 covers a broader category than civilians should also be indicated.[334]

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329. Article 6 (b) of the Nuremberg Charter includes the crime of killing of hostages among the war crimes over which the Nuremberg Tribunal had jurisdiction. Article II (b) of the CCL No. 10 has the same provision.
330. For its importance, *see supra* notes 160–1 and accompanying text.
331. *See Kordic & Others, Kordic Defence Pre-Trial Brief*, Vol. II – Legal Issues (Case No. IT-95-14/2-PT, 6 April 1999), paras. 57–61. 'By the terms of Article 2, this enumerated offence can only be committed against civilians. … civilians are those who are *not* (a) members of the armed forces, (b) members of other militias or voluntary corps that have responsible command, a measure of organisation and internal discipline, or (c) inhabitants of non-occupied territories who take up arms to defend themselves …' (emphasis in original, para. 58). On the other hand, the Prosecution Service argues that the victims of the offence must be *protected persons*. *See Kordic & Others, Prosecutor's Pre-Trial Brief* (Case No. IT-95-14/2-PT, 25 March 1999), p. 45. In relation to violations of Common Article 3 in this context, while the defence indicates that 'the offence of "taking of hostages" should be analysed in a manner consistent with "taking civilians as hostages" under Article 2 [of the ICTY Statute – the grave breaches system –]' (*Kordic & Others, Defence Pre-Trial Brief*, Vol. II – Legal Issues, para. 74), the Prosecution Service contends that the victims must be *persons taking no active part in hostilities* (*Kordic & Others, Prosecutor's Pre-Trial Brief*, p. 48). In the *Blaskic Case*, the Prosecution Service also stated that: '… it is clear that it is not a required element of the offence of hostage-taking under Article 3 of the Geneva Conventions that the persons be civilians: the requirement is that they be "persons taking no active part in the hostilities"' (*Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, 4 April 1997), *Response of the Prosecutor to the Defence Motion to Dismiss the Indictment Based upon Defects in the Form of the Indictment (Vagueness/Lack of Adequate Notice of Charges)*, p. 13. It is clearly understood from the argument that according to the Prosecution Service there is a big difference between the concepts of 'civilians' and 'persons taking no active part in hostilities'. We are not in agreement with such an understanding of the provisions of the Geneva Conventions and the Additional Protocols thereto for the reasons indicated below.
332. Ibid.
333. *See supra* note 331.
334. Jones, p. 33. The opinion depended upon the '*Decision on the Defence Motion to Dismiss the Indictment Based upon Defects Thereof (Vagueness/Lack of Adequate Notice of Charges)*' rendered in the *Blaskic Case* (Case No. IT-95-14-PT, 4 April 1997).

From the perspective of international humanitarian law, all aforementioned arguments should be considered as misunderstood, misinterpreted, insufficient and as not consistent with the norms of international humanitarian law for the following reasons: Firstly, the notion of civilians cannot be interpreted as protected person which is an artificial creation of the Geneva Conventions provided for the applicability of the grave breaches system by national courts. Secondly, the concept of civilians cannot be interpreted as just consisting of civilians who are not members of the armed forces or of other militias or voluntary corps or inhabitants of non-occupied territories who take arms to defend themselves, as the defence argued.[335] The concept of civilians clearly includes the view adopted for Common Article 3 which states '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, …'.[336] This way of understanding or interpretation does not create any controversy under the condition that all the 1949 Geneva Conventions and the 1977 Additional Protocols I and II thereto are examined together. This is because, under Article 4 (4) of the Fourth Geneva Convention, the concept of protected persons is limited to that Convention and does not cover wounded, sick and shipwrecked members of the armed forces either in the field or at sea. If these categories of persons fall into enemy hands, they will gain the status of prisoners of war.[337] However, the 1977 Additional Protocol I supplemented the Geneva Conventions and extended the categories of persons protected that clearly includes injured, sick, shipwrecked members of the enemy power, persons who have participated in hostilities and have fallen into enemy hands and persons *hors de combat*.[338] In light of these provisions, it can be concluded that the content of the offence of taking civilians as hostages is the same for the grave breaches system and for violations of Common Article 3. For these reasons, if the Prosecution Service unintentionally uses civilians for the applicability of Article 2 of the ICTY Statute instead of protected persons,[339] its content needs to be indicated in a way which has already been explained above. The rules of international humanitarian law should not be interpreted and applied to armed conflicts in a manner that is different for international and non-international conflicts, just because of an artificial distinction. At the end of the day, the offence of taking civilians as hostages is the same for both international and internal armed conflicts. In terms of the purpose of international humanitarian law, that is to protect innocent lives, there is no point in making complicated the applicability of the norms to international or internal armed conflicts, as far as the content of the offence is concerned.[340]

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335. *See supra* note 331.
336. Art. 3 (1) Common to the Geneva Conventions.
337. Art. 14 of the First Geneva Convention; Art. 16 of the Second Geneva Convention.
338. Arts. 8, 44, 45, 85 of the Additional Protocol I.
339. *See supra* note 331 and *infra* note 341.
340. Of course, for the applicability of the same offence to different categories of crimes, general conditions are different, not the content or elements of the crimes. For example, murder is murder either as a war crime or as a crime against humanity, but to consider the crime of murder as a crime against humanity, general requirements of the concept of crimes against humanity such as being part of a plan or widespread commission of the offence against civilians, are needed to establish individual criminal responsibility. *See infra* Chapters 5 and 6, p. 222, Killing Members of the Group and p. 256, Murder, respectively.

The view taken by the ICTY is consistent with the opinion indicated above: As has been easily inferred from the explanation made above, the definition of the offence of taking civilians as hostages was one of the main issues before the ICTY[341] since a number of indictments including this offence was brought by the Prosecution Service.[342] The Trial Chamber of the ICTY considering the crime in question, adopted a broad definition of the term 'hostage', which can be quoted as follows:

> The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that – persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death.[343]

The Trial Chamber also held that hostages are taken to 'obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking'.[344]

In the following cases of the ICTY, in particular, in the *Kordic and Cerkez Case,* the Trial Chamber dealt with the crime of taking of hostages under two different categories of offences as 'taking civilians as hostages constituting a grave breach of the Geneva Conventions and taking of hostages constituting a violation of the laws or customs of war' in accordance with the charges brought by the Prosecution Service.According to the Chamber:

> the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement. … The additional element that must be proved to establish the crime of unlawfully taking civilians hostage is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. … In the Chamber's view, such a threat must be intended as a coercive measure to achieve the fulfilment of a condition. … Consequently, the Chamber finds that an individual commits the offence of taking civilians as hostages when he threatens to subject civilians, who are unlawfully detained, to inhuman treatment or death as a means of achieving the fulfilment of a condition.[345]

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341. The offence of taking civilians as hostages can be defined as: an intentional act or omission causing person/s to be seized, detained, or otherwise unlawfully held and involving a threat to injure, kill, or continue to detain such person/s in order to compel a State, military force, international organisation, natural person or group of persons to act or refrain from acting, as an explicit or implicit condition for the safe release of the person/s. In this definition, the elements of the offence indicated by the Prosecution service in the *Kordic & Others Case* was regarded as a legal base. *See Prosecutor's Pre-Trial Brief* (25 March 1999), pp. 45, 48. For a broader definition and acts of taking of hostages, *see* Bassiouni, M. C., *International Criminal Law: A Draft International Criminal Code* (Alphen aan den Rijn, The Netherlands, Germantown, Maryland, USA: Sijthoff & Noordhoff, 1980), p. 92.
342. Some indictments including the offence of taking civilians as hostages can be indicated as follows: *Prosecutor v. Dario Kordic and Mario Cerkez (Amended Indictment*, 30 September 1998), paras. 50–4; *Prosecutor v. Radovan Karadzic and Ratko Mladic*, paras. 46–8.
343. Trial Chamber, *Prosecutor v. Tihomir Blaskic, Judgement,* Case No.: IT-95-14-T (3 March 2000) (hereinafer *Blaskic Case, Judgement*), para. 187.
344. Ibid.
345. Trial Chamber, *Kordic and Cerkez Case, Judgement,* paras. 311–14.

In relation to the crime of taking of hostages constituting a violation of the laws of war or customs of war, firstly, the 'Trial Chamber notes that Common Article 3 (1) (b) of the Geneva Conventions prohibits the taking of hostages in respect of persons taking no active part in the hostilities, members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.'[346] Then, the Chamber holds that '… in the context of an international armed conflict, the elements of the offence of taking of hostages under Article 3 of the Statute are essentially the same as those of the offence of taking civilians as hostage as described by Article 2 (h)'.[347]

The ruling of the Trial Chamber should be welcomed by international lawyers on the premise that the artificial distinction of war crimes (in this context, taking of hostages) between international armed conflicts and non-international armed conflicts does not have any significance in international humanitarian law and also does not require different elements to be applicable to the cases either occurring in an international armed conflict or not. The view taken by the ICTY also clarifies one of the most difficult concepts of international humanitarian law. Undoubtedly, the practice of the *ad hoc* tribunals considering the offence of taking of hostages contributes to international humanitarian law and creates an immense precedential value for the ICC.

Violations of the Laws or Customs of War

Article 3 of the ICTY Statute[348] under the heading of '[v]iolations of the laws or customs of war' provides:

> 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.

346. Ibid., para. 319.
347. Ibid., para. 320.
348. The ICTR Statute does not contain such a provision, but under Article 4 of its Statute, the ICTR has jurisdiction over serious violations of Common Article 3 to the Geneva Conventions and the Additional Protocol II, which are a part of the concept of violations of the laws or customs of war. For the practice of the *ad hoc* tribunals and the substantive content of the notion, *see infra* p. 182.

As far as the enumerated acts are concerned, it can be obviously seen that the legal base for Article 3 of the ICTY Statute is the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto, which mainly governs the means and methods of warfare.[349] The Commentary to the ICTY Statute also supports this fact.[350] Traditionally, the rules of Hague Regulations are regarded as only applicable to international armed conflicts in nature.[351] This way of understanding and application of the norms of international humanitarian law is the natural result of the artificial distinction created between the laws applicable to international and internal armed conflicts. As far as the main purpose of the norms of international humanitarian law, that is to protect innocent civilians and to govern the means and methods of warfare, is concerned such a distinction does not have any legal base.[352]

As indicated earlier, in accordance with the structure of the Statutes of the *ad hoc* tribunals and of the ICC, war crimes, in this study, are examined under the two separate categories as 'The Grave Breaches System' and 'Violations of the Laws or Customs of War'.[353] In the widest sense, the notion of violations of the laws or customs of war includes the grave breaches system, the crime of genocide and crimes against humanity as long as the last two categories of crimes are committed in an armed conflict situation,[354] and it cannot be only confined to the Hague Regulations and to international armed conflicts.[355] As the practice of the *ad hoc* tribunals proved, the concept of violations of the laws or customs of war is a broad category of war crimes under which no person seriously violating international humanitarian law would go unpunished and is applicable to all armed conflicts irrespective of their nature.[356]

The Practice of the *Ad Hoc* Tribunals and Their Contribution to International Humanitarian Law and Their Impact on the ICC

With regard to the concept of violations of the laws or customs of war, the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and possible impact on the ICC can be examined in two

349. *See supra* Chapter 3, note 28 and accompanying text.
350. *Secretary-General's Report*, paras. 41–4.
351. Bassiouni and Manikas, p. 510; Jones, p. 35; *Final Report*, paras. 52–4.
352. For an explanation of why there must not be any division between international and internal armed conflicts and of the law applicable to both types of conflicts, *see supra* p.000. The Nature of Armed Conflicts Must Not Have Any Significance in International Humanitarian Law.
353. *See supra* notes 5–6 and accompanying text.
354. For the crime of genocide and crimes against humanity, the existence of an armed conflict is not a requirement, they can be committed in peacetime as well. *See infra* Chapter 5, pp. 201–3 and Chapter 6, p. 245. The Existence of an Armed Conflict, respectively.; The definition of war crimes also supports this view. 'War crimes are violations of the laws and customs of the law of armed conflict and are punishable whether committed by combatants or civilians, including the nationals of neutral states' (Green, L.C., *The Contemporary Law of Armed Conflict* (Manchester, New York: Manchester University Press, 1993), p. 276).
355. *See infra* notes 382 and accompanying text.
356. For the practice of the *ad hoc* tribunals and its importance, *see* the following notes and accompanying text.

ways. Firstly, not to violate the principle of *nullum crimen sine lege*, the Tribunals make clear the conditions for the applicability of the notion of violations of the laws or customs of war. Secondly, having drawn the framework for the substantive content of the notion, which is different from the grave breaches system, they specifically deal with each act regarded as violations of the laws or customs of war and examine the elements of specific acts. In this context, serious violations of Common Article 3 to the Geneva Conventions and of the 1977 Additional Protocol II and the practice of the *ad hoc* tribunals in this regard have a historic significance since it was the first time at international level that individual criminal responsibility could be enforced by the International Tribunals for serious violations of international humanitarian law committed in internal armed conflicts.

The Conditions for the Applicability of Violations of the Laws or Customs of War

Under Article 3 of its Statute, the ICTY has jurisdiction over the crimes considered as violations of the laws or customs of war and has power to try persons responsible for such offences. One of the main issues of the cases consisting of charges of violations of the laws or customs of war before the ICTY was to determine the scope of this part of the war crimes and to make clear under what conditions and to what extent the concept was applicable to the events that occurred in the former Yugoslavia.

In the *Tadic Jurisdiction Decision*, the notion of violations of the laws or customs of war was examined in great detail. In this case, the defence argued that the concept was limited to the Hague Regulations and could only be applied to international armed conflicts.[357] On the other hand, the Prosecution Service contended that the expression 'laws or customs of war' used in Article 3 could be applied to both international and internal armed conflicts, and that since the acts enumerated in Article 3 were illustrative, the Tribunal had jurisdiction over violations of Common Article 3 to the Geneva Conventions, which contains minimum humanitarian standards, regardless of the nature of the armed conflict, and that the application of Common Article 3 did not violate the principle of legality, as it formed a part of customary international law.[358]

The Trial Chamber in its Decision mainly shared the view of the Prosecution Service and decided that the concept of violations of the laws or customs of war in Article 3 was applicable to international and internal armed conflicts, the character of the conflict was not important for the subject-matter jurisdiction of the Tribunal under Article 3 and Common Article 3 to the Geneva Conventions as a minimum standard in armed conflicts could be tried under violations of the laws or customs of war and its application did not violate the principle of legality.[359]

The defence challenged with the Trial Chamber's *Decision on Jurisdiction* and filed a notice of (interlocutory) appeal against the decision,

357. *Defence Motion on the Jurisdiction Decision*, paras. 10.1–10.3.
358. *Prosecutor's Response*, pp. 47–53.
359. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 74. For the legal basis of the decision, *see* paras. 58–73.

which basically included the same arguments put forward before the Trial Chamber.[360]

In the appeal stage, the Appeals Chamber in its *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* interpreted literally Article 3 of its Statute and found that violations of the laws or customs of war included a broad category of offences; the enumerated acts in the Article were illustrative, not exhaustive and it could be considered as covering all violations of international humanitarian law.[361] According to the Chamber, Article 3 of the Statute was a general or residual clause to cover *all violations of international humanitarian law* not covered by Articles 2, 4 and 5 of its Statute and this way of interpretation was in compliance with the main purpose of the establishment of the International Tribunal since providing no person responsible for serious violations of international humanitarian law would go unpunished.[362] To reach such an interpretation of Article 3, the

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360. *Defence's Brief to Support the Notice of Appeal (Jurisdiction of the Tribunal), Tadic Case*, Case No. IT-94-1-T (25 August 1995), paras. 8.9–8.15; and also *see Prosecutor's Response to the Defence's Brief* (1 September 1995). Almost in every case these arguments were repeated by the defence even after the Appeals Chamber Decision on Jurisdiction of the Tribunal which was in favour of the applicability of violations of the laws or customs of war to all conflicts and of the applicability of Common Article 3 as a part of it (*see* the following notes and accompanying text). For example, *see Radic & Others, Defence Preliminary Motion*, Case No. IT-98-30-PT (14 January 1999); *Radic & Others, Prosecutor's Reply to the Defence's Preliminary Motion including Annex*, Case No. IT-98-30-PT (28 January 1999); *Kordic & Others, Jurisdictional Motion #2 – Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3*, Case No. IT-95-14/2-PT (22 January 1999); *Kordic & Others, Prosecutor's Response to Joint Defence Jurisdictional Motion #2 to Dismiss the Amended Indictment for Lack of Jurisdiction, Based on the Limited Jurisdictional Reach of Articles 2 and 3*, Case No. IT-95-14/2-PT (5 February 1999); *Kordic & Others, Joint Defence Reply in Support of Jurisdictional Motion #2 – Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3*, Case No. IT-95-14/2-PT (12 February 1999); *Kordic & Others, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3*, Case No. IT-95-14/2-PT (2 March 1999).

361. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 87. 'Article 3 may be taken to cover *all violations* of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 …' (emphasis in original, para. 87).

362. The related parts of the Decision can be quoted as follows:

> '… 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; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of Common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict …' (para. 89).
>
> 'Article 3 thus confers on the International Tribunal jurisdiction over *any* serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any 'serious violation of international humanitarian law' must be prosecuted by the International Tribunal. In other words, 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' (emphasis in original, para. 91).
>
> '… 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' (para. 92).
>
> Judge Li was not in agreement with the majority opinion of the Appeals Chamber. *See Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction*, paras. 5–13.

Chamber depended upon the wording of the Article '[s]uch violations shall include, but not be limited to', statements of the representatives of the USA, UK and France made after the adoption of Resolution 827, establishing the ICTY.[363]

Having indicated the general or residual nature of Article 3, the Chamber set out the conditions for the applicability of the concept of violations of the laws or customs of war as follows:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [two requirements for a treaty are: that it must be binding on the parties at the time of the alleged offence, and must not be in conflict with or derogated from peremptory norms of international law (in para. 143)];
>
> (iii) 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 …;
>
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[364]

Furthermore, the Appeals Chamber clearly held that provided that the requirements already indicated above were met, the notion of serious violations of the laws or customs of war were applicable to all armed conflicts irrespective of their nature either international or non-international.[365]

In its Decision, the Appeals Chamber discussed the third and fourth requirements of the applicability of Article 3 of its Statute in detail. For the first two requirements, it is very obvious that there cannot be any doubt that all charges including murder, rape, torture, inhuman or cruel treatment and so on, constitute violations of international humanitarian law and these crimes are serious enough to trigger the jurisdiction of the *ad hoc* tribunals.[366]

As indicated above, for the applicability of the notion of violations of the laws or customs of war, the nature of armed conflict does not have any importance on the subject-matter jurisdiction of the ICTY. Nevertheless, the Appeals Chamber discussed at length the evolution of customary rules of international humanitarian law governing internal armed conflicts.[367] In this part of the Decision, the Tribunal indicated that distinction between international and internal armed conflicts '[was] losing its value as far as human beings are concerned'.[368] To support this conclusion, the Chamber

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363. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, paras. 87–8. For the Statements indicating that the term 'the laws or customs of war' includes violations of Common Article 3 and the 1977 Additional Protocols, *see supra* note 26.
364. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 94.
365. Ibid.
366. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 173, 176, 178, 280.
367. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, paras. 96–127.
368. Ibid., para. 97. However, this approach creates a controversy over the view adopted on the applicability of the grave breaches system. *See supra* notes 70–3 and *infra* notes 384–6 and accompanying text.

examined State practice in the situations of internal armed conflicts, including the Spanish Civil War,[369] the Chinese Civil War,[370] the Yemen Conflict,[371] the Congo Civil War,[372] the Biafra Conflict in Nigeria[373] and the El Salvador Conflict;[374] the practice of the ICRC;[375] two resolutions adopted by the UN General Assembly which are Resolutions 2444 (1968) and 2675 (1970);[376] some declarations of the European Community (European Union);[377] and military manuals of States,[378] all of which were considered as indicating general principles of international humanitarian law that mainly protects civilians and civilian objects in cases of armed conflicts. Additionally, there are some rules governing the means and methods of warfare which are also applicable to both international and internal armed conflicts.[379] In this context, the Tribunal particularly concentrated on the use of chemical weapons by virtue of illustration of the alleged acts of the Iraqi authorities against their own Kurdish population.[380] On this ground, the Chamber held that a number of customary international law rules governing international armed conflicts had been extended to govern internal armed conflicts.[381] According to the Chamber, '[t]hese 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 a ban on certain methods of conducting hostilities',[382] and undoubtedly violations of these rules, in particular violations of Common Article 3, imposes individual criminal responsibility.[383]

From the perspective of international humanitarian law, the approach taken by the Appeals Chamber in relation to the interpretation of Article 3, violations of the laws or customs of war, should be assessed as a very important step towards the enforcement of the norms of international humanitarian law irrespective of the nature of armed conflicts. It is also significant that the view of the Appeals Chamber does not leave any room to persons responsible for serious violations of international humanitarian law to go unpunished whatever the nature of the conflict. On this basis, the approach taken by the ICTY in the *Tadic Jurisdiction Decision* is welcomed and considered as progressive and creative by international lawyers.[384]

369. Ibid., paras. 100–1.
370. Ibid., para. 102.
371. Ibid., para. 103.
372. Ibid., para. 105.
373. Ibid., para. 106.
374. Ibid., para. 107.
375. Ibid., para. 109.
376. Ibid., paras. 110–12.
377. Ibid., paras. 113, 115–16.
378. Ibid., para. 118.
379. Ibid., para. 119.
380. Ibid., paras. 120–4.
381. Ibid., para. 126.
382. Ibid., para. 127.
383. Ibid., para. 134. For the examination of individual criminal responsibility in internal armed conflicts by the Appeals Chamber, *see* paras. 128–36.
384. Fenrick, W., 'The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', in Schmitt and Green (eds), p. 92;

However, when the interpretation of Article 3 is compared with that of Article 2 (grave breaches) by the same Appeals Chamber, in the same Decision, it cannot be explained how such a Tribunal could interpret the grave breaches system in a strict way without mentioning the customary nature of the grave breaches system, that is also a part of violations of the laws or customs of war in a sense. This should be assessed as a clear controversy when the practice of the ICTY is taken entirely into account.[385] At this point, one question comes into mind that of whether the interpretation of Article 3 was compensation for the interpretation of Article 2, in other words, whether the International Tribunal had to interpret and apply the concept of violations of the laws or customs of war so as to prevent persons responsible for grave breaches of the Geneva Conventions, but they could not be tried under this category of crimes in cases of non-international armed conflicts, from going unpunished.[386]

Whatever the reason behind the interpretation of the concept of violations of the laws or customs of war by the International Tribunal is, the *Tadic Jurisdiction Decision* should be regarded as a turning point in the history of international humanitarian law. The significant aspects of the Decision can be briefly indicated as follows:

First, it creates guidance for the following cases of the *ad hoc* tribunals and this contribution can be examined in the cases endorsing the ruling of the Appeals Chamber. Amongst them, the *Tadic,*[387] *Celebici Camp Case,*[388] *Furundzija*[389] and the *Akayesu Judgements*[390] can be referred to.

Second and most importantly, the international community has witnessed the international criminalisation of internal atrocities,[391] and its consequence the enforcement of individual criminal responsibility for serious violations of international humanitarian law in internal armed conflicts.[392] In this context, the international community's practice has

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King, F.P. and A.-M. La Rosa, 'The Jurisprudence of the Yugoslavia Tribunal: 1994–1996' (1997), 8 *EJIL*, p. 146; Aldrich, G.H., 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia' (1996), 90 *AJIL*, p. 69; Meindersma, p. 396; Von Sternberg, M.R., 'Yugoslavian War Crimes and the Search for a New Humanitarian Order: The Case of Dusko Tadic' (1997), 12 *St. John's J. L. Comm.*, pp. 360–4.

385. *See supra* notes 70–3, 129–32 and accompanying text.

386. Aldrich considers Article 3 of the ICTY Statute as a saviour, when it is compared with the Decision of the Chamber with regard to Article 2 of the Statute creating obvious problems for the applicability of the grave breaches system such as the nature of the conflict to be international. (Aldrich, p. 67).

387. For the first time a final judgement level, Article 3 of the ICTY Statute was applied in the *Tadic Judgement* in accordance with the requirements laid down in the *Jurisdiction Decision* by the Appeals Chamber. Trial Chamber, *Tadic Case, Judgement*, paras. 609–13.

388. Trial Chamber, *Celebici Camp Case, Judgement*, paras. 278–80, 296–8.

389. Trial Chamber, *Furundzija Case, Judgement*, paras. 132–3, 258.

390. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.5.140–3.

391. For a detailed explanation and discussion, *see* Meron, 'International Criminalization …', pp. 554–77.

392. For an extensive discussion of the responsibility of individuals for violations of international humanitarian law in internal armed conflicts, from the aspects of different methods used to approach an issue – in this sense, individual criminal responsibility for violations of international humanitarian law in internal armed conflicts – in international law, *see* Simma, B. and A.L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999), 93 *AJIL*, p. 302; Wiessner, S. and A.R. Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of

reached the same level as the practice regarding international armed conflicts by virtue of the practice of the *ad hoc* tribunals. In other words, customary rules of international humanitarian law governing internal armed conflicts has achieved the status of *jus cogens* and the obligations of States have become *erga omnes* in nature.[393]

Third, the practice of the *ad hoc* tribunals has played a crucial role for the adoption of the ICC Statute in a way which consists of detailed rules prohibiting serious violations of the laws and customs applicable to international armed conflicts[394] and to internal armed conflicts.[395] The inclusion of Common Article 3,[396] some principles of the Hague Regulations,[397] some provisions of the Additional Protocols I and II,[398] the explicit prohibition on rape and other forms of sexual crimes,[399] and criminalisation of some acts, for the first time coming under the jurisdiction of an international criminal court, such as against humanitarian organisations, UN peace-keepers, their flags, emblems; recruiting children under the age of 15 years into the armed forces[400] demonstrated that the concept of violations of the laws or customs of war need not be confined to the means and methods of warfare, in other words, the Hague Regulations, and to international armed conflicts. The ICC Statute is the most authoritative international humanitarian law instrument consisting of sufficient evidence to prove that the approach taken by the International Tribunal in relation to the interpretation and application of the concept is generally consistent with the practice of the international community. It can be said generally in compliance with the ICC Statute. This is because there is a clear controversy between the practice of the *ad hoc* tribunals and the ICC Statute.[401] As indicated earlier,[402] the International

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Human Dignity' (1999), 93 *AJIL*, p. 316; O'Connell, p. 334; Abbott, K.W., 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (1999), 93 *AJIL*, p. 361; Dunoff, J.L. and J.P. Trachtman, 'The Law and Economics of Humanitarian Violations in Internal Conflict' (1999), 93 *AJIL*, p. 394; Charlesworth, H., 'Feminist Methods in International Law' (1999), 93 *AJIL*, p. 379; and also *see* Ratner and Abrams, pp. 91–101.

393. Von Sternberg, pp. 376–83; Meron, 'International Criminalization …', p. 576. This achievement also indicates that there must not be any distinction between international and internal armed conflicts and the laws applicable to armed conflicts. *See supra* notes 133–9 and accompanying text.
394. Art. 8 (2) (b) (i–xxvi) of the ICC Statute.
395. Art. 8 (2) (e) (i–xii) of the ICC Statute.
396. Article 8 (2) (c) of the ICC Statute explicitly includes serious violations of Article 3 common to the four Geneva Conventions as a war crime (just for internal armed conflicts).
397. Principles governing the means and conduct of warfare such as prohibiting the use of poison or poisoned weapons (Regulation 23 (a and e); Art. 3 (a) of the ICTY Statute; Art. 8 (2) (b) (xvii–xviii) of the ICC Statute), prohibiting attacks or bombardment of undefended towns, villages, dwellings or buildings (Regulation 25; Art. 3 (c) of the ICTY Statute; Art. 8 (2) (b) (v) of the ICC Statute), prohibiting the seizure of or destruction or damage to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science (Regulation 56; Art. 3 (d) of the ICTY Statute; Art. 8 (2) (b) (ix) and 8 (2) (e) (iv) of the ICC Statute) can be indicated as examples.
398. For example, compare Articles 85 and 57 of the Additional Protocol I with Article 8 (2) (b) (i–ii, iv, viii) of the ICC Statute (mainly concerning the prohibition of attacks on the civilian population, civilian objects, the principle of proportionality and deportation or transfer of civilians). Compare Article 17 of the Additional Protocol II with Article 8 (2) (e) (viii) of the ICC Statute (concerning the displacement of the civilian population).
399. Art. 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the ICC Statute.
400. Art. 8 (2) (b) (iii, vii, xxvi) and 8 (2) (e) (iii, vii) of the ICC Statute.
401. Sarooshi, D., 'The Statute of the International Criminal Court' (1999), 48 *ICLQ*, p. 399.
402. *See supra* note 365 and accompanying text.

Tribunal ruled that the concept of violations of the laws or customs of war was applicable to all conflicts regardless of the nature of armed conflicts. However, the ICC Statute contains rules separately for international armed conflicts in Article 8 (2) (b) which is more detailed than rules governing internal armed conflicts in Article 8 (2) (e). Moreover, according to the International Tribunal, serious violations of Common Article 3 to the Geneva Conventions form part of customary international law and are applicable to both international and non-international armed conflicts,[403] however, serious violations of Common Article 3 to the Geneva Conventions are regulated for merely internal armed conflicts in Article 8 (2) (c) of the ICC Statute that can be considered as the extension of the grave breaches system to internal armed conflicts.The structure of the ICC Statute supports this view.[404] Furthermore, there is no provision prohibiting the use of any kind of weapon in internal armed conflicts. Even the use of poisonous gas or biological, and chemical weapons is not included in the ICC Statute for non-international armed conflicts.This is completely against the practice of the International Tribunal and of the international community.[405] On the other hand, the rules governing the means of warfare in cases of international armed conflicts in the ICC Statute[406] are far from being in compliance with one of the main purposes of international humanitarian law, that is to say, protecting innocent lives and reducing the suffering of human beings in armed conflicts. Even the use of biological and chemical weapons is not explicitly prohibited, but the ICC can interpret the provision of banning the use of poisonous or other gases to cover such weapons.[407] Unfortunately, there is no room to include the use of nuclear weapons as a war crime under the ICC Statute.[408] From the perspective of international humanitarian law, banning the use of some kinds of bullets,[409] poison or poisonous weapons, poisonous gases,[410] which can be interpreted as including biolog-

403. *See supra* notes 365, 383 and accompanying text.

404. For international armed conflicts, *see* the ICC Statute Art. 8 (2) (a) (grave breaches system),Art. 8 (2) (b) (other serious violations of the laws and customs applicable in international armed conflicts). For internal armed conflicts, *see* the ICC Statute, Art. 8 (2) (c and d) (serious violations of Common Article 3 to the Geneva Conventions), Art. 8 (2) (e) (other serious violations of the laws and customs applicable in non-international armed conflicts).

405. In this sense, *see* the argument and the view taken by the international community in relation to whether Iraqi authorities used chemical weapons against its own population of Kurdish origin and the examination of this issue by the Appeals Chamber of the ICTY in the *Jurisdiction Decision*, paras. 120–4; Cassese, 'The Statute …', pp. 152–3.

406. Art. 8 (2) (b) (xvii–xx) of the ICC Statute.

407. Art. 8 (2) (b) (xviii) of the ICC Statute.

408. The legality of the use of nuclear weapons was recently discussed by the ICJ in a great detail. *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (8 July 1996), (1996), *ICJ Rep.*, p. 226. In its *Advisory Opinion*, the ICJ, unfortunately, did not decide whether the use of nuclear weapons was illegal or not.The most important part of the *Advisory Opinion* can be quoted as follows '… the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake' (para. 105. 2.E). From the *Advisory Opinion* of the ICJ it can be inferred that the use of nuclear weapons is not illegal, but the rules of international humanitarian law must be taken into account such as the principles of military necessity, and of proportionality.There is no way to use nuclear weapons as used in the Second World War.

409. Art. 8 (2) (b) (xix) of the ICC Statute.

410. Art. 8 (2) (b) (xvii–xviii) of the ICC Statute.

ical and chemical weapons, but not the use of nuclear weapons, cannot be explained on any legal ground as far as the protection of human beings in armed conflicts is concerned.[411]

On the basis of this explanation, it can be concluded that the practice of the *ad hoc* tribunals with regard to the concept of violations of the laws or customs of war is more convenient than the ICC Statute since abandoning the distinction between international and internal armed conflicts and including the same prohibitions on the use of weapons and on the conduct of warfare for all armed conflicts whether international or non-international. To be in compliance with the practice of the *ad hoc* tribunals, the ICC Statute should have included just one category of violations of the laws or customs of war for all types of armed conflicts, at least, as far as the fundamental norms of international humanitarian law are concerned. The way adopted in the ICC Statute is obviously against the developed customary international law and a step backward from the practice of the *ad hoc* tribunals.

The Substantive Content of the Violations of the Laws or Customs of War

As has already been indicated above, the concept of violations of the laws or customs of war covers a broad field of war crimes under which civilians, civilian objects, persons who do not (or no longer) take part in hostilities are protected and the means and methods of warfare are regulated.[412] From the perspective of the practice of the *ad hoc* tribunals, the inclusion of Common Article 3 to the Geneva Conventions and the Additional Protocol II as a part of violations of the laws or customs of war into the subject-matter jurisdiction of the International Tribunals has a special significance in international humanitarian law. For this reason, the practice of the ICTY and the ICTR in relation to the conditions for the applicability and substantive content of Common Article 3 and the Additional Protocol II will be explained below.

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

Common Article 3 to the Geneva Conventions[413] is the only Article dealing with internal armed conflicts.[414] It states:

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411. The same criticism is also valid for the non-inclusion of the use of blinding laser weapons and landmines in the ICC Statute as a war crime. With regard to these means of warfare, the practice of the international community is on the way to prohibiting these weapons. In this context, *see* Zockler, M.C., 'Commentary on Protocol IV on Blinding Laser Weapons' (1998), 1 *YIHL*, pp. 333–40; Goose, S.D., 'The Ottawa Process and the 1997 Mine Ban Treaty' (1998), 1 *YIHL*, pp. 269–91.
412. *See supra* notes 382–3 and accompanying text.
413. For the historical background and drafting history of Common Article 3, *see* Moir, L., 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949' (1998), 47 *ICLQ*, p. 337, in particular, pp. 355–61.
414. For a detailed study on internal conflicts and the protection of human rights, *see* Meron, T., *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius Publications Limited, 1987), in particular, pp. 45–69.

> In case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
>
> (2) The wounded and sick shall be collected and cared for …

This Article was reaffirmed and supplemented by the Additional Protocol II to the Geneva Conventions. Although Article 4 (1) (2) of the Additional Protocol II generally repeats Common Article 3, it contains some more prohibited acts such as collective punishments, acts of terrorism, pillage, and so on. For the first time at international level, Article 4 of the ICTR Statute which was drawn from Common Article 3 and Article 4 of the Additional Protocol II expressly gave power to an international criminal organisation to prosecute and punish persons responsible for violations of these norms of international humanitarian law.[415] Even though the ICTY Statute does not include such an Article, as indicated above, it has jurisdiction over violations of Common Article 3 and of the Additional Protocol II as long as the requirements of the concept of violations of the laws or customs of war are met.[416]

Under the modern concept of international humanitarian law, the applicability of Common Article 3 and many provisions of the Additional Protocol II cannot be limited to only non-international armed conflicts due to being regarded as the customary rules of international law and the

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415. *See* Art. 4 of the ICTR Statute; Common Article 3; Art. 4 (1) (2) of the Additional Protocol II.

416. *See supra* notes 364–82 and accompanying text. In a very recent interlocutory decision, the ICTY again made it clear that the ICTY had jurisdiction over serious violations of Common Article 3 and of the Additional Protocols I and II. *See Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3 (Kordic & Others*, Case No. IT-95-14/2-PT, 2 March 1999), para. 34. For reasons and brief explanation of the practice of the ICTY as a legal base for the Decision, *see* paras. 17–33.

minimum humanitarian standards which must be applied in all armed conflicts regardless of the character of the conflicts either international or non-international.[417]

In addition to being customary or fundamental rules of international humanitarian law, to hold an individual criminally responsible for serious violations of Common Article 3, the conditions for the applicability of Common Article 3 must be met. These requirements were, for the first time, laid down by the ICTY in the *Tadic Judgement* as follows:

> The rules contained in paragraph 1 of Common Article 3 proscribe a number of acts which: (i) are committed within the context of an armed conflict; (ii) have a close connection to the armed conflict; and (iii) are committed against persons taking no active part in hostilities.[418]

The first two elements of the applicability of Common Article 3, to be an armed conflict and nexus, are not different from the general requirements of the applicability of the grave breaches system. For this reason, the explanation made in this context is also valid for the applicability of Common Article 3 as well.[419] The significant element concerning what class of persons are protected by Common Article 3 is indicated in paragraph 1 of Common Article 3 as '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause …'. In other words, these are the persons who are protected in all four Geneva Conventions and the grave breaches system applicable to them in international armed conflicts.[420] Common Article 3 just extends the

417. The view taken by the ICJ with regard to the international humanitarian norms also supports this opinion. In the *Nicaragua Case*, the Court decided that: 'Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute *a minimum yardstick,* in addition to the more elaborate rules which are *also to apply to international conflicts*; [emphasis added] and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (*Corfu Channel, Merits, ICJ. Reports* 1949, p. 22)' (emphasis in original, para. 218). Similarly, in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ indicated the customary nature of international humanitarian law norms in relation to the Hague and Geneva Conventions as follows: 'It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgement of 9 April 1949 in the *Corfu Channel* case (*ICJ Reports* 1949, p. 22), [emphasis in original] that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute *intransgressible principles of international customary law*." (emphasis added, para. 79).

For the international community's effort to provide the applicability of the norms of international humanitarian and of human rights law to all conflicts regardless of their nature by virtue of the concept of *minimum humanitarian standards*, *see* Eide, A., A. Rosas and T. Meron, 'Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards' (1995), 89 *AJIL*, pp. 215–23.

418. Trial Chamber, *Tadic Case, Judgement*, para. 614.

419. *See supra* p. 120, The Existence of an Armed Conflict.

420. Trial Chamber, *Tadic Case, Judgement*, para. 615.

regulations to internal armed conflicts in a way of excluding the applicability of the grave breaches regime to such conflicts.[421] The International Tribunal has to separately examine each individual's circumstances to decide whether the victim has taken an active part in the hostilities and whether the victim is protected by Common Article 3.[422]

The interpretation and application of serious violations of Common Article 3 and of the Additional Protocol II have a significant place in the practice of the Rwandan Tribunal. However, when the practice of the ICTR is compared with the ICTY's approach, it can be clearly seen that there are some contrasts which need to be discussed. In the *Akayesu Case*, first of all, the ICTR separately examined the conditions for the applicability of Common Article 3 and the Additional Protocol II. As previously indicated,[423] the regulation of Common Article 3 is quite different from the Additional Protocol II with regard to the threshold of the applicability of the norms to internal conflicts. While Common Article 3 does not include any criterion, just mentioning 'armed conflicts not of an international character', in this context, Article 1 (1) of Protocol II introduces a higher threshold which can be indicated as being two sets of armed forces, with responsible command and sufficient control over territory to carry out sustained and concerted military operations. In terms of determining the existence of an armed conflict for the applicability of Common Article 3, the view taken by the ICTR is, in this sense, completely in compliance with the ICTY. As the ICTY made clear to decide whether an armed conflict existed, the examination of the intensity and organisation of the parties to the conflict were enough to trigger the jurisdiction of the International Tribunal over serious violations of humanitarian law.[424] On the other hand, for the applicability of Protocol II, the ICTR examined the higher threshold set out in Article 1 (1) of that Protocol to apply Article 4 of its Statute to the Rwandan conflict.[425]

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421. This also constitutes more evidence to prove that there must not be any division between international and internal armed conflicts and the laws applicable to those conflicts.
422. Trial Chamber, *Tadic Case, Judgement*, para. 616.
423. *See supra* notes 35–46 and accompanying text.
424. *See supra* notes 45–6 and accompanying text; Trial Chamber, *Akayesu Case, Judgement,* paras. 6.5.162–3, 6.5.1–3.
425. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.5.4–15. The following cases of the ICTR also applied the ruling of the *Akayesu Judgement*. *See Prosecutor v. Clement Kayishema and Obed Ruzindana*, *Judgement*, Case No. ICTR-95-1-T (21 May 1999) (hereinafter *Kayishema and Ruzindana Case, Judgement*), paras. 171–2; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement*, Case No. ICTR-96-3-T (6 December 1999) (hereinafter *Rutaganda Case, Judgement*), para. 2.4. (under the heading of Serious Violation of Common Article 3 of the Geneva Conventions and Additional Protocol II in the Applicable Law Part of the Judgement). In this context, the opinion, amongst the scholars, that Common Article 3 applies to all armed conflicts but Protocol II only applies to internal conflicts and additional criteria need to be present for its application (Morris, V. and M.P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. I (Irvington-on-Hudson, New York: Transnational Publishers, 1998), p. 146) should be indicated. Such a distinction cannot be acceptable from the perspective of international humanitarian law, at least from the aspect of the practice of the *ad hoc* tribunals, on the premise that the Protocol II was adopted to make possible the enforcement of Common Article 3 and it reaffirmed and supplemented Common Article 3. While Common Article 3 is applicable to all armed conflicts, limitation of the Protocol II to only internal armed conflicts cannot be justified in terms of many provisions of the Protocol II that have reached the level of customary rule status of international humanitarian law. For further explanation, *see* the following notes and the accompanying text.

The approach taken by the ICTR can be criticised on two grounds:

(a) To apply such a higher threshold for the applicability of the norms of Protocol II, the ICTR should have examined the customary nature of Article 1 (1) of the Protocol II.[426] As indicated earlier, the requirements of Article 1 (1) of the Protocol II do not form part of the customary rules of international humanitarian law. The 1996 ILC Draft Code and the ICC Statute are the latest international humanitarian law instruments considered as reflecting customary international humanitarian law and neither of them includes such requirements for the applicability of the norms of international humanitarian law to internal armed conflicts.[427] In this context, the provision of the ICC Statute in Article 8 (2) (f) should not be considered as the reflection of Article 1 (1) of the Additional Protocol II,[428] but for distinguishing internal armed conflicts from banditry, unorganised and short-lived insurrections, or terrorist activities and clarifying the vagueness of the threshold of the applicability of international humanitarian norms to internal armed conflicts.[429]

(b) With regard to Article 4 of the ICTR Statute, the explanation made by the Secretary General cannot justify the interpretation and application of the norms of international humanitarian law by the ICTR in this way. As is known, the Commentary to the ICTR Statute states that:

> 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, and for the first time criminalizes common Article 3 …[430]

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426. This point also indicates the controversy inside the Decision of the ICTR in the *Akayesu Case*. Whereas the Tribunal indicated the customary nature of Article 4 of the Additional Protocol II which was the legal base for Article 4 of the ICTR Statute (paras. 6.5.156–7), Article 1 (1) of the Protocol II was not mentioned as constituting a part of customary rules of international humanitarian law.
427. For its discussion, *see supra* notes 35–46 and accompanying text.
428. Article 8 (2) (f) of the ICC Statute provides: 'Paragraph 2 (e) applies to armed conflicts not of an international character thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.' For the assessment of this provision, *see supra* notes 43–6 and accompanying text. However, some scholars interpret this provision as a reflection of Article 1 (1) of the Additional Protocol II. Meron, 'Epilogue' in *War Crimes* …, p. 309; Arsanjani, M.H., 'The Rome Statute of the International Criminal Court' (1999), 93 *AJIL*, p. 35; Sarooshi, p. 399.
429. The wording of the ICC Statute by using the terms 'protracted armed conflict' soon after the indication of 'internal disturbances and tensions' and the practice of the ICTY support this view. For the importance of the practice of the ICTY and its impact on the ICC Statute, *see supra* notes 40–6 and accompanying text.
430. *Secretary-General's Report for Rwanda*, para. 12 (emphasis added).

From the perspective of international humanitarian and international law in general, the approach taken in the *Secretary-General's Report* has no basis on the ground that the Security Council does not have any legislative power to make some acts that can be prosecuted and punished by an international criminal organisation.[431] The Statutes adopted by the Security Council for the ICTY and the ICTR can only be considered as reflecting customary rules of international humanitarian law and can guide the *ad hoc* tribunals. Whatever the intent of the Security Council or *Secretary-General's Report* in adopting the ICTR Statute might be, the ICTR should, in fact *has to*, interpret and apply customary rules of international humanitarian law, as rightly indicated in the *Secretary-General's Report* in relation to the ICTY Statute 'the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law'.[432]

On the basis of these facts, in this context, the ICTR should have applied the requirement of Common Article 3 for the applicability of Article 4 of its Statute.

The second controversy in the ICTR's practice can be found in the examination of personal jurisdiction over serious violations of Common Article 3 and of the Additional Protocol II. In the *Akayesu Judgement*, the International Tribunal looked for a condition, that is to say, 'the class of perpetrators', which was classified by the Tribunal as 'commanders, combatants and other members of the armed forces … individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts' can be held accountable for serious violations of Common Article 3 and of the Additional Protocol II.[433] In the Decision, it is very clear that to hold a civilian criminally responsible, a higher standard is required which is completely against the practice of the international community and of the ICTY. As indicated earlier, to establish individual criminal responsibility either for military personnel or a civilian, it is sufficient that the crimes in question are committed in connection with the armed conflict, that is nothing other than the existence of nexus which is one of the main requirements of war crimes.[434] According to the approach taken by the ICTR, many civilians will escape punishment.[435] This creates an obvious controversy with the ruling of the Appeals Chamber in the *Jurisdiction Decision* which states that no serious violations of international humanitarian law should go unpunished.[436]

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431. This fact was indicated in the *Celebici Camp Case Judgement* (para. 310) by the ICTY.
432. *Secretary-General's Report*, para. 34.
433. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.5.20–9. In the following cases this approach guided the ICTR. *See* Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 173–6; Trial Chamber, *Rutaganda Case, Judgement*, para. 2.4. (under the heading of Serious Violation of Common Article 3 of the Geneva Conventions and Additional Protocol II in the Applicable Law Part of the Judgement).
434. *See supra* p. 123, The Link (Nexus) between the Acts of the Accused and the Armed Conflict.
435. For the same reasons, Akayesu was not found guilty of violations of Common Article 3 and of the Additional Protocol II. *See* paras. 7.1.37–42.
436. *See supra* notes 361–2 and accompanying text.

On this ground the view of the ICTR cannot be welcomed from the perspective of international humanitarian law.[437] Common Article 3 and the Additional Protocol II are designed to protect innocent lives, they cannot be interpreted and applied in such a manner that a class of perpetrator can be held responsible for violations of their provisions. On the other hand, the practice of the *ad hoc* tribunals should be in compliance with each other. While the ICTY is interpreting Article 3 of its Statute (violations of the laws or customs of war), it has taken an important step forward in terms of providing the application of the norms of international humanitarian law in a way that does not leave any room for responsible persons to go unpunished. To reach such a conclusion, the legal base was the customary nature of Article 3, including Common Article 3 and many provisions of the Additional Protocol II which have reached the customary international law status. In this sense, the practice of the ICTR in relation to the conditions for the applicability of Common Article 3 and of the Additional Protocol II cannot be explained on any legal grounds. As far as the circumstances of internal armed conflicts in which every individual can become easily involve in the hostilities because of his/her ethnic origin or religious differences, which were the cases in the former Yugoslavia and Rwanda, are concerned, to establish individual criminal responsibility of a civilian for war crimes, the application of a higher standard does not meet the necessity of the international community and cannot be considered as consistent with the customary international humanitarian law.

Moreover, while the ICTR is exercising its jurisdiction in accordance with Article 4 of its Statute, it should be guided by the ICTY's approach, and the concept of serious violations of Common Article 3 and of the Additional Protocol II should be interpreted in a manner that covers all violations of the customary international law rules, at least of many provisions of the Additional Protocol II regarded as customary law rules, and the Hague Regulations mainly governing the means and methods of warfare applicable to internal armed conflicts. The wording of the ICTR Statute also allows the Tribunal to take this approach by virtue of deploying the phrase '[t]hese violations shall include, but shall not be limited to …'.[438] However, the practice of the ICTR, until the present time, is not promising in terms of employing the above-mentioned interpretation and application of the international humanitarian law rules.

In addition to all the requirements of violations of the laws or customs of war, and of Common Article 3 and the Additional Protocol II, the *ad hoc* tribunals have to deal with the specific elements of each act enumerated in Common Article 3, Article 4 of the Additional Protocol II, or in any other international humanitarian law instrument containing acts that are consid-

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437. Cisse, C., 'The End of a Culture of Impunity in Rwanda?' (1998), 1 *YIHL*, pp. 171–2; Amann, D.M., 'Commentary on Prosecutor v. Akayesu Case' in (1999), 93 *AJIL*, pp. 197–9.

438. Art. 4 of the ICTR Statute. In a sense, Article 4 of the ICTR Statute can 'be seen as a 'catch-all' provision that allows for the prosecution of individuals who might not be successfully convicted under the more rigorous requirements of Article 2's 'genocide' definition or Article 3' 'crimes against humanity' definition' (footnotes omitted). (Wang, M.M., 'The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact' (1995), 27 *Col. Hum. Rts. L. Rev.*, p. 223).

ered as a part of violations of the laws or customs of war, not to violate the principle of *nullum crimen sine lege*. Like the grave breaches system, main charges under this category of war crimes include murder, torture, cruel treatment, rape and any other forms of sexual violence and so on, as far as the practice of the *ad hoc* tribunals is concerned.[439]

Conclusions

The concept of war crimes and the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and their impact on the ICC Statute, because of the artificial distinction between international and non-international armed conflicts and the laws applicable to them, can be examined by way of dividing the concept into two principal categories: 'The Grave Breaches System' and 'Violations of the Laws or Customs of War'.

Under Article 2 of its Statute, the ICTY has jurisdiction over the grave breaches of the Geneva Conventions and of the Additional Protocol I thereto. The distinguishing feature of the grave breaches system from other violations of the laws or customs of war is that it imposes an obligation on States parties to the Conventions and to the Additional Protocol I to prosecute or extradite persons responsible for violations of the system, in other words, the concept of universal jurisdiction is accepted for the grave breaches system. For the enforcement of international humanitarian law norms, the grave breaches system was the major achievement of the international community after the Second World War as far as national criminal jurisdiction systems and the principle of sovereignty of States are concerned. However, the practice of the *ad hoc* tribunals and the ICC Statute proved that all serious violations of international humanitarian law whether committed in international or non-international armed conflicts can be prosecuted and punished at an international level as well as national level.

Since the Geneva Conventions and the Additional Protocols are now being applied for the first time at the international level by the *ad hoc* tribunals, the interpretation and application of these instruments have a significant place in the development of international humanitarian law. In terms of subject-matter jurisdiction of the *ad hoc* tribunals, the contribution of the practice of the International Tribunals to international humanitarian law and their impact on the ICC can be examined in two ways: (a) making clear the conditions for the applicability of different categories of crime (in this context, war crimes: the grave breaches system and violations of the laws or customs of war); (b) determining the scope of international crimes and providing definitions of such crimes by means of examining specific elements of each offences.

With regard to the grave breaches system, the Appeals Chamber of the ICTY in the *Tadic Jurisdiction Decision* indicated the conditions for the applicability of the system as follows: (a) General Conditions: (i) the

439. For the explanation and discussion, and the importance of the practice of the *ad hoc* tribunals in relation to the elements of the offences, *see supra* p.146, The Substantive Content of the Grave Breaches System.

existence of an armed conflict and (ii) the link (nexus) between the acts of the accused and the armed conflict; (b) Specific Conditions: (i) the existence of an international armed conflict and (ii) the acts must be committed against persons or property protected by the Conventions and the Additional Protocol I. The view taken by the Appeals Chamber created a guideline for the following cases of the Tribunal such as the *Tadic Case (Final Judgement), Celebici Camp Case, Aleksovski Case*, and will possibly have a big impact on the ICC since the ICC Statute includes the grave breaches system.

However, the approach taken by the International Tribunal that the international character of an armed conflict is a prerequisite condition for the applicability of the grave breaches system, which derives from the artificial distinction between international and non-international armed conflicts, should not be perceived as in compliance with the development of international and of human rights law as far as the protection of innocent civilians in a wartime situation is concerned. This is because, firstly, the nature of armed conflicts has increasingly changed from international to internal or internationalised one and the laws of war codified in the Geneva Conventions has become irrelevant and insufficient. Secondly, the grave breaches system must be applicable to all conflicts irrespective of the character of the armed conflict, and for its applicability the element of internationality must not be a precondition for international tribunals or the ICC on the ground that the grave breaches system was introduced into international humanitarian law in order to provide the enforcement of the system by States parties to the Conventions and to the Additional Protocol I by way of adopting the concept of universal jurisdiction. Thirdly, there is a clear controversy in the practice of the ICTY, that is to say, while the Tribunal interprets and applies its jurisdiction over violations of the laws or customs of war, it has taken a very important view that the rules of international humanitarian law are applicable to all conflicts regardless of their nature, it does not mention the customary nature of the grave breaches system. There is no doubt that the grave breaches system forms a part of fundamental norms of international humanitarian law which has reached the customary international law status and must be applicable to all conflicts. Fourthly, the international community has been witnessing the criminalisation of internal atrocities which creates the same effect as the grave breaches system on the premise that once the international community recognises the criminalisation of internal conflicts and the individual criminal responsibility for that, it should be considered as giving a right to every State to prosecute or extradite responsible persons. Lastly, the substantive contents of the grave breaches system and of Common Article 3 are similar to each other and both of them guarantees minimum human rights standards in armed conflicts for innocent persons and those persons are protected against horrendous crimes of concern to the international community such as murder, torture, inhuman or cruel treatment, rape and any other forms of sexual violence.

In the same vein, the International Tribunal to apply the grave breaches system examined the concept of protected persons or property in connection with the requirement of the internationality of the armed conflict.

From the perspectives of international humanitarian and of human rights law, the opinion of the Tribunal can be criticised as follows: First, there should be no connection between the nature of the armed conflict and the concept of protected persons or property. If the concept of protected persons or property as a condition to apply the grave breaches system is examined in conjunction with the nature of armed conflicts, as the Appeals Chamber on *Jurisdiction Decision*, the Trials Chamber's on the *Tadic* and *Aleksovski Judgements*, and even in the appeal stage of the *Tadic Judgement* were done, in other words, its application is depended upon the existence of an international armed conflict, how can it be explained that for the applicability of the grave breaches system, two different elements are required? In this sense, the wording of Article 2 of the ICTY Statute, which replaces the notion of protected persons by a specific designation of civilians, should have guided the International Tribunal in a way that the grave breaches system is applicable to all conflicts whenever they are committed against civilians. Second, the notion of protected persons must not be interpreted by way of using the concept of nationality that derives from the domestic legislation on citizenship on the grounds that it is not sufficient to provide a guideline for the protection of innocent lives, in particular, in the cases of internal or internationalised armed conflicts. The concept of 'community' should be considered as more convenient for the interpretation and application of the notion of protected persons. The Appeals Chamber's ruling, in relation to this specific point, in the appeal stage of the *Tadic Judgement* can be seen closer to this view and should be welcomed by the international community.

One of the other major contributions of the practice of the *ad hoc* tribunals to international humanitarian law and its impact on the ICC lies in the determination of the scope of the grave breaches system and the definitions of crimes by virtue of examination of the specific elements of each offence. This significance is equally valid for the concept of violations of the laws or customs of war, as far as it is related to the criminal acts, such as wilful killing or murder, torture, inhuman or cruel treatment, rape or any other forms of sexual violence and so on. In this context, some significant points of the practice of the *ad hoc* tribunals can be indicated as follows: The acceptance of recklessness which is not clear in the Conventions as sufficient to establish individual criminal responsibility for crimes, in particular for wilful killing or murder; regarding the definition of torture made in the 1984 Torture Convention as representing customary international law and extensive examination of the elements of torture in a manner that is in compliance with the development of international humanitarian and human rights law; the treatment of rape and other forms of sexual violence as torture under the grave breaches system and serious violations of Common Article 3, the first ever definition of the crime of rape and sexual violence at an international level constituting a significant impact on the ICC Statute that for the first time in international law provides detailed provisions on sexual crimes which are explicitly included in the grave breaches system and in serious violations of Common Article 3; the first ever definitions of inhuman treatment and of cruel treatment and setting up the framework for these offences, the introduction of the concept of 'inhuman

conditions' as a part of inhuman treatment and its definition in international humanitarian law; the definition of wilfully causing great suffering or serious injury to body or health is a way of solving the vagueness problem inherent in this offence; making clear the notion of military necessity and its requirements being military objective and proportionality; providing a guidance with regard to other crimes such as deportation or transfers of civilians, unlawful confinement of civilians, the taking of civilians as hostages and so on. In relation to the substantive content of crimes, there cannot be any doubt that the practice of the *ad hoc* tribunals will create an immense precedential value for the ICC.

Lastly, the major contribution of the practice of the *ad hoc* tribunals to international humanitarian and human rights law can be examined in the interpretation and application of the concept of violations of the laws or customs of war. The recognition of crimes committed in internal armed conflicts as international crimes and of individual criminal responsibility for these offences was able to be practised by the *ad hoc* tribunals for the first time in international humanitarian law. This should be perceived as a turning point in the history of international humanitarian law since it provides protection for civilians who are in internal armed conflicts, at an international level. On these grounds it can be concluded that in terms of the enforcement of the grave breaches system and of other violations of international humanitarian law such as serious violations of Common Article 3 there is no more difference as far as the jurisdiction of international criminal institutions and national courts are concerned. In other words, serious violations of international humanitarian law as with the grave breaches system can be prosecuted and punished at national and international levels due to being regarded as having reached the status of customary international law and *erga omnes* obligation on States. In particular, the inclusion of serious violations of Common Article 3 and some provisions of the Additional Protocol II into the ICC Statute should be seen as one of the most important impacts of the practice of the *ad hoc* tribunals on the ICC Statute. In the same vein, the recognition of the applicability of some Hague principles governing international armed conflicts warfare methods for internal armed conflicts in the ICC Statute reflects the significance of the International Tribunals' interpretation and application of the norms of international humanitarian law. Even more, it should be noted that the way adopted by the *ad hoc* tribunals with regard to the concept of violations of the laws or customs of war is more convenient with the customary international law rules and with the practice of the international community than the way adopted in the ICC Statute since it indicates the applicability of customary international law rules containing fundamental or minimum guarantees for civilians in all types of armed conflicts and provides the applicability of some of the Hague principles governing the means of warfare, such as the ban on the use of poisonous gas, which can be interpreted as including the ban on the use of biological and chemical weapons, to internal armed conflicts as well.

5

The Crime of Genocide

Introduction

The crime of genocide[1] is universally prohibited by the conventional and customary rules of international law, 'whether committed in time of peace or in time of war'.[2]

The conventional base of the crime of genocide is the Convention on the Prevention and Punishment of the Crime of Genocide which was adopted by the UN General Assembly in 1948.[3] The adoption of the ICC Statute should also be considered as constituting another treaty base for this crime since giving jurisdiction to the ICC over the crime of genocide to try and punish responsible individuals in this regard.[4]

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1. The term 'genocide' was coined, for the first time in international law, by Raphael Lemkin who combined the Greek word *genos* (race, tribe) with the French suffix *cide* (from the Latin *caedere*, to kill) (Lemkin, R., *Axis Rule in Occupied Europe* (1944), p. 79). According to Lemkin genocide means 'the destruction of a nation or of an ethnic group. … genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, the culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as entity and the actions involved are directed against the individuals, not in their individual capacity but as members of the national group' (p. 79).

   Undoubtedly, the work of Lemkin guided the international community to adopt the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (hereinafter the Genocide Convention or the Convention). Even before the adoption of the Genocide Convention, the impact of Lemkin's approach to the crime of genocide can be examined in the UN General Assembly Resolution (96) (I) of 11 December 1946. By this, the UN General Assembly states 'that genocide is a crime under international law which the civilised world condemns – and for the commission of which principals and accomplices, whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable'.

   In this context, also *see* Lemkin, R., 'Genocide as a Crime under International Law' (1947), 41 *AJIL*, p. 145.
2. Art. 1 of the Genocide Convention.
3. The Genocide Convention, 78 UNTS 277 opened for signature on 8 December 1948 and entered into force on 12 January 1951.
4. Art. 6 of the ICC Statute (known as Rome Statute of the International Criminal Court which was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the

Additionally, there cannot be any doubt that the rules governing the crime of genocide are part of the customary rules of international law which have reached the level of *jus cogens,*[5] and the consequential obligation on States to prevent and punish the crime of genocide is *erga omnes* in nature.[6]

Despite its extensive prohibition under the conventional and customary rules of international law, until the practice of the ICTY and the ICTR, it was not possible to enforce these rules at the international level because of the principle of sovereignty of States and the non-existence of an international criminal tribunal or court.[7] The establishment of the ICTY and the ICTR and their practice demonstrate its enforceability at the international level. The international community has been witnessing charges of genocide and the punishment of individuals responsible for this heinous crime by way of refuting the criticism that real attention has not been paid to preventing and punishing the persons responsible and finding States responsible under the Genocide Convention. In fact, it is true that a number of genocidal events have not been dealt with in accordance with the provisions of the Genocide Convention such as the Russian, Cambodian, Bangladeshi and Afghan cases that have occurred in the twentieth century. However, the latest developments in international humanitarian law should be seen as promising that human rights violations will not be tolerated any more by the international community. The establishment of the ICTY, the ICTR and the ICC constitutes clear evidence of this fact.

Establishment of an International Criminal Court on 17 July 1998, UN Doc. A/CONF.183/9, 17 July 1998, and entered into force on 1 July 2002 in accordance with Article 126 of the Statute. As of November 2002, the number of signatories to the Statute has reached 139 and the number of parties to it, 82).

5. The ICJ in its *Advisory Opinion on Reservations to the Convention on Genocide Case* (1951, *ICJ Rep.*, p. 15) indicated that: 'The origins of the Convention show that it was the intention of the United Nations to condemn and punish Genocide as "a crime under international law" … involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution (96) (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are *recognised by civilised nations as binding on States, even without any conventional obligation.* A second consequence is the *universal character both of the condemnation of genocide and of the cooperation* required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention)' (emphasis added, p. 23).
6. Ibid.; and also *see Barcelona Traction Case* (Belgium v. Spain) (1970), *ICJ Rep.*, p. 3, at paras. 33–4. This fact was recently reaffirmed by the ICJ in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (Bosnia-Herzegovina v. Yugoslavia (11 July 1996), (1996), *ICJ Rep.*, p. 595 para. 31.

   For the *jus cogens* and *erga omnes* nature of the rules governing genocide, *see* also *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674 – 27 May 1994, para. 88; *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, UN Doc. S/1994/1405 – 9 December 1994 (*for Rwanda*), para. 152.
7. For some detailed work explaining the ineffectiveness of the Genocide Convention in this sense, *see* Starkman, P., 'Genocide and International Law: Is There a Cause of Action?' (1984), 8 *ASILS Int'l L. J.*, p. 1.

As far as the crime of genocide is concerned, the practice of the ICTY and the ICTR, both of which have jurisdiction over genocide, creates a historical opportunity in interpreting and applying the provisions of the Genocide Convention, in other words, in clarifying the elements and substantive content of the crime of genocide which is too vague in the Convention. In this sense, their practice provides the first ever application of the Convention in international law. Undoubtedly, the view taken by the *ad hoc* tribunals, in this context, will guide the ICC in its case law.

The Concept of Genocide

Articles 2 and 4 of the ICTR and the ICTY Statutes respectively state:

> 1. The International Tribunal [for Rwanda] shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.
> 3. The following acts shall be punishable:
> (a) genocide;
> (b) conspiracy to commit genocide;
> (c) direct and public incitement to commit genocide;
> (d) attempt to commit genocide;
> (e) complicity in genocide.

As indicated by the Secretary-General, the legal base for the inclusion of genocide in the Statutes of the *ad hoc* tribunals was the 1948 Genocide Convention,[8] and related provisions of the Convention (Articles 2 and 3) were employed verbatim in the Statutes of the ICTY and the ICTR. As is well known from history, the adoption of the Genocide Convention was one of the major results of the Second World War in which the international community had seen the extermination of Jews, Poles, Gypsies and other social groups such as homosexuals and mentally ill persons by Nazi Germany. The response of the Allied Powers to this humanitarian tragedy was the adoption of the Charter of the Nuremberg Tribunal and the estab-

8. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704 & Add. 1 (1993), para. 45.

lishment of the International Military Tribunal at Nuremberg to try and punish the major Nazi criminals responsible for commission of the crimes against peace, war crimes and crimes against humanity.[9] The Nuremberg Charter did not include any provision giving power to the Tribunal to prosecute and punish persons responsible for the crime of genocide, but the acts that could constitute this crime were tried in connection with either the concept of crimes against humanity or war crimes.[10]

Distinguishing the Crime of Genocide from Crimes Against Humanity

As a result of the practice of the Nuremberg Tribunal and also the application of the notion of genocide in various domestic criminal cases in which genocide was considered as falling within the definition of crimes against humanity,[11] some scholars regarded the crime of genocide as a 'second category of crimes against humanity recognised in the Nuremberg Charter as constituting the persecution of individuals on political, racial or religious grounds'.[12] This view cannot be considered as in compliance with the development of international humanitarian law and has no basis in international law for the following reasons:

Firstly, the drafters of the Genocide Convention did not have any intention of codifying the Nuremberg Charter and the Judgement of the International Military Tribunal at Nuremberg. This was because the Convention employed the view that there was no need for the requirement of nexus between the acts and armed conflict which indicated one of the major differences from the Nuremberg Tribunal's practice in which the existence of an armed conflict was regarded as a precondition for the applicability of crimes against humanity and, during the drafting period of the Convention, proposals referring to the Nuremberg practice and crimes against humanity in the Genocide Convention were rejected.[13]

Secondly, although the concept of crimes against humanity may be seen as the inspiration or source of the crime of genocide, in particular, as

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9. *See* Art. 6 of the Charter of the Nuremberg Tribunal.
10. Lippman, M., 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later' (1994), 8 *Temple Int'l & Comp. L. J.*, pp. 5–6. Although in the indictment the term 'genocide' was explicitly used in the Judgement of the Nuremberg Tribunal, it was not deployed at all; Kunz, J., 'The United Nations Convention on Genocide' (1949), 43 *AJIL*, p. 739.
11. In this sense, the practice of the Israeli District Court of Jerusalem in the *Eichmann Case* has a significant place in international humanitarian law. In this case, the crime of genocide was regarded as 'the gravest type of "crimes against humanity"'. *See* Lippman, p. 9.
12. Morris, V. and M.P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. I (Irvington-on-Hudson, New York: Transnational Publishers, 1998), p. 165; Morris, V. and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Vol. I (Irvington-on-Hudson, New York: Transnational Publishers, 1995) (hereinafter *An Insider's Guide*), p. 85.
13. Ratner, S.R. and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997), p. 27. For the drafting history of Article 1 of the Genocide Convention in which it is stated that the crime of genocide: 'whether committed in time of peace or in time of war, is a crime under international law', *see* Lippman, pp. 19–20.

deriving from one sub-category of offence, persecution, of crimes against humanity, the concept of genocide cannot be considered the same as this offence. This is because genocide as an international crime has been codified and has developed, and what needs to be shown to make its requirements applicable are totally different from the conditions for the applicability of crimes against humanity. As will be discussed later in this chapter, the practice of the *ad hoc* tribunals has clarified the requirements of the applicability of each category of crimes, war crimes, genocide, crimes against humanity, even more so the substantive content and specific offences included in these categories, in greater detail day after day. In this context, as far as the crime of genocide is concerned one of the chief distinguishing features of this crime from others, especially from crimes against humanity, is that of the mental element of genocide, that is to say, there must be an 'intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such'.[14] This is not the case for the concept of crimes against humanity whose application does not require such an intent.[15] In order to be an act considered as constituting a crime against humanity, it has to be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack',[16] and there is no need for the presence of intent required for the crime of genocide. Only for one sub-category of crimes against humanity, persecution, must there be an intent which is inherited in this offence and it can be identified as 'discriminatory intent',[17] not a 'genocidal intent'. In fact this notion was one of the major issues in the *Jelisic Case* before the ICTY in which Goran Jelisic was acquitted of genocide and found guilty of crimes against humanity on the basis that the accused acted 'with discriminatory intent' against Bosnian Muslims and Bosnian Croats. This was not enough to prove genocidal intent, but still counted as a key element in proving persecution, defined as 'a crime against humanity'.[18] On this ground, the approach taken by the ICTY should be seen as clear evidence proving the difference between genocide and crimes against humanity, in particular, persecution, and should be welcomed by the international

14. Art. 2 of the Genocide Convention.
15. Related provisions of the ICTY and the ICTR Statutes are significantly different from each other and their applications need the existence of different elements in terms of crimes against humanity. *See* Arts. 3 and 5 of the ICTR and the ICTY Statutes respectively. For the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and possible impact on the ICC with regard to crimes against humanity, *see* Chapter 6, p. 245.
16. Art. 7 (1) of the ICC Statute. In fact, this provision should be seen as a combination of Articles 3 and 5 of the ICTR and the ICTY Statutes and should be regarded as reflecting customary international law in this regard. For a discussion on this, *see* Chapter 6, p. 247, The Requirement of Attack Being Directed Against Any Civilian Population, p. 251, The Requirement of Discriminatory Intent and p. 254, The Requirement of *Mens Rea* (Mental Element).
17. Art. 7 (1) (h) of the ICC Statute; Art. 5 (h) of the ICTY Statute. In the ICTR Statute the wording of the provision indicates the necessity of the presence of this intent for the applicability of all sub-categories of offences constituting crimes against humanity. *See* Art. 3 of the ICTR Statute.
18. *Tribunal Update No. 148*, written by Mirko Klarin, available on the website: www.iwpr.net; Press Release, 'Goran Jelisic Acquitted of Genocide and Found Guilty of Crimes Against Humanity and Violations of the Laws or Customs of War', Doc. No. JL/P.I.S./441-E, The Hague (19 October 1999). For the examination of the conditions of crimes against humanity and of genocide by the ICTY, and justification of *Jelisic*'s intent, *see The Prosecutor v. Goran Jelisic, Judgement*, Case No. IT-95-10-T (14 December 1999), paras. 50–8, 59–108.

community since making it clear that genocide cannot be accepted as part of crimes against humanity or as just a form of persecution. Otherwise, all concepts of international humanitarian law are damaged and other problems created. For example, how can it be explained that all international humanitarian law instruments include the crime of genocide as an independent crime?[19] If it were not the case, genocide would have been governed as a sub-category offence of crimes against humanity such as persecution, the crime of apartheid.[20] This way of understanding of genocide for the above-mentioned reasons has no grounds in international humanitarian law.

The Definition of Genocide

With regard to the concept of genocide, one of the other important issues is the definition of genocide. Article 2 of the Genocide Convention defines genocide as: '… any of the following acts [indicated in the Article through (a)–(e)] committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such'.[21] After the adoption of the Genocide Convention, the crime of genocide has been considered as the most horrendous crime and the term 'genocide' has been misused and abused to cover all different aspects of life or to label all mass killings of civilians.[22] However, this way of understanding and using the concept ignores the necessary elements of genocide, in particular, the element of intent to destroy the group.[23] The main reasons for such an outcome were the non-existence of an international criminal tribunal or court and of an authoritative interpretation of the Genocide Convention. These deficiencies of international humanitarian law and the perception of the Genocide Convention as limiting the protected groups to national, ethnical, racial or religious groups, and not including political, economic or social groups, caused the presence of definition of genocide in various ways. These definitions were used specifically to cover some of the events that had occurred throughout the twentieth century. Some of these definitions include all sorts of different human groups regardless of whether they are national, ethnical, racial, religious, political, economic or social.[24] The aim of this

19. Art. 3 of the ICTR Statute; Art. 5 of the ICTY Statute.; Art. 17 of the ILC's Draft Code; Art. 6 of the ICC Statute.
20. For a detailed regulation of the offences constituting crimes against humanity, *see* Art. 7 (1) of the ICC Statute, in particular, Art. 7 (1) (h) (j) of the ICC Statute.
21. Articles 3 and 5 of the ICTR and the ICTY Statutes respectively and Article 6 of the ICC Statute include the same definition.
22. Kuper, L., 'Theoretical Issues Relating to Genocide: Uses and Abuses', in Andreopoulos, G.J. (ed.), *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press, 1994), pp. 35–6; Fein, H., 'Genocide, Terror, Life Integrity, and War Crimes: The Case for Discrimination', in Andreopoulos (ed.), p. 95. For example, even birth control clinics were labelled as the place in which the crime of genocide was committed on the grounds that it creates an act constituting genocide under Article 2 (d) of the Convention, which indicates one category of acts of genocide as the 'imposi[tion of] measures intended to prevent births within the group' (Kuper, p. 35).
23. Ibid., pp. 35–6.
24. Drots defines genocide as 'the deliberate destruction of physical life of individual human beings by reason of their membership of any human collectivity as such' (Drots, P.N., *The Crime of State, Genocide*, Vol. II (Leyden: A.W. Sythoff, 1959), p. 125).

understanding of genocide was to consider mass killings carried out, in particular, on political grounds such as in Stalin's Soviet Union,[25] Indonesian human rights violations in East Timor[26] and the Khmer Rouge regime in Cambodia[27] as constituting genocide.[28] Some other definitions concentrated on the perpetrator of genocide, which was considered as a policy employed by States.[29] In addition to these definitions of genocide, some scholars tried to describe the concept from a humanistic point of view under which all mass killings of human beings can be regarded as constituting genocide.[30] In consequence, even mass killings that had occurred as a result of ecological destruction were considered as genocide, ecological genocide.[31] The bombings of Hiroshima and Nagasaki by nuclear weapons were named as genocide in the course of war.[32]

It is possible to extend the definition and use of the concept of genocide to different aspects of life like the notion of cultural genocide.[33] However, from the view of international humanitarian law, these attempts

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Fein defines genocide as a 'sustained purposeful action by a perpetrator to physically destroy a collectivity directly … or indirectly, through interdiction of the biological ... and social reproduction of group members …' (Fein, p. 97); and also *see* Fein, H., *Genocide: A Sociological Perspective* (London: Sage Publications, 1993), p. 24.

Ratner and Abrams comment on the definition of genocide in relation to the regulation of the Genocide Convention as follows: '... only when the legal definition of genocide expands to encompass the mass destruction of any human collective based on any integral element of human identity will it fully address the most heinous international offence' (Ratner and Abrams, p. 43).

25. For a bibliographical work on the former Russian Case, *see* Mace, J.E., 'Genocide in the USSR', in Charny, I.W. (ed.), *Genocide: A Critical Bibliographic Review* (London: Mansell Publishing Limited, 1988), p. 116.
26. For the explanation and assessment of the East Timor Case, *see* Dunn, J., 'East Timor: A Case of Cultural Genocide', in Andreopoulos, G.J. (ed.), p. 171.
27. For the Cambodian Case, *see* Kiernan, B., 'The Cambodian Genocide: Issues and Responses', in Andreopoulos, G.J. (ed.), p. 191. For a bibliographical work on the Cambodian Case, *see* Hawk, D., 'The Cambodian Genocide', in Charny, I.W. (ed.), p. 137; Burgler, R.A., 'The Case of Cambodia: The Khmer Rouge's Reign of Terror', in Jongman, A.J. (ed.), *Contemporary Genocides: Causes, Cases, Consequences* (Leiden: Projecten Interdisciplinair Onderzoek naar de Oorzaken van Mensenrechtenschendingen (PIOOM) (Interdisciplinary Research Program on Root Causes of Human Rights Violations), 1996), p. 59. For efforts to bring persons responsible for violations of international humanitarian and of human rights law by the Khmer Rouge regime to justice and possible accountability mechanisms for that, *see* Rajagopal, B., 'The Pragmatics of Prosecuting the Khmer Rouge' (1998), 1 *YIHL*, p. 189; Marks, S.P., 'Forgetting "The Policies and Practices of the Past": Impunity in Cambodia' (1994), 17 *Flet. F. W. Aff.*, pp. 17–43.
28. Ratner and Abrams, p. 43; *see supra* notes 26–8.
29. Horowitz defines genocide as 'a structural and systematic destruction of innocent people by a state bureaucratic apparatus' (Horowitz, I.L., *Taking Lives: Genocide and State Power* (New Brunswick, NJ: Transaction Books, 1980), p. 17).

    Chalk describes genocide as follows: 'Genocide is a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator' (Chalk, F., 'Redefining Genocide', in Andreopoulos, G.J. (ed.), p. 52.
30. For example, Charny defines genocide as follows: 'Genocide in the generic sense is the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims' (Charny, I.W., 'Toward a Generic Definition of Genocide', in Andreopoulos, G.J. (ed.), p. 75).
31. Ibid., pp. 65–6.
32. Kuper, L., 'Other Selected Cases of Genocide and General Massacres: Types of Genocide', in Charny, I.W. (ed.), p. 158.
33. Charny, 'Toward a Generic Definition …', pp. 84–5.

should be assessed as not in compliance with the structure and logic of this branch of international law on the ground that all different types of definitions of genocide lead the international community to different conclusions which cannot be explained and supported in international law. Moreover, all international humanitarian law instruments should be taken into consideration while justifying whether any specific event amounts to genocide. If this way of understanding is applied to cases, completely different results are achieved. Different categories of crimes and their substantive elements should guide international lawyers. For example, the bombings of Hiroshima and Nagasaki cannot be labelled as genocide since the element of intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such is lacking. Who can argue that these cities were bombed with such intent? However, the other category of international crimes such as war crimes[34] would be more suitable to justify such bombings than the concept of genocide. Under the notion of war crimes, not only the killing of civilians but also the use of atomic bombs as a weapon in a wartime situation can be judged in terms of whether the employment of such weapons is allowed by international humanitarian law.

In sum, it can be concluded that the concept of genocide should not be mixed with other categories of international crimes, in particular with crimes against humanity and that all mass killings of human beings should not be labelled as genocide. All international humanitarian law instruments should be taken into account to assess one specific case whether it constitutes war crimes, genocide or crimes against humanity. Otherwise, how can it be explained that other categories of international crimes are needed if it is possible to label all humanitarian tragedy as genocide? Moreover, the concept should not be used as a means of drawing the attention of the international community to the events which are not regarded as genocide in international law. As indicated earlier, non-existence of an international criminal tribunal or court and of an authoritative interpretation of the Genocide Convention caused these unacceptable results. However, today, the international community has two *ad hoc* tribunals operating, and one ICC that came into operation on 1 July 2002. In this sense, there cannot be any doubt that the practice of the *ad hoc* tribunals will provide a very useful interpretation and application of the Genocide Convention and will prevent the misunderstandings, misuse or abuse of the concept of genocide.

The Practice of the *Ad Hoc* Tribunals and Their Contribution to International Humanitarian Law and Their Impact on the ICC

The international community has been witnessing the first ever interpretation and application of the Genocide Convention at the international

34. Fein, 'Genocide, Terror, …', p. 105; Fein, H., 'Discriminating Genocide from War Crimes: Vietnam and Afghanistan Reexamined' (1993), 22 *Denv. J. Int.'l L. & Pol'y*, p. 36.

level[35] by means of the practice of the *ad hoc* tribunals and of the practice of domestic criminal courts at a national level.[36] The significance of the practice of the ICTY and the ICTR can be examined in two ways: Firstly, they interpret and apply the elements of the crime of genocide in relation to the events that occurred in the former Yugoslavia and in Rwanda. Secondly, they clarify the substantive content of the crime of genocide.

The Elements of the Crime of Genocide

As has already been mentioned above, the Genocide Convention in its Article 2 defines genocide as 'any of the following acts [indicated through (a)–(e)] committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such'. In accordance with this definition, to consider an act as constituting the crime of genocide, there must be three elements present. These are: The Victimised Group, the Intent and the Identifiable Act.

The Victimised Group

According to the Genocide Convention and the Statutes of the *ad hoc* tribunals, the first element of the crime of genocide is that the acts must be committed against an identifiable group, namely a national, ethnic, racial or religious group.[37] The requirement of the existence of an identifiable

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35. The *Akayesu Judgement* of the ICTR constitutes a historical turning point in the history of international humanitarian law since it is the first interpretation and application of the Genocide Convention by an international tribunal (*The Prosecutor v. Jean-Paul Akayesu, Judgement*, Case No: ICTR-96-4-T, 2 September 1998). *See* Press Release, 'First-Ever Judgements on Crime of Genocide Due 2 September', UN Doc. AFR/93 L/2894 (31 August 1998); Press Release, 'Rwanda International Criminal Tribunal Pronounces Guilty Verdict in Historic Genocide Trial', UN Doc. AFR/94 L/2895 (2 September 1998); Press Release, '*Secretary-General Welcomes Rwanda Tribunal's Genocide Judgement as Landmark in International Criminal Law*', UN Doc. SG/SM/6687 L/2896 (2 September 1998); Mutiso, C., 'War Criminal Behaviour, Rwanda's genocidal leaders are being brought to justice by a groundbreaking international tribunal', *Time* (14 September 1998), p. 40.

    The *Kayishema and Ruzindana Case* including the application of the Genocide Convention followed the *Akayesu Judgement*, and the ICTR delivered its Judgement on this case on 21 May 1999 (*The Prosecutor v. Clement Kayishema and Obed Ruzindana, Judgement*, Case No: ICTR-95-1-T, 21 May 1999).

    The recent Judgement in relation to the crime of genocide was again rendered by the ICTR in the *Rutaganda Case* on 6 December 1999 (*The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement,* Case No: ICTR-96-3-T, 6 December 1999); In this context also *see*, ICTR Press Release, '*Rutaganda Convicted of Genocide and Sentenced to Life Imprisonment*', Doc. No. ICTR/INFO9-2-216en, Arusha (6 December 1999).

36. The German practice is impressive in relation to the charges of genocide which occurred in the Yugoslavian conflict. *See Public Prosecutor v. Djajic*, No. 20/96, Supreme Court of Bavaria, 3d Strafsenat (23 May 1997), in 'Case Note with Commentary by Safferling', Safferling, C.J.M. (1998), 92 *AJIL*, p. 528. In this case, the defendant was acquitted of genocide on the basis of lack of necessary mental element, *mens rea*, of genocide (p. 529); *Public Prosecutor v. Nikola Jorgic*, The District Court of Düsseldorf (26 September 1997). In this case, Jorgic was found guilty of genocide. This Judgement was the first national criminal court decision on genocide that occurred in the Former Yugoslavia. In this sense, for the German practice, *see* also Fischer, H., 'Some Aspects of German State Practice Concerning IHL' (1998), 1 *YIHL*, p. 380, in particular, pp. 384–5.

37. Art. 2 of the Genocide Convention; Art. 2 (2) of the ICTR Statute; Art. 4 (2) of the ICTY Statute.

group should also be seen as a part of the specific intent of genocide. This is because victims are chosen on the basis of being a member of a national, ethnic, racial or religious group, not because of his or her individual identity. In a sense, the victim of 'the crime of genocide is the group itself and not only the individual'.[38] In other words, the *actus reus* (physical element) of the crime may be limited to one human being, but the *mens rea* (mental element) of genocide must target the protected group itself.[39] As clearly understood from the texts of the Genocide Convention and from the ICTY and the ICTR Statutes, the groups protected by these instruments are restricted and only included national, ethnic, racial and religious groups,[40] and there are no definitions of these concepts either in the Genocide Convention or in the commentary to the Genocide Convention, as with the Statutes of the *ad hoc* tribunals.[41] Even in the ILC's Draft Code and in the ICC Statute,[42] the international community did not define these notions which have unresolved issues inherited in them. On this ground, the practice of the *ad hoc* tribunals in relation to the requirement of the existence of a protected group to apply the crime of genocide to the Rwandan and Yugoslavian cases will have a significant impact in international humanitarian law.

The ICTR in the *Akayesu Judgement* defines a national group; a 'group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties';[43] an ethnic group as 'a group whose members share a common language or culture';[44] a racial group 'is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors';[45] and a religious group 'is one whose members share the same religion, denomination or mode of worship'.[46]

When these definitions are strictly applied to the Rwandan case, it is clear that none of them can provide a legal base for the application of the

38. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.1.316–17; Commentary on the crime of genocide for the ILC Draft Code explains this fact as follows: '… the intention must be to destroy a group and not merely one or more individuals who are coincidentally members of a particular group. The prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target or intended victim of this type of mass criminal conduct. The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group' (note omitted). (International Law Commission Report, 1996, Draft Code of Crimes Against the Peace and Security of Mankind, available on the web: www.un.org/law/ilc/reports/1996/chap02.htm, p. 32, hereinafter page numbers are referred to according to the web pages).
39. Bassiouni, C., *International Criminal Law: A Draft International Criminal Code* (Alphen aan den Rijn: Sijthoff and Noordoff, 1980), p. 73.
40. Webb, p. 391.
41. Ratner and Abrams, p. 31.
42. *See* Art. 17 of the ILC Draft Code and Commentary on the crime of genocide, pp. 30–3; Art. 6 of the ICC Statute.
43. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.1.298–9.
44. Ibid., paras. 6.3.1.300–1.
45. Ibid., paras. 6.3.1.302–3; Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 98.
46. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.1.304–5; Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 98.

crime of genocide on the premise that there are three different groups, the Hutus, the Tutsis and the Twas, who share the same nationality, the same culture, the same language, the same territory and believe in the same myths in Rwanda.[47] In light of these facts, the International Tribunal are faced with the problem of whether the Tutsi population can be regarded as a protected group against genocide and whether the groups enumerated in its Statute are limited or not. In this context, the ICTR examined 'the intention of the drafters of the Genocide Convention, which … was patently to ensure the protection of *any stable and permanent group*'.[48] According to the Tribunal, to determine the stability and permanence of a group, the criterion was to become a member of the group by birth, 'in a continuous and often irremediable manner', as opposed to 'the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups'.[49] In accordance with this criterion, the ICTR considered the Tutsis as an ethnic group falling within the meaning of the Genocide Convention and of its Statute on the ground that the Tutsi membership derives from birth and a child automatically gains his or her father's ethnic origin and moreover that the existence of identification cards indicating the ethnicity of bearer as Hutu, Tutsi or Twa at the time of the conflict were sufficient to prove the existence of customary rules governing the determination of ethnic groups in Rwanda.[50]

In fact, the way adopted by the ICTR regarding the Tutsis as an ethnic group was nothing other than the recognition of socially imposed categorisation based on economic class differences between the Hutus and the Tutsis as a means of ethnic identification.[51] The definition provided in the *Kayishema and Ruzindana Judgement* also shows this, and solves the problem of definition of ethnic group which remained disputed after the *Akayesu Judgement*. According to the *Kayishema and Ruzindana Judgement,* '[a]n ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)'.[52] In terms of indicating the subjective nature of the concept and the importance of communities' belief to consider a group as an ethical group, this definition can be regarded as in compliance with the development of international humanitarian law on the ground that this way of interpretation and application is too important in the cases where a group cannot be categorised as a national, racial or religious group, as seen in the Rwanda conflict, and that provides protection for the victims under the Genocide Convention.[53]

47. Trial Chamber, *Akayesu Case, Judgement*, paras. 5.1.322–3; Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 34.
48. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.1.306–7 (emphasis added).
49. Ibid., paras. 6.3.1.296–7.
50. Ibid., paras. 7.8.156–7, 5.1.324–5; Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 523–4.
51. Amann, D.M., 'Case Note, Prosecutor v. Akayesu' (1999), 93 *AJIL*, p. 198. For an explanation of events in a historical context and the question of ethnicity by the ICTR, *see Akayesu Case, Judgement*, paras. 2.139–205, 3.207–41; *Kayishema and Ruzindana Case, Judgement*, paras. 31–54, in particular, paras. 34–5.
52. Trial Chamber, *Kayishema and Ruzindana Case, Judgement,* para. 98.
53. In the practice of the *ad hoc* tribunals, in some cases it is possible to see some documents

On the other hand, as far as the practice of the ICTY is in question, there should not be any problem with regard to the requirement of the victimised group. This is because, Bosnian Muslims, Croats and Serbs fall within the meaning of the Genocide Convention either as an ethnic or religious group or possibly more as a national group. Although it can be argued that all these three groups share the same Slavic origin, they have completely different religious, national and cultural characteristics, which are stable and permanent in nature and should be sufficient to protect any of these groups against the crime of genocide.[54] When the Yugoslavian case is compared with the Rwandan one, it is very clear that the definition of genocide in the Convention and in the Statutes of the *ad hoc* tribunals can be applied to the Yugoslavian conflict more easily than the Rwanda case.

In international humanitarian law, the practice of the *ad hoc* tribunals in relation to the interpretation and application of the concept of protected group within the meaning of the Genocide Convention has a historic significance on the premise that the practice of the ICTR proved that the protected groups are not limited to national, ethnic, racial or religious groups, and that any groups, as long as they are stable and permanent, can be under the protection of the Genocide Convention. This way of employment of the concept is also consistent with the view expressed by Lemkin and by the international community (through the General Assembly Resolution 96 (I) of 11 December 1946) even before the adoption of the Genocide Convention,[55] consistent with the major objective, purpose or spirit of the Convention specifically, and consistent with the purpose of international humanitarian law in general.

However, the interpretation of the protected group in explicitly excluding political and economic groups due to being labelled as 'mobile' groups, that is, not stable and not permanent, can be criticised on the following grounds: The Convention was drafted in the prevailing conditions of the 1940s as a result of the Nazi horrors in the Second World War, and does not fit the needs of the international community in the late twentieth century. Political, economic and social groups have become more important than national, ethnic, racial or religious groups, thus, the interpretation or definition of the Convention should include these groups as well.[56] In fact, the practice of the *ad hoc* tribunals had created a big opportunity to interpret the protected group by including political and economic groups for the international community. When the drafting history of the Genocide Convention and the factors are examined not to include political and economic groups in the definition of genocide, it can

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indicating the subjective nature of the notion of ethnic group. For example, *see Jelisic and Cesic Case*, *Prosecutor's Pre Trial Brief*, Case No. IT-95-10-PT, 19 November 1998, para. 4.7; *The Prosecutor v. Georges Anderson Nderubumve Rutaganda, Prosecution's Final Trial Brief*, Case No. ICTR-96-3-T., paras. 298–302.

54. Weeb, pp. 399–400. In fact, this was the view adopted by the ICTY in the *Kristic Case*. According to the Trial Chamber, the protected group was the Bosnian Muslims. (Trial Chamber, *Prosecutor v. Radislav Krstic, Judgement,* Case No. IT-98-33 (2 August 2001) (hereinafter *Kristic Case, Judgement*), para. 560).
55. *See supra* note 1.
56. Ratner and Abrams, p. 43.

clearly be seen that the general tendency of the international community was toward the inclusion of political groups to the Convention, but it had not become possible because of the Soviet Union's bloc[57] and the non-stability and temporary characters of these groups.[58] However, today, the world has significantly changed. The Soviet Union has been replaced by new States and the Cold War seems to be over. Political, economic or social groups have become too important in modern life. If the International Tribunal had taken these facts into consideration it would have been possible to interpret the definition of genocide to cover such groups provided that they are considered as stable and permanent in each specific case. This would have created an invaluable impact in international humanitarian law. On the other hand, even if the Tribunal had reached such a conclusion it would not have led the international community to consider any mass killings as constituting the crime of genocide.[59] In this sense, it would be difficult to share the opinion that the Genocide Convention was not applicable to the events that occurred throughout the twentieth century such as the Cambodian case due to exclusion of political groups in its definition.[60] The means of international humanitarian law should be, all together, taken into account and it should not be forgotten that any individual responsible for violations of humanitarian law can be prosecuted and punished by these means. If political, economic or social groups cannot be protected by the Genocide Convention, the offence of persecution under crimes against humanity can provide protection for the groups mentioned.[61] For this reason, non-prosecution and punishment of responsible persons involved in mass killings of human beings cannot only depend upon the deficiency of the definition of genocide in the Convention. Instead, the problem lies in the enforcement of the norms of international humanitarian law. This is because the concept of crimes against humanity, as with genocide, enjoys the customary law status, even more *jus cogens* status, and States' obligation to prosecute or punish responsible individuals is *erga omnes* in nature. Additionally, if all mass killings based on any collectivity of human beings are considered as genocide, there would not be any need for the norms governing the offences regarded as crimes against humanity.

In the light of this explanation, it can be concluded that the approach taken by the ICTR in its Judgements are, *mutatis mutandis*, in compliance with the drafting history of the Genocide Convention and with the development of international humanitarian law. The view of the ICTR can only

57. Remarks by Cherif Bassiouni on 'Genocide: The Convention, Domestic Laws, and State Responsibility' (1989), *ASIL Proceedings*, p. 315; Kunz, p. 743; Finch, p. 734. For the drafting history of the Convention, *see* Lippman, pp. 27–30. This was one of the main reasons for the USA not to ratify the Genocide Convention for many years, until the late 1980s. In this context, *see* LeBlanc, L.J., 'The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment' (1988), 13 *Yale L. J. Int.l L.*, p. 268.
58. LeBlanc, pp. 274–5; Lippman, pp. 27–8.
59. This would be the misuse or abuse of the concept of genocide, *see supra* notes 24–34 and accompanying text.
60. Ratner and Abrams, p. 43.
61. Amnesty International, *The International Criminal Court, Making the Right Choices* – Part I, AI Index: IOR 40/01/97, January 1997, p. 24. Commentary on the crime of genocide in the ILC Draft Code, p. 32.

be criticised with regard to the express exclusion of political and economic groups. In this context, the right opinion should have been that if any political, economic or social group is considered as stable and permanent, which can be justified in light of the evidence of each specific case by an international tribunal or court, they must enjoy the protection of the Genocide Convention within the meaning of the group protected by this Convention.

The Intent

Under Articles 2 (2) and 4 (2) of the ICTR and the ICTY Statutes respectively, as with Article 2 of the Genocide Convention, to regard an act constituting genocide, there must be a specific intent which means that the act must be committed 'with intent to destroy, in whole or in part [a protected group], as such'. This is the requirement that distinguishes the crime of genocide from other categories of crimes, namely from war crimes and crimes against humanity in general, and from murder in particular. As long as this intent is present, single killing can constitute genocide. On the other hand, killing of a thousand individuals without such intent does not constitute genocide, but homicide.[62]

Although the requirement of intent is the central element of the crime of genocide it is not possible to see its definitive interpretation either in the language or in the drafting history of the Convention.[63] This was one of the main reasons for confusing the concept with other crimes and for efforts to define the crime of genocide.[64] The lack of definition of the intent and of its interpretation has created some issues which has to be solved in international law. In this sense, the practice of the *ad hoc* tribunals has a significant role to play in making clear the problems that occur in relation to the intent requirement of genocide.

The first issue lies in the interpretation of the relationship between 'intent to destroy' and 'in whole or in part' a protected group.[65] As can be easily inferred from the phrase 'intent to destroy' with a protected group, for the crime of genocide to occur, there must be an act which can be considered as causing the destruction of the group concerned. But what

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62. Ratner and Abrams, p. 33; Roberge, M-C., 'Jurisdiction of the Ad Hoc Tribunals for the former Yugoslavia and Rwanda over Crimes Against Humanity and Genocide' (1997), 37 *Int'l Rev. Red Cross*, p. 662. The difference between the crimes of genocide and homicide was indicated by the General Assembly on 11 December 1948 as follows: '[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings'.
63. Ratner and Abrams, p. 33.
64. *See supra* p. 203, The Concept of Genocide.
65. This was one of the main issues for the ratification of the Genocide Convention in the United States. The Senate and scholars in America have discussed the requirement of intent for many years and as a consequence the ratification of the Convention took more than 30 years. In this context, *see* LeBlanc, L.J., 'The Intent to Destroy Groups in the Genocide Convention: The Proposed US Understanding' (1984), 78 *AJIL*, p. 369, in particular, pp. 373–80. For the US ratification and its criticism, *see* remarks by Jordan Paust on 'Genocide: The Convention, Domestic Laws, and State Responsibility' (1989), *ASIL Proceedings*, pp. 314–21. Remarks by Steven Lubet on 'Prospects for Implementation of the Genocide Convention under United States Law' (1989), *ASIL Proceedings*, pp. 323–6.

constitutes the destruction of a group? The ICTR in the *Akayesu Judgement* held that one of the acts enumerated in Article 2 (2) (a–e)[66] would be considered as providing a means to destroy the group protected by the Genocide Convention.[67] As will be discussed later in relation to the substantive content of the crime of genocide, the acts which constitute destruction of the group are not limited to the killing of individual members of the group – for example, rape or any other form of sexual violence can also have the same effect.[68] The other significant point is that the intent to destroy the protected group must be 'in whole or in part'. The phrase 'in whole' does not mean that extermination of the entire group is required.[69] The destruction of the group *in part* is sufficient to trigger the provisions of the Genocide Convention and the Statutes of the *ad hoc* tribunals. The notion of 'in part' was explained in the *Kayishema and Ruzindana Case* by the ICTR as follows: '… [it] requires the intention to destroy a considerable number of individuals who are part of the group. Individuals must be targeted due to their membership of the group to satisfy this definition.'[70]

In the light of the view taken by the ICTR, it can be concluded that there must be an intention to destroy the whole or a considerable number of individuals who are part of the group. One consequence of this is that genocidal intent ceases to be the principal factor since the numerical factor is equally significant. For this reason, the requirement of intent should be examined at two different levels: first of all, it should be established for the entire case, for example in the former Yugoslavia or in Rwanda – that is, whether the acts were committed with such intent. At this level, the number of victims may play a central role. Secondly, the existence of genocidal intent should be attributed to individuals to establish criminal responsibility for the commission of genocide. At this stage, the numerical aspects of the atrocity is left aside, and one single killing can constitute genocide. This way of understanding can be found in the practice of the *ad hoc* tribunals with regard to the issue of proof of the requisite intent of genocide.

The second major problem in the crime of genocide with regard to the intent requirement of the offence lies in the evidentiary matters, in other words, how to prove the existence of such intent. Indeed, this is the most difficult part of genocide – that is, to find an individual criminally responsible for the acts considered as constituting genocide.[71] However, the way

66. For the acts and the practice of the *ad hoc* tribunals in this regard, *see infra* p.221, The Substantive Content of the Crime of Genocide.
67. Trial Chamber, *Akayesu Case, Judgement*, para. 6.3.1.315.
68. Ibid., paras. 7.8.214–15. In the *Kayishema and Ruzindana Case* it was reaffirmed. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 95. Recently, the ICTR again confirmed this fact in the *Rutaganda Judgement*. Trial Chamber, *Rutaganda Case, Judgement*, para. 2.2 (under the heading of Genocide in the Applicable Law Part of the Judgement).
69. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.1.268–9.
70. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 97. At this point, the problem of how it can be justified that a considerable number of individuals of the group were intended to be destroyed arises. The ICTR made this fact clearer by indicating that 'a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership. … both proportionate scale and total number are relevant' (para. 96); and also *see Final Report*, para. 94.

adopted by the ICTY and the ICTR guides the international community, and their practice demonstrates that the establishment of the specific intent requirement of genocide is not as difficult as the international community used to think. In this sense, best examples can be found in the ICTR practice. The ICTR, first of all, examines whether the events that occurred in Rwanda and in the specific region, depending on the indictments, for instance in the *Akayesu Case* the *Taba* commune, in the *Kayishema and Ruzindana Case* the *Kibuye Prefecture*, constitute genocide or not. In this context, the Tribunal examines the requirements of genocide in general. To find out that the specific intent of genocide is present, the ICTR has to depend upon the testimonies of witnesses proving that mass killings around the country and the area in question took place[72] and the UN Reports documenting the massacres which took place in Rwanda.[73] In the light of this evidence, the International Tribunal concluded that the acts of violence that occurred in Rwanda in the period of conflict were committed with the intent to destroy the Tutsi population.[74] In the *Kayishema and Ruzindana Case*, this approach was made even clearer. As is well known, the crime of genocide, due to its nature, is almost impossible to commit 'without some direct or indirect involvement on the part of the State given the magnitude of this crime'.[75] Of course, it is rarely possible to find an official document outlining the State's plan or policy to commit genocide against a protected group, but the existence of such a plan or policy can be inferred from circumstantial evidence. The International Tribunal, in the *Kayishema and Ruzindana Judgement* has taken into account the following evidence as constituting sufficient indicators to reach the conclusion that such a plan or policy of genocide was in place in Rwanda and that 'such a plan would be strong evidence of the specific intent requirement for the crime of genocide':[76] 'execution lists',[77] 'the spreading of extremist ideology through the Rwandan media which facilitated the campaign of incitement to exterminate the Tutsi population',[78]

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71. Morris and Scharf, p. 170; Ratner and Abrams, p. 34.
72. Trial Chamber, *Akayesu Case, Judgement*, paras. 5.1.297–311. The Tribunal has also given special attention to the witnesses who testified with regard to events that occurred in the *Taba* commune. The following quotation from the *Akayesu Judgement* proves the existence of the specific intent requirement of genocide in Rwanda: 'Witness OO testified that … all the Tutsi should be killed so that someday a child could be born who would have to ask what a Tutsi had looked like. She also quoted this speaker as saying "I will have peace when there will be no longer a Tutsi in Rwanda". Witness V testified that Tutsi were thrown into the Nyabarongo river, which flows towards the Nile, and told to "meet their parents in Abyssinia", signifying that the Tutsi came from Abyssinia (Ethiopia) and that they "should go back to where they came from"' (paras. 5.1.318–19).
73. Ibid., paras. 5.1.312–13.
74. Ibid., paras. 5.1.320–1.
75. Morris and Scharf, p. 168.
76. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 275–6, 289–91. Specifically, for the examination of genocide and the conclusion in relation to the *Kibuye Prefecture* by the ICTR, *see* paras. 292–312.
77. 'execution lists, which targeted the Tutsi elite, government ministers, leading businessmen, professors and high profile Hutus, who may have favoured the implementation of the Arusha Accords' (ibid., paras. 275, 277–8).
78. Ibid., paras. 275, 279–82.

'the use of the civil defence programme and the distribution of weapons to the civilian population'[79] and 'the "screening" carried out at many roadblocks which were erected with great speed after the downing of the President's plane'.[80]

Having established the general genocidal intent, the ICTR dealt with the imputability of this intent to individual perpetrators of this crime. In the *Akayesu Judgement*, after indicating the difficulty of the determination of specific intent, if there is no confession from the accused, the International Tribunal held that such an intent 'could be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in what region or country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act'.[81] Similarly, in the *Kayishema and Ruzindana Case*, the Tribunal followed the same approach, and even examined in more detail the intent of the responsible individuals in this regard. To find out *Kayishema*'s and *Ruzindana*'s genocidal intent, the Chamber relied upon the following circumstances: the number of victims,[82] the methodology-persistent pattern of conduct[83] and their utterances.[84]

The approach taken by the ICTR in its practice shows that the imputability of the intent requirement of genocide to individuals is possible not only for high-ranking individuals who are associated with the organisation or the regime whose genocidal intent was already set out due to it being easier to prove the existence of the required intent, but also for low-ranking individuals. In this context, some scholars indicated that low-ranking individuals, for example a soldier or a militia member, could not be charged with genocide, but only with homicide because of the difficulty of imputing intent from circumstantial evidence.[85] As has already been indicated above, the practice of the ICTR can completely refute this idea and such an opinion should not be seen as at all consistent with the concept of genocide. It is a well-established principle that even if only a

79. Ibid., paras. 275, 283–6.
80. Ibid., paras. 275, 287–8.
81. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.1.320–1. To support its view, the ICTR, in para. 6.3.1.324, also referred to the practice of the ICTY. 'This intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group' (*Karadzic and Mladic Case, Decision of Trial Chamber I – Review of Indictment Pursuant to Rule 61* (11 July 1996), para. 95).
82. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 531–3.
83. Ibid., paras. 534–7; for Ruzindana, paras. 543–4.
84. Ibid., paras. 538–9; for Ruzindana, para. 542.
85. Wang, M.M., 'The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact' (1995), 27 *Colum. Hum Rts. L. Rev.*, p. 206.

single killing is carried out but with a specific intent, it constitutes genocide. Genocide is not just a crime for high-ranking individuals, but for all individuals regardless of their position.

In this context, there is no doubt that the practice of the ICTR first of all guides the ICTY and will also guide the ICC in terms of setting up the guideline on how to determine whether the required intent of genocide can be established in a specific case. When the practice of the ICTY is examined in relation to the crime of genocide, it is seen that General *Radislav Krstic* became the first person to be convicted of genocide at the ICTY.[86] In the *Prosecutor v. Radislav Krstic Case,* the Trial Chamber held that it was convinced beyond any reasonable doubt that a crime of genocide was committed in Srebrenica and that General *Kristic* was guilty of this.[87] However, it should not be forgotten that the ICTY had to deal with the crime of genocide in the *Jelisic Case* in which *Goran Jelisic* was not found guilty of genocide, but rather of crimes against humanity, in detail before the *Krstic Case*.[88] In accordance with the practice of the ICTY, it should also be indicated that there is a great deal of evidence proving the presence of specific intent to regard criminal acts as constituting the crime of genocide in the Yugoslavian conflict.[89] The first ever use of the notion of

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86. Press Release, 'Radislav Krstic Becomes the First Person to be Convicted of Genocide at the ICTY and is Sentenced to 46 Years' Imprisonment', Doc. No. OF/P.I.S./609e (The Hague, 2 August 2001).

87. Trial Chamber, *Kristic Case, Judgement*, paras. 653, 727. For the concept of intent to destroy the group in whole or in part, *see* paras. 569–99.

88. In the *Jelisic Case*, the ICTY found the accused not guilty of genocide on the ground that the genocidal intent of Jelisic was not proven beyond a reasonable doubt (Trial Chamber, *Jelisic Case, Judgement,* para. 108). The way adopted by the ICTY to establish the specific intent requirement of genocide is also similar to the ICTR's approach. The way adopted by the ICTY in relation to the examination of genocidal intent can be briefly indicated as follows:

    'According to the Trial Chamber, in order to establish Jelisic's intent, the Prosecutor had to prove that, either, 1) Jelisic was an executioner, a participant to a "global" genocidal project, or that, 2) he himself committed genocide. However the Trial Chamber considered that neither had been proven.

    With regard to the first option, the Trial Chamber was not satisfied that a *global* genocide, that is a genocide in the whole Brcko region, had been demonstrated beyond a reasonable doubt. It nevertheless underlined that this finding in no way negated that such a genocide might have taken place in this region, but only that it had not been established to the satisfaction of the court.

    With regard to the second option, the Trial Chamber found that Jelisic's declarations and actions could not be interpreted as an expression of the specific genocidal intent in Article 4 of the Statute. According to the Chamber, Jelisic's behaviour, "*in addition to being clearly odious and discriminatory, was opportunistic and inconsistent"*. However, *"the Trial Chamber is of the opinion that the acts of Goran Jelisic are not the expression of a person with the conscious intention to destroy a group as such"* (Press Release, 'Goran Jelisic Sentenced to 40 Years 'Imprisonment for Crimes Against Humanity and War Crimes', Doc. No. JL/P.I.S./454-e, The Hague, 14 December 1999, emphasis in original). And also *see* 'Jelisic Case Summary of the Judgement', Text read by the Presiding Judge during the Judgement Hearing on 14 December 1999 (14 December 1999).

    In addition to this Case, there are some Rule 61 decisions indicating the opinion of the ICTY with regard to the crime of genocide. In this sense, *see Decision of Trial Chamber I – Review of Indictment Pursuant to Rule 61 in the Karadzic and Mladic Cases* (IT-95-5-R61 and IT-95-18-R61, 11 July 1996); *Decision of Trial Chamber I – Review of Indictment Pursuant to Rule 61 in the Nikolic Case* (IT-95-2-R61, 20 October 1995).

89. In this context, for general information about the crimes committed in the former Yugoslavia, *see* the reports indicated in Chapter 1, notes 30–8; *Final Report*, paras. 87–101; *Application of*

'ethnic cleansing' in the international arena should also be considered as implying the existence of genocidal intent in the Yugoslavian conflict.[90]

Lastly, in this context, it should be noted that the specific intent requirement of genocide must not be confused with the discriminatory intent of crimes against humanity which is regulated as a precondition for all categories of offences of crimes against humanity in the ICTR Statute, while the ICTY and the ICC Statutes give place for this element just for the offence of persecution.[91] This was one of the main issues in the *Kayishema and Ruzindana Case* before the ICTR. In this case, the Tribunal indicated that in some instances the discriminatory grounds for genocide and crimes against humanity can coincide and overlap on the grounds that '[t]he definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of "extermination and persecutions on political, racial or religious grounds" and it was intended to cover "*the intentional destruction of groups in whole or in substantial part*" … The crime of genocide is a type of crime against humanity'.[92] In light of this understanding, the majority of the Tribunal[93] held that the crime of genocide, and murder and extermination – two specific categories of offences under the concept of crimes against humanity – overlap and in fact they were the same offences in this particular case, therefore, 'extermination and murder [were] subsumed fully by … genocide', in other words, the accused were found guilty of genocide, but not guilty of extermination and murder under crimes against humanity.[94] The legal basis for reaching such a conclusion was that in the particular case the required elements of crimes against humanity, the acts and the required elements of genocide, in particular genocidal intent to destroy or exterminate the Tutsi population, were the same for the same sets of facts and that the protected social interest, protection of Tutsi civilians was the same.[95]

The view taken by the ICTR in the *Kayishema and Ruzindana Case* cannot be considered as reflecting customary international law and its

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the Republic of Bosnia and Herzegovina [to the ICJ], *the Genocide Case* (20 March 1993), in Francis A. Boyle, *The Bosnian People Charge Genocide* (Amherst, Massachusetts: Aletheia Press, 1996), in particular, *see* para. 87B of the Application setting out evidence and statements implicating the FRY Government's involvement in genocide. For the utterances of soldiers that can be considered as proving the presence of the requirement of intent of genocide, *see* paras. 32, 37, 54, 83 of the Application.

90. Webb, J., 'Genocide Treaty – Ethnic Cleansing – Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia' (1993), 23 *GA. J. Int'l & Comp. L.*, pp. 400–1. For an opinion on how to determine whether there exists the specific intent requirement of genocide, *see* Petrovic, D., 'Ethnic Cleansing – An Attempt at Methodology' (1994), 5 *EJIL*, pp. 357–8. For the connection between the concept of ethnic cleansing and genocide in the practice of the ICTY in Rule 61 decisions, *see Karadzic and Mladic Cases*, paras. 64, 94; *Nikolic Case*, para. 34.
91. For its explanation and discussion, *see* Chapter 6, p. 251, The Requirement of Discriminatory Intent.
92. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 89 (emphasis in original).
93. Judge Khan dissented on this point. *See Separate and Dissenting Opinion of Judge Tafazzal Hossain Khan Regarding the Verdicts under the Charges of Crimes Against Humanity/Murder and Crimes Against Humanity/Extermination* (Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, Case No. ICTR-95-1-T, 21 May 1999).
94. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 647–9.
95. Ibid., para. 646. For its discussion by the ICTR in more detail, *see* paras. 625–44.

understanding, interpretation and application of the concept of genocide; the required intent for the crime, especially, should be seen as damaging the whole concept of international humanitarian law for the following reasons:

First, as indicated earlier, the concepts of crimes against humanity and of genocide are totally different and independent categories of international crimes,[96] which have different elements, protect different interests and most importantly, it is necessary under international criminal law that in recording a conviction for the same sets of acts, which constitute different offences, to describe what the legal base was for the conviction and what the responsible individuals did.[97]

Second, the Statutes of the *ad hoc* tribunals or of the ICC do not set out any hierarchy between the norms governing war crimes, genocide and crimes against humanity.[98] On this ground it is not possible to apply the rules of international humanitarian law, as the ICTR did in the *Kayishema and Ruzindana Case*, as a way of finding an accused guilty of genocide, but not guilty of crimes against humanity or of war crimes despite the presence of their requirements being satisfied.

Third, holding an individual criminally responsible for the same set of acts for example, for both crimes against humanity and the crime of genocide, does not mean that the individual will be punished twice for the same acts. It is well-established under the practice of the *ad hoc* tribunals that the concept of concurrent sentences prevents the accused from being punished twice and provides an acceptable solution to this issue. The place to deal with the consequence of concurrence is the penalty stage of final Judgements, by sentencing the individual concurrently for the cumulative charges rather than the verdict.[99]

Lastly, the practice of the ICTY in the *Jelisic Case* in which the accused was acquitted of genocide, but found guilty of crimes against humanity,

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96. For reasons, *see supra* p.204, Distinguishing the Crime of Genocide from Crimes Against Humanity.
97. Trial Chamber, *Akayesu Case, Judgement*, para. 6.1.211.
98. Ibid., paras. 6.1.214–15.
99. *See Separate and Dissenting Opinion of Judge Khan*, para. 6. This issue arose for the first time before the ICTY in the *Tadic Case*, and in its decision the Trial Chamber held that '[i]n any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. 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' (*Tadic Case*, *Decision on Defence Motion on Form of the Indictment*, Case No. IT-94-1-T, 14 November 1995, p. 10). In the *Tadic Case*, Tadic was found guilty of crimes against humanity and of war crimes – violations of the laws or customs of war – for the same act of beating and sentenced to imprisonment 7 and 6 years respectively for these acts. The Tribunal stated that these sentences will be served concurrently. (*Prosecutor v. Dusko Tadic, Sentencing Judgement*, Case No. IT-94-1-T, 14 July 1997, paras. 74–5). The same approach was again deployed by the ICTY in the *Celebici Camp Case*, *see Celebici Camp Case, Judgement* (*Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Lanzo*, Case No. IT-96-21-T, 16 November 1998, *see Sentencing Part of the Judgement,* in particular, para. 1204). The ICTR in the *Akayesu Judgement* also referred to the practice of the ICTY and indicated the possibility of enforcement of concurrent sentence (Trial Chamber, *Akayesu Judgement*, paras. 6.1.200–3). This also creates a controversy between the practice of the different Chambers of the ICTR.

that is, persecution, on the premise that the genocidal intent of the accused was not proven beyond a reasonable doubt while his discriminatory intent for persecution, a category of crimes against humanity, was proven,[100] should be noted in order to indicate the fact that the concepts of crimes against humanity and of genocide have different purposes, that their elements, in particular the intent requirement of genocide, do not coincide or overlap. In this sense, the significance of the *Jelisic Case* lies in indicating the difference between the genocidal intent and discriminatory intent of crimes against humanity for the offence of persecution.

The Act

The third element of the crime of genocide is that there must be an act constituting this crime. The acts regarded as constituting genocide are indicated in Article 2 (a–e) of the Genocide Convention and verbatim taken its place in the Statutes of the *ad hoc* tribunals.[101] These acts vary from killing members of the group to forcibly transferring children of the group to another group[102] and are exhaustive, not illustrative in nature.[103]

Which acts constitute the crime of genocide will be discussed in more detail below.

The Substantive Content of the Crime of Genocide

In international humanitarian and criminal law, the following acts are regarded as constituting the crime of genocide when 'committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group'.[104]

As clearly understood from this regulation, some of the acts are very clear and easy to apply to specific events while the others are vague in nature such as causing serious bodily or mental harm to members of the group.[105] In this sense, the significance of the practice of the *ad hoc* tribunals can be examined in the interpretation and application of the acts and in the determination of the scope of each category of act, in other words, which types of offences fall within the meaning of these acts.

In addition to the importance of the practice of the *ad hoc* tribunals in relation to the acts of genocide, the establishment of individual criminal responsibility should also be indicated and discussed under this subtitle since the Statutes of the ICTY and the ICTR give a place to a special provision

100. *See supra* notes 18, 88.
101. Arts. 2 (2) (a–e) and 4 (2) (a–e) of the ICTR and the ICTY Statutes respectively.
102. Ibid.
103. Art. 17 of the ILC Draft Code; Art. 6 of the ICC Statute; Ratner and Abrams, p. 28.
104. Art. 2 of the Genocide Convention; Art. 2 (2) of the ICTR Statute; Art. 4 (2) of the ICTY Statute; Art. 17 of the ILC Draft Code; Art. 6 of the ICC Statute.
105. Roberge, pp. 663–4; Ratner and Abrams, p. 28.

governing individual criminal responsibility with regard to the crime of genocide, apart from the general regulation of individual responsibility.[106]

The Acts Constituting Genocide

As has already been indicated above, the practice of the *ad hoc* tribunals has a significant place in terms of providing the first ever interpretation and application of the concept of genocide in international humanitarian law and there is no doubt that their practice will guide the international community and the ICC in this regard. This is also valid in relation to the acts constituting genocide.

Killing Members of the Group

This is one of the most obvious acts constituting the crime of genocide and the international community witnessed the commission of genocide in the killing of members of groups in the Yugoslavian and Rwandan conflicts.[107]

In practice, the ICTR in the *Akayesu Judgement* concentrated on the term 'killing' in the English version and indicated its difference from the French version '*meurtre*' as killing can include 'both intentional and unintentional homicides'.[108] The International Tribunal did not accept the English version of the term 'killing' as authoritative since the crime of genocide includes unlawful and intentional killings, but not unintentional ones.[109] However, as long as the crime of genocide is concerned, the view deployed by the ICTR in the *Akayesu Case* has no importance on the ground that the crime of genocide requires a specific intent to destroy, in whole or in part, the protected group and as a matter of practicality, no difference can be found between the term 'killing' in the English version and *'meurtre'* in the French version. In fact, in the following case, the *Kayishema and Ruzindana Judgement*, the International Tribunal indicated this fact.[110]

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106. *See* Art. 2 (3) of the ICTR Statute; Art. 4 (3) of the ICTY Statute. For general regulations of individual criminal responsibility, *see* Arts. 6 and 7 of the ICTR and the ICTY Statutes, respectively. For the practice of the *ad hoc* tribunals in relation to the principle of individual criminal responsibility and their contribution to international humanitarian law and possible impact on the ICC, *see supra* Chapter 3, p. 81.
107. There is a great deal of evidence and reports indicating the killing of innocent civilians in these two conflicts. *See supra* Chapter 1, notes 30–8, 51, 53–5; and also *see Application of the Republic of Bosnia and Herzegovina* [to the ICJ], paras. 34–4, 44A–N.
108. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.1.274–5.
109. Ibid., paras. 6.3.1.276–7.
110. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 101–4. The ICTR cited the commentary on the crime of genocide in relation to the ILC Draft Code as follows: '[The acts] are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. They are not the type of acts that would normally occur by accident or even as a result of mere negligence … the definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act' (para. 103). For the practice of the ICTY accepting murders as constituting the crime of genocide, *see Krstic Case, Judgement,* para. 546.

Causing Serious Bodily or Mental Harm to Members of the Group

Under Articles 2 (2) (b) and 4 (2) (b) of the ICTR and the ICTY Statutes, respectively, the International Tribunals have power to prosecute and punish responsible persons with the acts considered as 'causing serious bodily or mental harm to members of the group' under the crime of genocide. However, there is no definition of the phrases 'serious bodily or mental harm' in the Genocide Convention, as with the provisions of the Statutes of the *ad hoc* tribunals, and also the drafting history of the Convention does not do any more than indicate that the use of drugs or narcotics is prohibited and can constitute mental harm which is punishable under this category of act of genocide.[111]

On this ground, the practice of the *ad hoc* tribunals has a significant role to play in terms of providing the first ever definition of this concept and of providing guidance for the international community and the ICC with regard to determining the substantive content of causing serious bodily or mental harm to members of the group, in other words, indicating which types of offences or acts constitute the crime of genocide under this subparagraph act of genocide.

In practice, the ICTR, in the *Akayesu Judgement*, first clarified the issue of whether the constitution of an act on causing serious bodily or mental harm needs to be permanent or not,[112] and the International Tribunal decided that '[c]ausing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable'.[113] Furthermore, according to the *Akayesu Judgement*, serious bodily or mental harm cannot be limited to the 'acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution'.[114] Indeed, in the Legal Findings Part of the Judgement, the Tribunal, for the first time in international law, explicitly ruled that 'rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, … one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm', and thus, they constitute the crime of genocide.[115] In the *Kayishema and Ruzindana Case*, the ICTR confirmed the interpretation, application and findings of the *Akayesu Judgement*[116] and

111. The ILC Draft Code and the ICC Statute do not provide any definitions for this offence either. For the drafting history of the Genocide Convention in relation to this act, *see* Lippman, pp. 31–2; Ratner and Abrams, p. 28.
112. This was one of the main issues in the US understanding of the Genocide Convention and according to the US understanding of the terms 'mental harm' meant 'permanent impairment of mental faculties'. *See* Bryant, B., 'The United States and the 1948 Genocide Convention' (1975), 16 *Harv. Int.'l L. J.*, pp. 693–6. This way of interpretation is completely against the practice of the *ad hoc* tribunals. *See infra* note 115 and accompanying text.
113. Trial Chamber, *Akayesu Case, Judgement*, para. 6.3.1.279.
114. Ibid., para. 6.3.1.283. For the practice of the ICTY regarding the infliction of serious bodily or mental harm to members of the group constituting the crime of genocide, *see Kristic Case, Judgement,* para. 560.
115. Ibid., paras. 7.8.214–15. For the definition of rape and sexual violence, the practice of the *ad hoc* tribunals in this regard, and its importance in international humanitarian law, *see supra* Chapter 4, p. 156, Rape and Any Other Forms of Sexual Violence as Torture under the Grave Breaches System.
116. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 108. The *Rutaganda Judgement* followed this approach. *See* Trial Chamber, *Rutaganda Case, Judgement*, para. 2.2. (under the heading of genocide in the Applicable Law Part of the Judgement).

even more provided a definition for the notion of causing serious bodily harm as follows: '[it] could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses'.[117]

In international humanitarian law, the most significant part of the practice of the ICTR lies in the recognition of rape and sexual violence as a means of committing genocide. This is the first time in international law that sexual crimes are considered as constituting acts which fall within the meaning of the Genocide Convention and they have the same effects as other acts in terms of destroying the protected groups.[118] The view taken by the ICTR should be considered as a creating historical precedence in international humanitarian law on the basis of providing the interpretation and application of the Genocide Convention in accordance with the events that have occurred around the world, in this sense the commission of rape and sexual violence on a massive scale during the course of armed conflicts, and with the modern concept of international humanitarian law. This is one of the main reasons why the international community has welcomed the *Akayesu Judgement*.[119]

There cannot be any doubt that the approach taken by the ICTR will firstly guide the ICTY in regard to the inclusion of rape and sexual violence in the concept of causing serious bodily or mental harm to members of the group since these offences were committed in a systematic and planned manner in the Yugoslav conflict[120] and then the ICC in its case law.

Lastly, it should be indicated that although there is no application, at the moment, to the siege of towns, destruction of national symbols such as cultural and religious monuments as a means of constituting the act considered as causing serious bodily or mental harm in the practice of the *ad hoc* tribunals, that can be taken into account as a means of genocide.[121] Of course, this way of understanding should not be

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117. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 109. For the concept of serious mental harm, *see* paras. 110–13.

118. The related part of the *Akayesu Judgement* that has historical importance in international humanitarian law can be cited as follows: '… rape and sexual violence … constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. … the acts of rape and sexual violence … were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times. … These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole' (paras. 7.8.214–15). 'Sexual violence was a step in the process of destruction of the [T]utsi group – destruction of the spirit, of the will to live, and of life itself' (paras. 7.8.216–17).

119. *See supra* note 35; and also *see* Askin, K.D., 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status' (1999), 93 *AJIL*, pp. 107–8; Cisse, C., 'The End of a Culture of Impunity in Rwanda?' (1998), 1 *YIHL*, p. 171; McDonald, A., 'The Year in Review' (1998), 1 *YIHL*, p. 127.

120. *See Final Report*, paras. 236–53; *Application of the Republic of Bosnia and Herzegovina* [to the ICJ], paras. 45–68, 68A–F; Allen, B., *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (London, Minneapolis: University of Minnesota Press, 1996); Stiglmayer, A., (ed.), *Mass Rape, the War Against Women in Bosnia Herzegovina* (Lincoln, London: University of Nebraska Press, 1994).

121. Petrovic, pp. 356–7.

perceived as the concept of 'cultural genocide'[122] is under the jurisdiction of the *ad hoc* tribunals, but, at least, in a wartime situation, it should be considered as constituting the evidence of proving specific intent of the crime of genocide, and possibly as constituting mental harm to the members of the group.

Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about its Physical Destruction in Whole or in Part

According to Articles 2 (2) (c) and 4 (2) (c) of the Statutes of the ICTR and the ICTY, respectively, the crime of genocide can be committed by acts of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'. Like the acts causing serious bodily or mental harm to members of the group, the definition and exact scope of these acts are not clear enough.[123] In this sense, the practice of the *ad hoc* tribunals plays a crucial role in interpreting and applying the provisions of their Statutes in this respect.

In the ICTR practice, this concept was defined as 'the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction'[124] and 'subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement' were indicated as some examples of means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.[125]

With regard to the scope of the acts constituting 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', the destruction of villages, shelling of cities in which there is no military objective or if its destruction does not provide any military advantage, establishments of concentration camps, attacking international relief convoys which prevents the protected group

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122. The ILC Commentary on the crime of genocide explains this concept as follows: '… the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. … It is true that the 1947 draft Convention prepared by the Secretary-General and the 1948 draft prepared by the Ad Hoc Committee on Genocide contained provisions on "cultural genocide" covering any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group. However, the text of the Convention ... did not include the concept of "cultural genocide" …' (pp. 32–3).
123. Roberge, p. 664; Ratner and Abrams, p. 28. For the drafting history of the Genocide Convention in this regard, *see* Lippman, pp. 32–4.
124. Trial Chamber, *Akayesu Case, Judgement*, para. 6.3.1.285.
125. Ibid., paras. 6.3.1.286–7. The *Kayishema and Ruzindana Case* followed the approach taken by the ICTR in the *Akayesu Judgement* (Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 114–16). The *Rutaganda Judgement* again confirmed this view (Trial Chamber, *Rutaganda Judgement*, para. 2.2. under the heading of genocide in the Applicable Law Part of the Judgement).

from reaching food, medicine or shelter, forcible deportation or displacement of innocent civilians under inhuman conditions can also be included.[126]

Imposing Measures Intended to Prevent Births within the Group

The acts considered as imposing measures intended to prevent births within the group can be prosecuted and punished under Articles 2 (2) (d) and 4 (2) (d) of the Statutes of the ICTR and the ICTY, respectively. Like the previous two categories of acts of genocide, the exact scope of these acts are not clear enough. When the drafting history of Article 2 (d) of the Genocide Convention is examined, it can be clearly seen that the main reason for the inclusion of such a provision in the Convention was to protect the human groups from being destroyed in this way. The drafting history of the Convention in this particular respect indicates that Article 2 (d) of the Convention can be interpreted as including castration, sterilisation, compulsory abortion and the segregation of the sexes.[127] As will be indicated below, the scope of this category of acts is much wider than the view expressed during the course of the adoption of the Genocide Convention. The practice of the *ad hoc* tribunals creates a significant opportunity for the international community with regard to determining the scope of what types of acts can constitute genocide in the meaning of imposing measures intended to prevent births within the group.

In practice, the ICTR in the *Akayesu Case* held that 'sexual mutiliation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriages' could constitute the crime of genocide.[128] The real significance of the practice of the ICTR lies in the inclusion of rape as constituting the crime of genocide under the heading of measures intended to prevent births within the group while the crime of rape may result in a birth.[129] Furthermore, the practice of the ICTR noted that measures intended to prevent births within the group might not be only physical, but could also be mental.[130]

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126. How these acts can constitute the crime of genocide in the case of the Yugoslav conflict, *see Application of the Republic of Bosnia and Herzegovina* [to the ICJ], paras. 69–82.
127. Lippman, p. 34.
128. Trial Chamber, *Akayesu Case, Judgement*, para. 6.3.1.289. The other cases followed this approach. *Kayishema and Ruzindana Case, Judgement*, para. 117. *Rutaganda Case, Judgement*, para. 2.2 under the heading of genocide in the Applicable Law Part of the Judgement.
129. Trial Chamber, *Akayesu Case, Judgement*, para. 6.3.1.289. From the Judgement of the ICTR, the legal base for such an interpretation can be cited as follows: 'In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group, with the intent to have her give birth to a child who will consequently not belong to its mother's group' (para. 6.3.1.289).
130. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.1.290–1; *Kayishema and Ruzindana Case, Judgement*, para. 117; *Rutaganda Case, Judgement*, para. 2.2 under the heading of genocide in the Applicable Law Part of the Judgement. The Trial Chamber in the *Akayesu Judgement* explained how the mental element involved in rape can be used to prevent births within the group as follows: '… rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate' (paras. 6.3.1.290–1).

The approach taken by the ICTR creates a precedential value for the ICTY and the ICC. As similar to the Rwandan case, the international community has witnessed the widespread and planned rape of Bosnian Muslim women. The perpetrators of this horrible crime must be brought to justice before the ICTY. There cannot be any doubt that the crime of rape can be tried as an act constituting the crime of genocide under the category of imposing measures intended to prevent births within the group, as the ICTR practice proved. This is particularly important for the Bosnia and Herzegovina conflict on the ground that the offence of rape, in the culture of this society, is 'perceived as staining its victims, making single women unmarriageable and married women subject to rejection by their husbands'[131] that can be interpreted as a means of imposing measures intended to prevent births within the group and, thus, as constituting the crime of genocide.[132]

Forcibly Transferring Children of the Group to Another Group

The last category of the act constituting genocide is the forcible transfer of children from one group to another and the ICTR and the ICTY have jurisdiction over such acts.[133] Although there is no indication that this offence was committed in the Yugoslav and Rwanda conflicts, the ICTR interpreted this provision as follows: '… the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another'.[134] The interpretation and application of this notion in a way of including mental aspects of transferring children of the group to another group should be regarded as a significant point in terms of making clear its substantive content in international humanitarian law.

Individual Criminal Responsibility for the Crime of Genocide

The regulations of the Genocide Convention provide both State responsibility and individual criminal responsibility in relation to the crime of genocide. Although the notion of State responsibility for the crime of genocide is not a part of this study, it should be briefly indicated that under Article 9 of the Convention the ICJ has jurisdiction over disputes with regard to the interpretation, application or fulfilment of the Convention,

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131. Morris, V. and Scharf, M.P., *An Insider's Guide*, pp. 86–7. For a brief explanation of this culture and the perception of rape in this society, *see* Zalihic-Kaurin, A., 'The Muslim Women', in Stiglmayer, A. (ed.), *Mass Rape: The War Against Women in Bosnia Herzegovina* (Lincoln, London: University of Nebraska Press, 1994), pp. 170–3.
132. Morris and Scharf, *An Insider's Guide*, p. 87. Application of the Republic of Bosnia and Herzegovina [to the ICJ], para. 83.
133. Art. 2 (e) of the Genocide Convention; Art. 2 (2) (e) of the ICTR Statute; Art. 4 (2) (e) of the ICTY Statute. For the drafting history of the Genocide Convention in this regard, *see* Lippman, pp. 35–6.
134. Trial Chamber, *Akayesu Case, Judgement*, para. 6.3.1.293; *Kayishema and Ruzindana Case, Judgement*, para. 118; *Rutaganda Case, Judgement*, para. 2.2. under the heading of genocide in the Applicable Law Part of the Judgement.

and its jurisdiction includes the disputes relating to the responsibility of States which may arise out of breaches of Articles 2 (the acts constituting genocide) and 3 (the punishable acts) of the Genocide Convention.[135] In terms of individual criminal responsibility, the crime of genocide has specific provisions providing responsibility not only for the perpetrators of genocide but also for all those who played an essential role in the occurrence of this horrible crime. In this sense, Article 3 of the Genocide Convention states: '[t]he following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide'. This Article has verbatim taken its place in the Statutes of the *ad hoc* tribunals.[136] However, the ILC Draft Code and the ICC Statute do not specify the punishable acts under the definition of genocide, instead they include one Article dealing with individual criminal responsibility which is applicable to all crimes, the crime of aggression, war crimes, genocide and crimes against humanity.[137] The way adopted, in particular in the ICC Statute, can be, at first glance, considered as 'a positive innovation and an advancement over the Statutes of the ICTR/ICTY' since it provides a basis for individual criminal responsibility for some additional acts of the crime of genocide like 'soliciting or inducing the crime'.[138] However, this view does not have any legal ground in international humanitarian law since the Statutes of the ICTR and the ICTY, as in compliance with the Genocide Convention, cover all aspects of individual criminal responsibility and also include some punishable acts even if the crime itself does not occur, as a result of the preventive nature of the Convention. The examples of soliciting or inducing the crime are already punishable acts which qualify different forms of complicity in genocide under the Statutes of the ICTY and the ICTR.

Given this ground, the practice of the *ad hoc* tribunals with regard to the establishment of individual criminal responsibility has a unique place in international humanitarian law for the following reasons: Firstly, there is no definition and application of the punishable acts, and the international community will witness the first ever interpretation and application of these concepts. Secondly, as will be indicated below, the specific regulation

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135. In this context, the Application of the Republic of Bosnia and Herzegovina to the ICJ has a significant place since it is the first in international law. *See supra* notes 6, 87; Apart from the Genocide Case, the only case dealing with genocide and State responsibility is the case which was brought by Pakistan against India before the ICJ in 1973. It was related to preventing India from extraditing 195 Pakistani nationals to Bangladesh. All States concerned reached an agreement and the case was not concluded by the ICJ. In this sense, *see Trial of Pakistani Prisoners of War* (Pak. v. India), 1973, *ICJ Rep* 347; Levie, H.S., 'Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India' (1973), 67 *AJIL*, p. 512; Levie, H.S., 'The Indo-Pakistani Agreement of August 28, 1973' (1974), 68 *AJIL*, p. 95; Paust, J.J. and A.P. Blaustein, 'War Crimes Jurisdiction and Due Process: The Bangladesh Experience' (1978), 11 *Van. J. Trans.'l L.*, p. 1, in particular pp. 34–8.

136. Art. 2 (3) of the ICTR Statute; Art. 4 (3) of the ICTY Statute.

137. Art. 2 of the ILC Draft Code; Art. 25 of the ICC Statute. In this Article, the ICC Statute in paragraph 3 (e) just refers to the one category of punishable act in relation to the crime of genocide that is the direct and public incitement of another to commit genocide.

138. Sarooshi, D., 'The Statute of the International Criminal Court' (1999), 48 *ICLQ*, p. 397.

of the punishable acts of the crime of genocide provides individual criminal responsibility that cannot be provided under the general regulation of individual criminal responsibility, as the ICC Statute provides. In this sense, it is necessary to separately examine the concept of individual criminal responsibility with regard to the crime of genocide.[139]

Genocide

Any individual who commits one of the enumerated acts indicated in Articles 2 (2) and 4 (2) of the Statutes of the ICTR and the ICTY, respectively, with intent to destroy, in whole or in part, a national, ethnic, racial or religious group incurs individual criminal responsibility for the crime of genocide.[140]

Conspiracy to Commit Genocide

Under the Statutes of the *ad hoc* tribunals, the crime of genocide is the only crime giving power to the ICTR and the ICTY to hold an individual criminally responsible for conspiracy to commit genocide.[141] There is no definition of conspiracy either in the Genocide Convention[142] or in the Statutes of the *ad hoc* tribunals. However, the finding of *Jean Kambanda* guilty of conspiracy to commit genocide by the ICTR provides a guideline in explaining the concept of conspiracy to commit genocide.[143]

In light of the drafting history of the Genocide Convention, the notion of conspiracy can be defined as an agreement made between two or more persons to commit genocide or any other offence,[144] and to hold an individual criminally responsible for the offence of conspiracy to commit genocide, the mere agreement should be seen as sufficient[145] irrespective of the occurrence of genocide. This way of understanding the concept should be regarded as consistent with the spirit and purpose of the Convention and even more consistent with the name of the Genocide Convention itself – Convention on the *Prevention* and Punishment of the

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139. For the concept of individual criminal responsibility and the practice of the *ad hoc* tribunals, their contribution to international humanitarian law and their impact on the ICC, *see supra* Chapter 3, p. 81.
140. Art. 2 (3) (a) of the ICTR Statute; Art. 4 (3) (a) of the ICTY Statute; Art. 3 (a) of the Genocide Convention.
141. Art. 2 (3) (b) of the ICTR Statute; Art. 4 (3) (b) of the ICTY Statute; Art. 3 (b) of the Genocide Convention.
142. For the drafting history of the Genocide Convention in this respect, *see* Lippman, pp. 39–41.
143. The ICTR found *Jean Kambanda* guilty of conspiracy to commit genocide in light of his guilty plea in relation to the crime of genocide, but did not examine the notion of conspiracy to commit genocide. *See Prosecutor v. Jean Kambanda, Judgement and Sentence*, Case No. ICTR-97-23-S, 4 September 1998, para. 40 (2). The significance of this Judgement lies in the establishment of individual criminal responsibility for the offence of conspiracy to commit genocide and the acknowledgement of the events by *Kambanda* – by his guilty plea – can be used as evidence in the following cases of the ICTR in proving the existence of genocide in Rwanda and setting up the responsibility for conspiracy to commit genocide since he was the Prime Minister of Rwanda at that time.
144. Lippman, pp. 39–40.
145. Ibid.

Crime of Genocide. As clearly inferred from the full name of the Convention, its purpose is not only to provide punishment of individuals for the crime of genocide but also to try to prevent its occurrence. Moreover, the approach taken by the ICTR in relation to attempt to commit genocide, direct and public incitement to commit genocide and complicity in genocide supports such a way of interpretation and application of the concept of conspiracy to commit genocide.[146]

However, the latest development in international humanitarian law, the adoption of the ICC Statute, departs from the ICTY and the ICTR Statutes in terms of not including any provision providing individual criminal responsibility for the offence of conspiracy to commit genocide.[147] The inclusion of the notion of 'common purpose' in Article 25 (3) (d) cannot be interpreted as providing a legal base for holding individuals criminally responsible for the offence of conspiracy to commit genocide on the ground that the establishment of individual responsibility under that notion depends on the occurrence of an unlawful act.[148] In this sense, the approach taken by the international community in the adoption of the ICC Statute can be assessed as a major step backward due to the non-inclusion of a provision providing punishment of the offence of conspiracy to commit genocide. This criticism is also valid for the crime of aggression over which the ICC has jurisdiction.[149] As in the case of the crime of genocide, the means to prevent the occurrence of the crime of aggression is significant and the concept of conspiracy to aggression qualifies one of the best available means to the international community. Unfortunately, the ICC Statute ignores this fact too. For the aforementioned reasons, the right approach might have been the inclusion of a provision stating individual criminal responsibility for conspiracy to commit genocide and to aggression in Article 25 of the ICC Statute. It should also be noted that this way of regulation is also in compliance with the customary rules of international humanitarian law since the concept of conspiracy has taken its place in the Nuremberg Tribunal Charter and in the practice of Second World War war crimes trials.[150]

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146. *See infra* p. 231, Direct and Public Incitement to Commit Genocide; p. 232, Attempts to Commit Genocide; and p. 233, Complicity in Genocide.
147. *See* Art. 25 of the ICC Statute.
148. Article 25 (3) (d) of the ICC Statute states:

> '3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: …
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime.'

For an excellent interpretation and application of the notion of 'common purpose' and the establishment of individual criminal responsibility in this regard, *see* Appeals Chamber, *Prosecutor v. Tadic, Judgement*, Case No. IT-94-1-A, 15 July 1999, paras. 185–234.

149. Art. 5 of the ICC Statute.
150. Article 6 of the Charter of the Nuremberg Tribunal in its last paragraph states: 'Leaders, organ-

Direct and Public Incitement to Commit Genocide

The notion of direct and public incitement to commit genocide constitutes a punishable act under the Statutes of the *ad hoc* tribunals in accordance with the regulation of the Genocide Convention.[151] However, there is no definition of this offence in these international humanitarian law instruments. For the first time in international law, the practice of the ICTR provides a detailed examination of this concept.

In the *Akayesu Case*, the ICTR, first of all, examined the meaning of the three terms: incitement, direct and public under both common law and civil law systems,[152] and then defined the offence of direct and public incitement to commit genocide as

> directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter[ials] in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.[153]

From this definition, it can be easily inferred that for an act to be considered as an offence of direct and public incitement to commit genocide, there must be two elements: (a) the existence of incitement (or of provocation) to commit genocide; (b) this incitement must be direct and public. In terms of indicating how an act can be justified as direct and public, the definition made by the International Tribunal creates a guidance for the international community.

The mental requirement (*mens rea*) of this crime is 'the intent to directly prompt or provoke another to commit genocide', in other words, 'the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[154] The issue on this point before the ICTR was whether the crime of direct and public incitement to commit genocide was punishable even if the incitement was not successful. The International Tribunal in this respect decided that 'genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such,

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isers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.' For a brief explanation on the concept of 'criminal conspiracies' and the practice of the Nuremberg Tribunal, *see* Morris and Scharf, pp. 270–2.

151. Art. 3 (c) of the Genocide Convention; Art. 2 (3) (c) of the ICTR Statute; Art. 4 (3) (c) of the ICTY Statute. For the drafting history of the Genocide Convention in this respect, *see* Lippman, pp. 43–6.
152. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.3.32–41.
153. Ibid., paras. 42–3.
154. Ibid., paras. 6.3.3.44–5.

even where such incitement failed to produce the result expected by the perpetrator'.[155]

The view taken by the International Tribunal should be welcomed by international lawyers and by the international community. It is also in compliance with the spirit and purpose of the Genocide Convention. This is because, the Genocide Convention does not only aim to punish individuals for the crime of genocide, but also to prevent it. The name of the Convention is self-explanatory. For these reasons, the crimes of genocide and of direct and public incitement to commit genocide are completely different in terms of establishing individual criminal responsibility. As rightly decided by the International Tribunal, an individual who directly and publicly incites another person or persons to commit genocide incurs individual criminal responsibility irrespective of whether the crime of genocide has occurred. The understanding of the concept in this way is so significant as to prevent the occurrence of the crime of genocide which costs many innocent lives. For this reason, perhaps the crime of direct and public incitement to commit genocide has explicitly taken its place in the ICC Statute although it does not employ a specific Article for the punishable acts of genocide.[156] There cannot be any doubt that the practice of the *ad hoc* tribunals creates a precedential value with regard to indicating the elements of the offence of direct and public incitement to commit genocide and creating guidance on the issue of how a specific act can be considered as constituting this offence for the following cases of the *ad hoc* tribunals and the ICC in its case law.

Attempts to Commit Genocide

One of the other acts punishable under the Statutes of the *ad hoc* tribunals, as with the Genocide Convention, is to attempt to commit genocide.[157] The ICTR in the *Rutaganda Judgement*, while dealing with the concept of individual criminal responsibility briefly indicated the difference between anattempt to commit genocide and an attempt to commit any other crimes as follows:

> the Chamber notes that Article 2 (3) of the Statute, on the crime of genocide, provides for prosecution for attempted genocide, among other acts. However, attempt is by definition an inchoate crime, inherent in the criminal conduct per se irrespective of its result. Consequently, the Chamber holds that an [a]ccused may incur individual criminal responsibility for inchoate offences under Article 2 (3) of the Statute and that, conversely, a person engaging in any form of participation in other crimes falling within the jurisdiction of the Tribunal, … would incur criminal responsibility only if the offence were consummated.[158]

155. Ibid., paras. 6.3.3.48–9. In the *Rutaganda Judgement*, this ruling was again confirmed. Trial Chamber, *Rutaganda Case, Judgement*, para. 2.2 under the heading of genocide in the Applicable Law Part of the Judgement.
156. *See* Art. 25 (3) (e) of the ICC Statute.
157. Art. 3 (d) of the Genocide Convention; Art. 2 (3)(d) of the ICTR Statute; Art. 4 (3) (d) of the ICTY Statute.
158. Trial Chamber, *Rutaganda Case, Judgement*, para. 2.2. under the heading of genocide in the Applicable Law Part of the Judgement.

The view taken by the ICTR clearly distinguishes the concept of attempt to commit genocide from other crimes in this regard. However, the ICC Statute ignores this fact and regulates the concept of attempt for all crimes as a general principle of criminal law.[159] The way adopted in the ICC Statute should be considered as against the practice of the *ad hoc* tribunals and as not consistent with the purpose and the nature of the Genocide Convention on the basis of not serving the preventive aspects of the Convention. In particular, the regulation of the ICC Statute with regard to the case of 'a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose'[160] cannot be supported in international humanitarian law for the aforementioned reasons. Such a situation should not be an obstacle to the establishment of individual criminal responsibility, but may be taken into consideration as a mitigating factor in sentencing procedure as far as the crime of genocide is concerned.

Complicity in Genocide

The last category of act punishable in relation to the crime of genocide under the Statutes of the *ad hoc* tribunals, as with the Genocide Convention, is complicity in genocide.[161] As similar to the other punishable acts of genocide, there is no definition of the offence of complicity in genocide either in the Convention[162] or in the Statutes of the ICTY and the ICTR. For this reason, the practice of the *ad hoc* tribunals has a significant place in international humanitarian law with regard to making clear the definition and elements of the crime of complicity in genocide.

For the first time in international humanitarian law, the ICTR in the *Akayesu Case* examined the concept of complicity in genocide in detail. In its decision, the International Tribunal defined the notion of complicity and accomplice in this regard for all crimes as follows:

> … complicity is … a form of criminal participation by all criminal law systems. … the accomplice to an offence may be defined as someone who associates himself in an offence committed by another, complicity necessarily implies the existence of a principal offence.[163]

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159. Article 25 (3) (f) of the ICC Statute provides: '3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: …
(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.'
160. Ibid.
161. Art. 3 (e) of the Genocide Convention; Art. 2 (3) (e) of the ICTR Statute; Art. 4 (3) (e) of the ICTY Statute.
162. For the drafting history of the Genocide Convention in this respect, *see* Lippman, pp. 47–9.
163. Trial Chamber, *Akayesu Case, Judgement*, para. 6.3.2.327.

To find an individual criminally responsible for the offence of complicity in genocide, someone else has to commit the crime of genocide, but it does not mean that the principal perpetrator or perpetrators of the crime of genocide have to be prosecuted and punished in order to find the individual criminally responsible as an accomplice to the genocide.[164] As a result of this, an individual cannot be found guilty of both crimes, the commission of the crime of genocide and complicity in genocide, in terms of the same act.[165]

According to the Tribunal, the physical elements (*actus reus*) of complicity in genocide can mostly be in three different forms of accomplice participation, namely, 'complicity by instigation, complicity by aiding [or] abetting, and complicity by procuring means'.[166] In this context, the general regulation of individual criminal responsibility in Articles 6 (1) and 7 (1) of the ICTY Statutes, respectively, under which any individual can be found guilty on the basis of participation in the crimes; war crimes, crimes against humanity and genocide, should be noted due to the fact that complicity in genocide can be a form of this regulation as well.[167] However, the establishment of individual criminal responsibility for complicity in genocide under the provision of the Genocide Convention, as with Articles 2 (3) (e) of the ICTR and 4 (3) (e) of the ICTY Statutes, and under the general regulation of individual criminal responsibility in Articles 6 (1) of the ICTR and 7 (1) of the ICTY Statutes are quite different from one another. The first main difference can be examined in the requirement of the mental element of complicity in genocide. Under Articles 6 (1) and 7 (1) of the ICTR and the ICTY Statutes, to hold an individual criminally responsible for complicity in genocide in a way of aiding, abetting, planning, preparing or executing genocide, it has to be proven that the individual acted with specific genocidal intent, that is to say, with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such, while it is not necessary to establish the responsibility of an individual as an accomplice to the crime of genocide[168] under Articles 2 (3) (e) of the ICTR and 4 (3) (e) of the ICTY Statutes. This is because, as rightly held by the International Tribunal, the mental element (*mens rea*) of the offence of complicity in genocide does not necessarily require the existence of the specific intent of genocide, the presence of *knowledge* of the genocidal plan is sufficient to establish individual criminal responsibil-

164. Ibid., paras. 6.3.2.328–35.
165. Ibid., para. 6.3.2.337.
166. Ibid., paras. 6.3.2.338–9. For a detailed explanation of this element by the Tribunal in light of the Rwandan Penal Code, *see* paras. 6.3.2.340–7.
167. Article 7 (1) of the ICTY Statute (Article 6 (1) of the ICTR Statute is the same) states: 'A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.'

For the concept of individual criminal responsibility in international humanitarian law, the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and their impact on the ICC, *see supra* Chapter 3, p. 81.
168. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.2.18–19.

ity.[169] The second main difference can be examined in the form of the physical element *(actus reus)* of complicity in genocide. Under Articles 6 (1) and 7 (1) of the ICTR and the ICTY Statutes, the establishment of individual criminal responsibility for complicity in genocide in a way of aiding, abetting does not necessarily require the occurrence of a positive act, it may be in the form of failing to act or refraining from action, whereas complicity in genocide under Articles 2 (3) (e) and 4 (3) (e) of the ICTR and the ICTY Statutes requires the existence of a positive act.[170]

From the perspective of international humanitarian law, the significance of the practice of the *ad hoc* tribunals with regard to the concept of complicity in genocide lies in the interpretation and application of the notion for the first time in international law by an international tribunal. The approach taken by the International Tribunal in relation to the elements of the offence of complicity in genocide and its distinction from the general regulation of individual criminal responsibility, in Articles 6 (1) and 7 (1) of the ICTR and the ICTY Statutes, should be regarded as a major contribution to international humanitarian law. Moreover, it should be seen as an advancement over the ICC Statute in which the punishable acts of genocide, apart from the crime of direct and public incitement to commit genocide, has not taken its place in the way of specific regulation under the definition of genocide.[171] The way adopted in the ICC Statute, regulating the concept of individual criminal responsibility as a general matter, does not cover the distinguishing features of complicity in genocide under the Genocide Convention and the Statutes of the *ad hoc* tribunals, as has already been indicated above. For this reason, it can be considered as a step backward from the regulation of the Genocide Convention and from the practice of the *ad hoc* tribunals.

Conclusions

The crime of genocide is universally prohibited by the conventional and customary rules of international law irrespective of whether it is committed in time of peace or in time of war. Moreover, the rules governing the crime of genocide enjoy the status of *jus cogens* and the consequential obligation on States to prevent and punish the crime of genocide is *erga omnes* in nature.

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169. Ibid., paras. 6.3.2.5–15. The related conclusion of the ICTR can be quoted as follows: 'In conclusion, the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such' (paras. 6.3.2.14–15).
170. Ibid., paras. 6.3.2.20–1. Even the presence of an individual may be sufficient to establish individual criminal responsibility under Articles 6 (1) and 7 (1) of the ICTR and the ICTY Statutes. To indicate this fact, the ICTR in the *Akayesu Judgement* (in para. 6.3.2.22) refers to the *Tadic Judgement*. For a detailed examination of this concept, *see supra* Chapter 3.
171. *See* Arts. 6 and 25 of the ICC Statute.

However, despite its extensive prohibition, until the practice of the ICTR and the ICTY, it was not possible to enforce the rules governing the crime of genocide, in other words, the Genocide Convention in international humanitarian law, and this situation created many issues in relation to the concept of genocide. In this context, one of the main issues was the recognition of the crime of genocide as a second category of crimes against humanity as consisting of the persecution of individuals on political, racial or religious grounds. As the practice of the ICTR and the ICTY shows, such an understanding has no basis in international humanitarian law on the ground that these two categories of international crimes have developed independently from each other and have different elements in order to be applicable to any specific event. The other major issue was the definition of genocide which was defined under Article 2 of the Genocide Convention as: '… any of the following acts [indicated in the Article through (a)–(e)] committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such'. Under this guideline, the international community has witnessed the misuse and abuse of the concept of genocide in the way that different aspects of life are labelled such as birth control clinics, ecological disasters, or all mass killings of civilians, as genocide, such as the bombings of Hiroshima and Nagasaki by nuclear weapons. The non-existence of an international criminal tribunal or court and of an authoritative interpretation of the Genocide Convention caused these unacceptable perceptions of the notion of genocide. However, today, the international community has two *ad hoc* tribunals operating and one ICC which came into operation on 1 July 2002, all of which have jurisdiction over the crime of genocide. In this sense, there cannot be any doubt that the practice of the *ad hoc* tribunals provides very useful interpretation and application of the crime of genocide and prevents the misuse or abuse of the concept of genocide.

The importance of the practice of the *ad hoc* tribunals can be examined in two ways: Firstly, they interpret and apply the elements of the crime of genocide. Secondly, they clarify the substantive content of the crime of genocide.

For the first time in international law, the requirements of genocide were interpreted and applied by the *ad hoc* tribunals. In this context, the *Judgements of Akayesu, Kayishema and Ruzindana, Kambanda, Rutaganda* rendered by the ICTR on the one hand, *Judgements of Krstic* and *Jelisic* delivered by the ICTY on the other hand are crucial in terms of providing guidance on the elements of genocide.

As has been indicated by the International Tribunal, the first requirement of the crime of genocide is that the acts must be committed against an identifiable group, namely, a national, ethnic, racial or religious group. In a sense, the victim of genocide is the group itself rather than the individual since victims are chosen on the basis of being a member of one of these groups instead of his or her individual identity. The wordings of the international humanitarian law instruments, the Genocide Convention, the Statutes of the ICTY and the ICTR, the ILC Draft Code, the ICC Statute, seem to be limiting the protected groups to national, ethnic, racial and religious groups, and do not provide any definition of these groups. This

situation created a big opportunity for the international community since the *ad hoc* tribunals could work out definitions of these notions in accordance with the necessities of the Yugoslav and Rwandan conflicts. In fact, the ICTR in the *Akayesu, Kayishema and Ruzindana*, and *Rutaganda Judgements* defined the concepts of national, ethnic, racial and religious groups. In this context, the practice of the *ad hoc* tribunals in relation to the interpretation and application of the notion of victimised or protected group within the meaning of the Genocide Convention has a historic significance on the premise that the practice of the ICTR proved that the protected groups are not limited to national, ethnic, racial or religious groups, and that any groups, as long as they are stable and permanent, can be under the protection of the Genocide Convention. The approach taken by the International Tribunal reflects the interpretation and application of the rules of international humanitarian law in a manner which is consistent with the development of international law. However, the interpretation of the protected group in the way of expressly excluding political and economic groups due to being labelled as 'mobile' groups, not stable and not permanent, can be criticised. Although these groups can be protected from the offence of persecution under the concept of crimes against humanity, the right opinion of the International Tribunal should have been that if any political, economic or social group is considered as a stable and permanent group, which can be justified in light of each specific case by an international tribunal or court, they must enjoy the protection of the Genocide Convention within the meaning of a group protected by this Convention.

The second requirement of the crime of genocide is the presence of a specific intent which means that to regard an act constituting genocide, it must be committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. This is the main requirement of genocide that distinguishes it from war crimes and crimes against humanity. The major contributions of the practice of the *ad hoc* tribunals to international humanitarian law and the possible impact on the ICC with regard to the specific intent of genocide can be witnessed in the following points: the interpretation of the relationship between 'intent to destroy' and 'in whole or in part' a protected group, in this sense, the clarification of what acts constitute a destruction of a group; establishing a guideline on how to determine whether the required intent of genocide can be found in a specific case and how to impute the intent to individual perpetrators of this crime, in other words, solving the evidentiary matters; making clear the distinction between the specific intent requirement of genocide, 'genocidal intent', and the 'discriminatory intent' of persecution under crimes against humanity; making clear the independence of the crime of genocide from crimes against humanity, and indicating that murder, extermination – two categories of crimes against humanity – cannot be subsumed by genocide.

The third requirement of the crime of genocide is that there must be an act constituting this offence. The acts regarded as constituting genocide are indicated in Article 2 (a–e) of the Genocide Convention and verbatim taken its place in the Statutes of the *ad hoc* tribunals and of the ICC.

The second major contribution of the practice of the *ad hoc* tribunals to international humanitarian law and possible impact on the ICC can be examined in relation to the interpretation and application of the substantive content of the crime of genocide. The offences which give rise to the crime of genocide are regulated in an exhaustive way, not illustrative in nature, and enumerated in the international humanitarian law instruments as follows: (a) killing members of the group, (b) causing serious bodily or mental harm to members of the group, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, (d) imposing measures intended to prevent births within the group, (e) forcibly transferring children of the group to another group. As clearly inferred from this regulation, some of the acts are very clear and easy to apply to specific cases whereas the others are vague in nature like causing serious bodily or mental harm to members of the group. In this sense, the significance of the practice of the *ad hoc* tribunals lies in the interpretation and application of the acts and in the determination of the scope of each category of act, in other words, which types of offences fall within the meaning of these acts since there is no definition of such acts in the international humanitarian law instruments. In particular, the recognition of rape and sexual violence as constituting the crime of genocide under the categories of 'causing serious bodily or mental harm to members of the group' and of 'imposing measures intended to prevent births within the group', for the first time in international law, by the International Tribunal creates a historical precedence in international humanitarian law and undoubtedly, will have a significant impact on the ICC.

The other major contribution of the practice of the *ad hoc* tribunals to international humanitarian law can be seen in the examination of the establishment of individual criminal responsibility for the crime of genocide. As with the Genocide Convention, under the Statutes of the *ad hoc* tribunals, the punishable acts of genocide are regulated as independent from the general regulation of individual criminal responsibility. The punishable acts of genocide are: (a) genocide, (b) conspiracy to commit genocide, (c) direct and public incitement to commit genocide, (d) attempt to commit genocide, (e) complicity in genocide. The approach taken by the International Tribunal in this regard has an important place in international humanitarian law on the premise that the first ever interpretation and application of these concepts are provided in international law. The view adopted by the International Tribunal also indicates how important the regulation of the punishable acts of genocide under a specific provision is. This is very significant since it provides individual criminal responsibility for the acts which cannot be provided under the general regulation of individual criminal responsibility. For example, the concept of conspiracy to commit genocide can be punishable under the specific regulation of the Genocide Convention and the Statutes of the *ad hoc* tribunals regardless of the occurrence of the crime of genocide. This way of understanding, interpretation and application of the norms governing the crime of genocide is in compliance with the spirit and purpose of the Convention and even more takes into account the preventive nature of the Convention. Similarly,

the notion of complicity in genocide under the specific regulation of the international humanitarian law instruments has its own distinguishing features which cannot be provided by means of a general regulation of individual criminal responsibility. The practice of the *ad hoc* tribunals obviously proves this fact. However, the ICC Statute in this respect departs from the Statutes of the *ad hoc* tribunals and from their practice due to regulating the concept of individual criminal responsibility by virtue of employing one Article for all international crimes over which the ICC has jurisdiction. It does not include a specific provision indicating punishable acts of genocide, apart from the crime of direct and public incitement to commit genocide. The way adopted in the ICC Statute ignores the preventive nature of the Genocide Convention which is also significant for the crime of aggression. This is because these two international crimes cost many innocent lives. The effort to prevent the occurrence of these horrendous crimes is as important as to punish the persons responsible for such crimes. Due to ignoring this fact, the ICC Statute should be seen as a major step backward from the regulations of the Genocide Convention and of the Statutes of the *ad hoc* tribunals and its consequence most importantly from the practice of the *ad hoc* tribunals.

6

Crimes Against Humanity

Introduction

As a category of international crimes, crimes against humanity are universally prohibited by the customary rules of international humanitarian law. Unlike other international crimes, namely, war crimes and the crime of genocide, the concept of crimes against humanity had no conventional base in international humanitarian law until the adoption of the ICC Statute, which is the only international treaty setting up the conditions and the substantive content of crimes against humanity in detail.[1]

As will be indicated in this chapter, the notion of crimes against humanity was one of the most important outcomes of the Second World War. This is because the concept and the individual criminal responsibility in this regard were, for the first time, introduced and enforced by the International Military Tribunals at Nuremberg and Tokyo.[2] Since the Second World War, the concept of crimes against humanity has evolved and become an independent category of international crimes. In this sense, the most significant developments are the adoption of the Statutes of the *ad hoc* tribunals (the ICTY and the ICTR) and of the ICC those of which give power to these international criminal institutions to try and punish individuals responsible for crimes against humanity.[3]

In international humanitarian law, today, it is well-established that the norms governing crimes against humanity have reached the level of *jus cogens* and States' duty to prosecute, punish or extradite the individuals responsible for crimes against humanity is an *obligatio erga omnes* in nature.[4] Despite the nature of the rules on crimes against humanity, there

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1. Art. 7 of the ICC Statute (known as the Rome Statute of the International Criminal Court which was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, UN Doc. A/CONF. 183/9, 17 July 1998 and entered into force in accordance with its Article 126 on 1 July 2002).
2. *See infra*, p. 241, The Concept of Crimes Against Humanity.
3. Art. 5 of the ICTY Statute; Art. 3 of the ICTR Statute; Art. 7 of the ICC Statute.
4. *See supra* Chapter 3, p. 78, Crimes Against Humanity. And also *see Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)* (hereinafter *Final Report*), para. 73. The latest practice of the international community in terms of confirming that the norms of international humanitarian law prohibiting crimes against humanity enjoy the status of peremptory norms of international humanitarian law or of *jus*

are important issues in relation to the definition of crimes against humanity, its elements and substantive content, which derives from the inconsistency of the regulations of the international humanitarian law instruments and of the practice of the international community. It can be examined in the Statutes of the ICTY and the ICTR under which the applicability of crimes against humanity is subject to different elements for each Statute.[5]

However, there cannot be any doubt that the practice of the International Tribunals plays a central role in solving these issues inherited in the concept of crimes against humanity and will create a precedential value for the ICC in its case law.

The Concept of Crimes Against Humanity

Article 5 of the ICTY Statute[6] states:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts.

As has clearly been indicated by the Secretary-General, the legal basis for the inclusion of crimes against humanity in the Statutes of the *ad hoc* tribunals were the Nuremberg Charter, Judgement of the Nuremberg Tribunal and the CCL No. 10 for Germany.[7]

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cogens can be examined in the *Judgement of Kupreskic and Others Case* rendered by the ICTY on 14 January 2000 (Trial Chamber, *Prosecutor v. Kupreskic and Others, Judgement*, Case No. IT-95-16-T, 14 January 2000, para. 520) (hereinafter *Kupreskic and Others Case, Judgement*).

5. *See infra*, p. 245, The Conditions for the Applicability of the Concept of Crimes Against Humanity.
6. The ICTR Statute has different regulations in relation to the conditions for the applicability of the concept of crimes against humanity although it enumerates the same acts constituting crimes against humanity as the ICTY Statute. Article 3 of the ICTR Statute states: 'The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes *when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'* (emphasis added).
7. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN. Doc. S/25704 & Add. 1 (1993) (hereinafter *Secretary-General's Report*), para. 47.

The notion of crimes against humanity has, for the first time in international law, taken its place in the Charter of the Nuremberg Tribunal[8] since the categories of war crimes and crimes against peace were not sufficient to cover some offences which either occurred in peacetime or were committed against the States' own citizens, such as 'atrocities committed by the Nazis against German Jews, Catholics, Gypsies and others'.[9] At the time of the adoption of the Nuremberg Charter it was argued that the regulation of crimes against humanity was not *ex post facto* law since it constituted a part of customary international law. In this context, the legal grounds were Hague Conventions of 1899 (II) and of 1907 (IV) Respecting the Laws and Customs of War on Land, both of which refer to the 'laws of humanity' in their preambles,[10] the Joint Declaration of 28 May (1915) made by France, Great Britain and Russia condemning the Ottoman Empire for committing crimes that were labelled as 'crimes against humanity and civilization' against its own citizens, Armenians,[11] and the *1919 Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws or Customs of War*, which provides individual criminal responsibility for the acts regarded as 'crimes against civilisation and humanity'.[12] However, none of these international law instruments regarded the concept of crimes against humanity

8. Bassiouni, M.C., *Crimes Against Humanity in International Criminal Law* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992), pp. 1, 32, 147.

   Article 6 (c) of the Nuremberg Charter regulates the concept of crimes against humanity as follows: '… namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.

9. Sunga, L.S., *Individual Responsibility in International Law for Serious Human Rights Violations* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992), pp. 44, 46–7.

10. The related part of the preamble of the 1907 Hague Convention can be quoted as follows: 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of law of nations, as they result from the usages established among civilised peoples, from *the laws of humanity,* and *the dictates of the public conscience*' (emphasis added). The text is available in D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts – A Collection of Conventions, Resolutions and Other Documents* (Geneva: Sijthoff and Noordhoff, 1981), pp. 57–92.

    This regulation in international law is known as the 'Martens Clause' and its customary nature was confirmed by the ICJ in the *Nuclear Weapons Case (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (8 July 1996), (1996), *ICJ Rep.*, p. 226, at p. 259, para. 84) and by the ICTY in the *Judgement of the Kupreskic and Others Case* (para. 525). For the concept of the Martens Clause, *see* Miyazaki, S., 'The Martens Clause and International Humanitarian Law', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet,* (Geneva, The Hague: International Committee of the Red Cross, Martinus Nijhoff Publishers, 1984), pp. 433–44.

11. Schwelb, E., 'Crimes Against Humanity' (1946), 23 *BYIL*, p. 181; Bassiouni, pp. 168–9. The literature is contradictory in relation to the alleged crimes committed by the Ottoman Empire against its own Armenian population in the First World War. In this context, for extensive studies or work on the justification and explanation of the Armenian Case, *see* Gurun, K., *Armenian File: The Myth of Innocence Exposed* (London: K. Rustem and Brothers, 1985); Gurun, K., *Ermeni Dosyasi* (Ankara: Turk Tarih Kurumu Yayinlari, 1993); Koymen, A., *Ermeni Soykirim Iddialari ve Arsivlerdeki Gercekler* (Ankara: 1990); Suslu, A., *Ermeniler ve 1915 Tehcir Olayi* (Van: Van Yuzuncu Yil Universitesi Rektorlugu Yayinlari, 1990); Onur, H., *Ermeniler* (Istanbul: Kitabevi, 1999).

as a legally independent category of international crimes. This raises the question of the legality of the Nuremberg Charter; did it create a new law or did it merely reflect the customary rules of international humanitarian law.[13] The approach of the Nuremberg Tribunal itself was equivocal since the Tribunal did not interpret the notion of crimes against humanity as a separate category of crime. Rather it looked for a connection with war crimes or crimes against peace in order for an offence to be punishable under the concept of crimes against humanity.[14] In a sense, the Nuremberg Tribunal treated the concept 'as secondary or ancillary to crimes against peace or war crimes'.[15]

The regulation of the Nuremberg Charter was followed, with some significant differences, by the Tokyo Charter of the International Military Tribunal for the Far East[16] and by the CCL No. 10 for Germany.[17] The most significant difference between the Charters of the Nuremberg and the Tokyo Tribunals and the CCL No. 10 was that the CCL No. 10 did not require the existence of any connection or link with other crimes, namely, war crimes or crimes against peace for the applicability of the concept of crimes against humanity.[18] In addition to these international humanitarian law instruments, Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, which was

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12. The text of the 1919 Report of the Commission is available in B.B. Ferencz, *An International Criminal Court, A Step Toward World Peace: A Documentary History and Analysis* (London, Rome, New York: Oceana Publications Inc., 1980), pp. 169–92. The related part of the Report can be cited as follows: 'All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution' (Ferencz, p. 177).
13. Robinson, D., 'Defining "Crimes Against Humanity" at the Rome Conference' (1999), 93 *AJIL*, p. 44.
14. Sunga, p. 46.
15. Morris, V. and M.P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. I (Irvington-on-Hudson, New York: Transnational Publishers, 1998), p. 162; Morris, V. and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Vol. I (Irvington-on-Hudson, New York: Transnational Publishers, 1995) (hereinafter *An Insider's Guide*), p. 76. For general observations on crimes against humanity in the Nuremberg Judgement, *see* Schwelb, pp. 205–12, in particular p. 206.
16. Article 5 (c) of the Tokyo Charter states: 'Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.' The text of the Tokyo Charter is available in Morris and Scharf, Vol. II. pp. 485–9. For the differences between the Nuremberg Charter and the Tokyo Charter, *see* Schwelb, pp. 215–16.
17. Article II (1) (c) of the CCL No. 10 states: 'Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated.' For the differences between the Nuremberg Charter and the CCL No. 10, *see* Schwelb, pp. 217–19. In this context also *see* Roberge, M-C., 'Jurisdiction of the ad hoc Tribunals for the Former Yugoslavia and Rwanda over Crimes against Humanity and Genocide' (1997), 37 *Int.'l Rev. Red Cross*, p. 655.
18. Ibid. The *Einsatzgruppen Case* is indicated by scholars to emphasise this significant point that the concept of crimes against humanity covers atrocities committed in time of peace. In this sense, *see* Roberge, pp. 655–6; Morris and Scharf, *An Insider's Guide*, pp. 75–6.

adopted by the International Law Commission of the United Nations in 1950[19] and the 1954 Draft Code of Offences against the Peace and Security of Mankind[20] should be indicated in terms of including regulations for the concept of crimes against humanity.

In light of these international humanitarian law instruments, the notion of crimes against humanity has evolved by means of some practice of the national courts.[21] The adoption of the ICTY and the ICTR Statutes under which the International Tribunals have jurisdiction over crimes against humanity by the Security Council in 1993 and 1994, respectively, followed the Second World War war crimes trials and the practice of the national courts.[22] The latest developments in international humanitarian law, the 1996 ILC's Draft Code of Crimes Against the Peace and Security of Mankind[23] and the adoption of the ICC Statute,[24] should also be indicated as evidence of reflecting the current customary status of international law in relation to the concept of crimes against humanity.

As has clearly been understood from the development of the concept of crimes against humanity, despite the fact that the notion has reached the level of *jus cogens* norms status of international humanitarian law until the adoption of the ICC Statute, there was not a clear substantive and uniform definition of crimes against humanity in the field of international law. All the aforementioned international law instruments required different elements for the applicability of crimes against humanity. As will be discussed below, even the Statutes of the ICTY and the ICTR require different elements in this sense for an act to be considered as constituting a

19. Principle VI (c) regulates crimes against humanity. The texts of the UN General Assembly Resolution 95 (I) of 11 December 1946, affirming the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal and of the Principles of International Law are available in Schindler and Toman (eds.), pp. 833, 835–6.

20. The 1954 Draft Code of Offences against the Peace and Security of Mankind was adopted by the International Law Commission. The text of the 1954 Draft Code is available in Johnson, D.H.N., 'The Draft Code of Offences Against the Peace and Security of Mankind' (1955), 4 *ICLQ*, pp. 466–8. One of the most significant points of this Draft Code is that 'inhuman acts' (the words, crimes against humanity were replaced by this phrase), which are regulated in Article 2 (11) of the 1954 Draft Code, do not need to be committed in connection with crimes against peace or war crimes. For the analysis of the 1954 Draft Code, *see* Johnson, pp. 445–66, in particular, p. 465.

21. The *Eichmann Case* is the most important one in which the accused was found guilty of crimes against humanity by the Israeli national court (*Attorney-General of the Government of Israel v. Eichmann* (1961), 36 *ILR*, p. 5, and (1962), 36 *ILR*, p. 277. For the analysis of this case, *see* Fawcett, J.E.S., 'The Eichmann Case' (1962), 38 *BYIL*, pp. 181–215. The significance of the *Eichmann Case* lies in the ruling that no link or connection is necessary between crimes against humanity and other crimes – either war crimes or crimes against peace.

    The Cases of *Demjanjuk v. Petrovski* (recognising the principle of universality for crimes against humanity, *Barbie* (establishing a new element, that is to say, the requirement of State policy for crimes against humanity) and of *Touvier* followed the *Eichmann* practice in international humanitarian law. In this context, for the importance of the practice of national courts in accordance with these and other national court decisions, *see* Ratner, S.R. and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997), pp. 47, 51–3; and also *see* Roberge, pp. 656–8.

22. Art. 5 of the ICTY Statute; Art. 3 of the ICTR Statute.

23. *See* Art. 18 of the ILC Draft Code.

24. *See* Art. 7 of the ICC Statute. Although there are significant differences between the ICC Statute and the Statutes of the *ad hoc* tribunals, it would not be wrong to say that the ICC Statute is a combination of the related provisions of the ICTY and the ICTR Statutes as far as the conditions for the applicability of crimes against humanity are concerned. These differences will be discussed in accordance with the practice of the *ad hoc* tribunals in detail below.

crime against humanity. However, whatever these differences are, the practice of the ICTY and the ICTR undoubtedly plays a crucial role in solving the problems inherited in this concept and will create a precedential value in terms of interpreting and applying the requirements and substantive content of crimes against humanity for the ICC.

The Practice of the *Ad Hoc* Tribunals and Their Contribution to International Humanitarian Law and Their Impact on the ICC

As with war crimes and the crime of genocide, the significance of the practice of the *ad hoc* tribunals with regard to the concept of crimes against humanity can be examined in two ways: Firstly, they interpret and apply the conditions for the applicability of crimes against humanity in relation to the events that occurred in the former Yugoslavia and in Rwanda. Secondly, they clarify the substantive content of crimes against humanity.

The Conditions for the Applicability of the Concept of Crimes Against Humanity

As will be discussed below, the conditions set out in the Statutes of the *ad hoc* tribunals with regard to crimes against humanity are quite different from each other and some of them, in fact, are not required under customary international humanitarian law. For these reasons, the most important aspects of the concept need to be discussed in accordance with the practice of the ICTY and the ICTR and also with the latest international humanitarian law instruments such as the 1996 ILC Draft Code and the ICC Statute. In this context, the following issues will be examined: The existence of an armed conflict; the requirement of attack being directed against any civilian population; the requirement of discriminatory intent; the requirement of *mens rea* (mental element); and the acts.

The Existence of an Armed Conflict[25]

Article 5 of the ICTY Statute explicitly requires the existence of an armed conflict, whether international or internal in nature, to regard an act as constituting a crime against humanity, unlike the ICTR Statute that does not include such a requirement for this category of international crime.[26]

In the practice of the ICTY, the issue of whether the existence of an armed conflict is a necessary element in crimes against humanity under customary international humanitarian law, was dealt with for the first time by the Trial Chamber and Appeals Chamber of the International Tribunal in the *Tadic Case* as an interlocutory decision which is known as the *Tadic Jurisdiction Decision*.[27] In this case, the Defence argued that for the applicability of crimes against humanity, the existence of an armed conflict of an *international* character is required, and the application of the concept to internal armed conflicts by way of Article 5 of the Statute violates the

principle of legality (*nullum crimen sine lege*) since it has no legal ground in customary international law.[28]

In the *Tadic Jurisdiction Decision*, both the Trial Chamber and the Appeals Chamber held that under customary international law, crimes against humanity did not require a connection to armed conflict, whether international or internal in character, and that in fact under Article 5 of the ICTY Statute the jurisdiction of the International Tribunal was limited by means of the inclusion of nexus with armed conflict that made the concept narrower than under customary international law.[29] As a result of this ruling, the International Tribunal decided that Article 5 of the Statute did not violate the principle of *nullum crimen sine lege* at all.[30] Moreover, the Chambers decided that customary international law did not require any nexus between crimes against humanity and crimes against peace or war crimes.[31]

In the Judgement of the *Tadic Case*, the Trial Chamber firstly confirmed the findings of the Appeals Chamber in the *Jurisdiction Decision*,[32] then clarified the requirement of the existence of an armed conflict for the purpose of the International Tribunal. In this context, the Chamber interpreted the condition that crimes against humanity be committed in an armed conflict to mean that 'the act occurred in the course or duration of an armed conflict'.[33] The Tribunal clarified its understanding by way of introducing two caveats which were 'that the act be linked geographically as well as temporally with the armed conflict'[34] and 'the act must not be

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25. For how to decide whether there exists an armed conflict either international or internal in character, the practice of the *ad hoc* tribunals and their contribution to international humanitarian law and possible impact on the ICC, *see supra* Chapter 4, p. 120, The Conditions for the Applicability of the Grave Breaches System.
26. *See* Art. 3 of the ICTR Statute.
27. Trial Chamber, *Tadic Case, Jurisdiction Decision*, Case No. IT-94-1-T (10 August 1995), paras. 75–83; Appeals Chamber, *Tadic Case, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (*Jurisdiction Decision*), Case No. IT-94-1-AR72 (2 October 1995), paras. 138–42.
28. *Defence Motions* (23 June 1995), paras. 11.1–11.6. In this context, for the Prosecution Service's argument that '[t]he ICTY has the power to prosecute the accused under Article 5 of the ICTY Statute insofar as crimes against humanity do not require a nexus with an armed conflict, whether international or internal in character', *see Prosecutor's Response to the Defence's Motions Filed on 23 June 1995* (7 July 1995), pp. 53–9.
29. Trial Chamber, *Tadic Case, Jurisdiction Decision*, paras. 82–3. Appeals Chamber, *Tadic Case, Jurisdiction Decision*, paras. 141–2. The related part of the decision of the Appeals Chamber can be quoted as follows: 'It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. …' (para. 141).
30. Trial Chamber, *Tadic Case, Jurisdiction Decision*, para. 83; Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 141.
31. Trial Chamber, *Tadic Case, Jurisdiction Decision*, paras. 79–81; Appeals Chamber, *Tadic Case, Jurisdiction Decision*, para. 140.
32. Trial Chamber, *Prosecutor v. Dusko Tadic, Judgement*, Case No. IT-94-1-T (7 May 1997), para. 627.
33. Trial Chamber, *Tadic Case, Judgement*, para. 633.
34. Ibid.

unrelated to the armed conflict, must not be done for purely personal motives of the perpetrator'.[35]

The view adopted by the Trial Chamber in the *Tadic Judgement* was followed, with one exception, by the International Tribunal in the *Kupreskic and Others Case*.[36] The exception was in the *Tadic Judgement*'s finding that crimes against humanity cannot be committed for purely personal motives or reasons.[37] This issue will be discussed later under the requirement of *mens rea* for crimes against humanity.

From the point of view of international humanitarian law, the importance of the practice of the ICTY lies in the rulings that under customary international law, crimes against humanity do not need to have any connection to armed conflicts whether international or internal in character, and that they do not need to have any nexus to other crimes, either crimes against peace or war crimes. These two facets of crimes against humanity are crucial in terms of indicating the independence of crimes against humanity from other international crimes and of providing protection for civilians in the cases of human rights violations occurring in time of peace. The way adopted by the ICTY is also in compliance with the latest international humanitarian law instruments: neither the 1996 ILC Draft Code[38] nor the ICC Statute[39] requires the existence of an armed conflict and nexus to other crimes for the applicability of crimes against humanity to specific events. Lastly, it should also be noted that the practice of the International Tribunal is also in compliance with the writings of international lawyers in this regard.[40]

The Requirement of Attack Being Directed Against any Civilian Population

Under both the Statutes of the ICTY and the ICTR, an act to be considered as constituting a crime against humanity, must be 'directed against any civil-

35. Ibid., para. 634 (emphasis in original).
36. Trial Chamber, *Kupreskic and Others Case, Judgement*, paras. 545–6.
37. The main reason for reaching such a conclusion in the *Kupreskic and Others Case* was the ruling of the Appeals Chamber which reversed the *Tadic Judgement* in this regard. *See* Appeals Chamber, *Prosecutor v. Dusko Tadic, Judgement*, Case No. IT-94-1-A (15 July 1999), paras. 238–72.
38. Article 18 of the ILC Draft Code defines crimes against humanity as 'any of the following acts [enumerated in Article 18 (a–k)], when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group'.
39. Article 7 (1) of the ICC Statute defines crimes against humanity as 'any of the following acts [enumerated in Article 7 (1) (a–k)] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.
40. Some scholars interpreted the terms 'when committed in armed conflict, whether international or internal in character' in Article 5 of the ICTY Statute as it was 'a consequence of the limited jurisdiction of the International Tribunal rather than a limitation on crimes against humanity as a matter of international law' (Morris and Scharf, *An Insider's Guide*, pp. 82–3); Ratner and Abrams, p. 57; Bassiouni, p. 191; Cassese, A., 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999), 10 *EJIL*, p. 150; Murphy, S.D., 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1999), 93 *AJIL*, p. 70; Wang, M.M., 'The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact' (1995), 27 *Col. Hum. Rts. L. Rev.*, p. 217; Reydams, L., 'Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice' (1996), 4 *Eur. J. Cr, Cr. L. & Cr. J.*,

ian population'.[41] As will be discussed in accordance with the practice of the *ad hoc* tribunals, this requirement includes several elements which need to be separately examined, because of their importance in international humanitarian law:

(i) The Notion of 'Civilian'

The meaning or scope of the notion of 'civilian' was first examined by the ICTY in the *Tadic Judgement* and it was interpreted in a broad manner in light of the different sources of international humanitarian law ranging from Common Article 3 to the Geneva Conventions to the decision of the French *Cour de Cassation* in the *Barbie Case*.[42] According to the definition of the International Tribunal, 'the presence of those actively involved in the conflict should not prevent the characterisation of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity'.[43]

The approach taken by the International Tribunal in the *Tadic Judgement* has created a precedential value for the following cases of the ICTY[44] and for the ICTR as well.[45]

(ii) The Notion of 'Population'

The International Tribunal, in the *Tadic Judgement*, explained the requirement of 'population' as intending 'to imply crimes of a collective nature

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p. 29; Turns, D., 'War Crimes Without War? – The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts' (1995), 7 *Afr. J. Int.'l Comp. L.*, pp. 812–13. However, it is still possible to see the idea that the concept of crimes against humanity is only applicable to international armed conflicts under customary international law. In this sense, *see* Shraga, D. and R. Zacklin, 'The International Criminal Tribunal for Rwanda' (1996), 7 *EJIL*, p. 509.

41. Art. 5 of the ICTY Statute. Article 3 of the ICTR Statute explains this element in a clearer manner as '… crimes when committed as part of a widespread or systematic attack against any civilian population …'.
42. Trial Chamber, *Tadic Case, Judgement*, paras. 639–43.
43. Ibid., para. 643. To reach such a conclusion, the Tribunal in para. 643 also referred to the finding of the ICTY in the *Vukovar Hospital Case*. In this case, the Tribunal decided that: '… Although according to the terms of Article 5 of the Statute of this Tribunal, the combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance' (*The Prosecutor v. Mile Mrksic, Miroslav Radic and Veselin Sljivancanin, Vukovar Hospital Case, Decision of Trial Chamber I – Review of Indictment Pursuant to Rule 61*, Case No. IT-95-13-R61 (3 April 1996), para. 29).
44. Trial Chamber, *Kupreskic and Others Case, Judgement*, paras. 547–9.
45. The practice of the ICTR, in this regard, is in compliance with the ICTY's approach. In the *Akayesu Judgemen*t, the Rwandan Tribunal even made clearer the issue of who is included in the notion of 'civilian' as follows: 'Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character' (Trial Chamber, *The Prosecutor v. Jean-Paul Akayesu, Judgement*, Case No. ICTR–96-4-T (2 September 1998), paras. 6.4.88–9); Trial Chamber, *The Prosecutor v. Clement Kayishema*

and thus exclude single or isolated acts'.[46] In a sense, as is similar to the crime of genocide, in fact, the victim is not the individual because of his individual attributes, instead, the victim is the targeted civilian population and the individual is chosen or victimised on the basis of his membership of this particular civilian population.[47] For this reason, this element has a very close link with the other requirement of crimes against humanity, that is to say, being a widespread or systematic attack or act.[48]

(iii) The Notion of 'Widespread or Systematic Attack'

Although this element has explicitly taken its place in the ICTR Statute, the ICTY Statute does not expressly require such an element in order for a crime to fall within the meaning of crimes against humanity.[49] However, the *Secretary-General's Report* (commentary to the ICTY Statute) deploys the terms 'widespread or systematic attack against any civilian population' to explain the concept of crimes against humanity.[50]

Given this ground, both *ad hoc* tribunals looked for the presence of the widespread or systematic attack or acts as a condition for the applicability of crimes against humanity to the Yugoslavian and Rwandan situations. In the *Akayesu Judgement*, the ICTR defined the concept of 'widespread' as 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'[51] and defined the notion of 'systematic' as 'thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.[52] The view taken by the ICTR is also consistent with the practice of the ICTY which has also adopted similar definitions for these concepts in the *Tadic Judgement*.[53]

In relation to the element of 'widespread or systematic attack', the issue of whether these two concepts must be present at the same time (conjunctive) or whether either of them is sufficient (disjunctive) was clarified by the practice of the *ad hoc* tribunals, both of the International Tribunals decided that either one of these concepts is enough for the applicability of crimes against humanity, in other words, these requirements are alternative rather than cumulative.[54]

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and Obed Ruzindana, Judgement, Case No. ICTR. 95-1-T (21 May 1999), paras. 127–8; Trial Chamber, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement*, Case No. ICTR-96-3-T (6 December 1999), *see* para. 2.3 (crimes against humanity) of Part 2 (the Applicable Law) of the Judgement.

46. Trial Chamber, *Tadic Case, Judgement*, para. 644.
47. Ibid.
48. Ibid.
49. *See* Arts. 3 and 5 of the ICTR and the ICTY Statutes, respectively.
50. *Secretary-General's Report*, para. 48.
51. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.4.84–5.
52. Ibid. In this context, for the practice of the ICTR, *see* Trial Chamber, *Kayishema and Ruzindana Case*, *Judgement,* para. 123.
53. '… the requirement that the acts must be directed against a civilian "population", … either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement' (Trial Chamber, *Tadic Case, Judgement*, para. 648).
54. Trial Chamber, *Tadic Case, Judgement*, paras. 647–8 Trial Chamber, *Akayesu Case, Judgement*, para. 6.4.83; Trial Chamber, *Kayishema and Ruzindana Case*, *Judgement*, para. 123.

The main reason for the necessity of the widespread or systematic occurrence of acts as a main element of crimes against humanity is to exclude isolated or random acts from this category of international crime. At this point, the issue of whether a single act by a perpetrator can constitute a crime against humanity or not arises. The opinion of the ICTY was affirmative on this issue and decided that a single act could constitute a crime against humanity.[55]

(iv) The Policy Element

This is one of the requirements of crimes against humanity, but neither the ICTY Statute nor the ICTR Statute includes such a provision in this regard. However, in international law, the existence of a policy element has been discussed among the scholars some of whom named this requirement as 'State action or policy'[56] and considered it as a *sine qua non* element of crimes against humanity;[57] and some of whom criticised the policy element on the basis that such a requirement was not even required for the crime of genocide.[58]

As has been indicated above, although the policy element was not expressly mentioned in the Statutes of the *ad hoc* tribunals, in practice both the ICTY and the ICTR have looked for the presence of this element. In this context, the International Tribunals indicated that 'the concept of crimes against humanity necessarily implies a policy element' despite the fact that there were some doubts about whether it was strictly required in international humanitarian law.[59] According to the Tribunals, 'such a policy need not be formalised and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalised or not.'[60] This point is significant in terms of setting up guidance on how to decide whether such a policy exists in a particular situation or not. In addition to these findings, the International Tribunals also noted that such a policy need

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55. 'Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is, the purpose of requiring that the acts be directed against a civilian *population* and thus '[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution' (footnote omitted, emphasis in original, Trial Chamber, *Tadic Case, Judgement*, para. 649). To reach this conclusion, the ICTY, in para. 649 of its decision, referred to the *Rule 61 Decision in the Vukovar Hospital Case* that had already indicated this fact in para. 30 of its ruling. In this context, also *see* Trial Chamber, *Kupreskic and Others Case, Judgement*, para. 550.
56. Bassiouni, pp. 236–62; Ratner and Abrams, pp. 64–7; Morris and Scharf, *An Insider's Guide*, pp. 79–80.
57. Bassiouni, pp. 236, 247.
58. Von Sternberg, M.R., 'A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity" ' (1996), 22 *Brook. J. Int.'l L.*, p. 139.
59. Trial Chamber, *Kupreskic and Others Case, Judgement*, para. 551; Trial Chamber, *Tadic Case, Judgement*, para. 653; Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 124.
60. Trial Chamber, *Tadic Case, Judgement*, para. 653; Trial Chamber, *Kayishema and Ruzindana Case*, *Judgement*, para. 124.

not be the policy of a State on the ground that crimes against humanity, in accordance with the development of customary international law, can be committed by forces which have *de facto* control over a territory.[61]

From the point of view of international humanitarian law, the approach taken by the ICTY and the ICTR in relation to the requirement of attacks or acts being directed against any civilian population should be considered as in compliance with the customary rules of international law since the latest international humanitarian law instruments, as evidence of current customary rules in this regard, consist of similar provisions. These are the 1996 ILC Draft Code[62] and the ICC Statute in which the notion of '[a]ttack directed against any civilian population' is described as '*a course of conduct involving the multiple commission of acts … against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack*'.[63] In this context, there cannot be any doubt that the practice of the *ad hoc* tribunals will create a precedential value for the ICC in its case law in terms of providing clear guidance on the definition and scope of the notions of 'civilian', 'population', 'widespread or systematic attack' and 'policy element', all of which are explicitly required as conditions of crimes against humanity in Article 7 (1–2) of the ICC Statute.[64] It should also be noted that this requirement of crimes against humanity now has been interpreted and applied by the *ad hoc* tribunals. In particular, the views taken by the ICTY and the ICTR with regard to the policy element, although it is not required by the Statutes of the *ad hoc* tribunals, and also the disjunctive nature of the requirement of being widespread or systematic attack[65] are merely two examples proving this. This is also significant to show that the International Tribunals have been interpreting and applying the customary rules of international humanitarian law, not their Statutes in the literal meaning.

The Requirement of Discriminatory Intent

Although the Statute of the ICTR explicitly requires a discriminatory intent for all crimes against humanity by way of referring to 'the following crimes when committed as part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds …*',[66] the ICTY Statute does not include such a requirement for all crimes against humanity.[67]

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61. Trial Chamber, *Tadic Case, Judgement*, paras. 654–5; Trial Chamber, *Kupreskic and Others Case, Judgement*, paras. 552–5; Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 125–6.
62. Article 18 of the 1996 ILC Draft Code defines crimes against humanity as 'any of the following acts [enumerated in Article 18 (a–k)] *when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group*' (emphasis added).
63. Art. 7 (2) (a) of the ICC Statute (emphasis added).
64. Sarooshi, D., 'The Statute of the International Criminal Court' (1999), 48 *ICLQ*, p. 398.
65. For the negotiation process of the disjunctive approach in the Rome Conference to adopt the ICC Statute, *see* Arsanjani, M.H., 'The Rome Statute of the International Criminal Court' (1999), 93 *AJIL*, pp. 30–1.
66. Art. 3 of the ICTR Statute (emphasis added).
67. Art. 5 of the ICTY Statute.

The ICTR, in accordance with its Statute to regard an act constituting crimes against humanity, has looked for the presence of discriminatory grounds which are indicated as 'national, political, ethnic, racial or religious grounds', and decided that the attacks or acts must be committed on one of these discriminatory grounds.[68]

On the other hand, despite the fact that the ICTY Statute did not require discriminatory intent as a condition for all crimes against humanity, the International Tribunal in the *Tadic Judgement* decided that the existence of discriminatory intent was a necessary element for all crimes against humanity, not only for persecution types of crimes. This was based on the *Report of the Secretary-General*[69] and on the statements referring to acts taken on a discriminatory basis made by some States in the Security Council, in the course of adopting the Statute.[70] Before reaching this conclusion, the International Tribunal examined customary international law and found that the Nuremberg and Tokyo Charters and CCL No. 10 did not contain discriminatory intent for all crimes against humanity, but only for persecution. Nonetheless, the Tribunal felt itself bound by *Secretary-General's Report* and also with the ICTR Statute.[71] The approach of the ICTY can be heavily criticised on the ground that it was required to apply customary rules of international humanitarian law. In this sense, if the regulations of the Statute and its commentary (*the Secretary-General's Report*) do not reflect customary international law, the *ad hoc* tribunals should not be bound by these instruments. This is because the Security Council does not have a legal power to create offences or elements for international crimes. This criticism is also valid for the way adopted in the ICTR Statute.[72]

Fortunately, the decision of the Trial Chamber that all crimes against humanity required a discriminatory intent was appealed by the Prosecution Service of the ICTY which argued that the Chamber erred in its findings and that the requirement of discriminatory intent was only for persecution type crimes, not for all crimes against humanity.[73] Having examined the text of Article 5 of the ICTY Statute,[74] customary interna-

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68. Trial Chamber, *Akayesu Case, Judgement*, paras. 6.4.90–1; Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 130–2; Trial Chamber, *Rutaganda Case, Judgement*, *see* paragraph 2.3 (Crimes Against Humanity) of Part 2 (The Applicable Law) of the Judgement.
69. The Report of the Secretary-General defines crimes against humanity as '… inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds*' (para. 48, emphasis added).
70. Trial Chamber, *Tadic Case, Judgement*, para. 652.
71. Ibid., paras. 650–2.
72. In this context, *see supra* Chapter 4 notes 430–2 and accompanying text. In this regard, for the criticism of the *Tadic Judgement*, *see* McDonald, A., 'The Year in Review' (1998), 1 *YIHL*, p. 141; Meron, T., 'War Crimes Law Comes of Age', in T. Meron, *War Crimes Law Comes of Age Essays* (Oxford: Clarendon Press, 1998), pp. 299–300. For the criticism of the regulation of the ICTR Statute, *see* Meron, T., 'International Criminalisation of Internal Atrocities' (1995), 89 *AJIL*, p. 557; *Amnesty International, The International Criminal Court Making the Right Choices*, Part I, AI Index: IOR 40/01/97, January 1997, p. 40.
73. Appeals Chamber, *Tadic Case, Judgement*, para. 273, and also for the Prosecution Service's argument in brief, *see* paras. 274–7.
74. Ibid., paras. 282–6.

tional law,[75] the *Report of the Secretary General*[76] and the statements made by some States in the Security Council,[77] the Appeals Chamber reversed the ruling of the Trial Chamber in the *Tadic Judgement* and concluded that the notion of discriminatory intent was not required for all crimes against humanity and such an intent was 'an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution'.[78]

From the aspects of international humanitarian law, the view taken by the Appeals Chamber should be regarded as a major contribution to international law on the ground that it does not limit the scope of crimes against humanity by way of requiring that all of them be committed on discriminatory grounds such as national, ethnic, racial or religious. As is well known one of the main purposes of international humanitarian law is to protect innocent lives. As long as the other requirements of crimes against humanity are fulfilled, responsible individuals should be brought to justice regardless of their discriminatory motives, which can only be for persecution types of crimes against humanity, in fact, this element is inherited in this offence.[79] In this context, it should also be noted that there may occur widespread or systematic attacks against any civilian population which may not be covered by the listed discriminatory grounds of the ICTR Statute, for example the extermination of physically or mentally ill persons, homosexuals, and so on, as was witnessed in Second World War Nazi Germany.[80] For this reason, in addition to the non-requirement of the discriminatory ground for all crimes against humanity, it should not be limited or listed even for the persecution types of crimes against humanity.[81] Lastly, it should also be indicated that the decision of the Appeals Chamber is consistent with the latest international humanitarian law instruments, namely with the 1996 ILC Draft Code and the ICC Statute both of which require the discriminatory intent for only persecution, not for all crimes against humanity.[82] On this ground, it should not be wrong to conclude that at least the practice of the ICTY in relation to this specific point has become compliant with the current customary international law rules as a result of the ruling of the Appeals Chamber in the *Tadic Judgement*.

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75. Ibid., paras. 287–92.
76. Ibid., paras. 293–7.
77. Ibid., paras. 298–304.
78. Ibid., para. 305.
79. For the crime of persecution, its elements and the practice of the *ad hoc* tribunals in this regard, *see infra*, p. 260, Persecutions on Political, Racial and Religious Grounds.
80. In fact, the Appeals Chamber refers to this situation as one of legal basis for its Judgement in para. 285.
81. The ICC Statute takes this fact into account in its enumeration of persecution as a crime against humanity in Article 7 (1) (h) which refers to '[p]ersecution against *any identifiable group or collectivity* on political, racial, national, ethnic, cultural, religious, gender … or *other grounds that are universally recognised as impermissible under international law, …*' (emphasis added).
82. *See* Art. 18 (e) of the 1996 Draft Code and Art. 7 (1) (h) of the ICC Statute.

The Requirement of *Mens Rea* (Mental Element)

Neither the ICTY Statute nor the ICTR Statute provides such a requirement for crimes against humanity.[83] However, this is one of the main elements of crimes against humanity that makes an ordinary crime an international one in nature. Because of this significance the *ad hoc* tribunals had to examine the presence of *mens rea* (the mental element) of crimes against humanity.

In the *Tadic Judgement*, the Trial Chamber of the ICTY, firstly, decided that the required *mens rea* for crimes against humanity was the following: 'to commit the underlying offence the perpetrator must know of the broader context in which his act occurs'.[84] The International Tribunal, secondly, held that 'the act must not be taken for purely personal reasons unrelated to the armed conflict'.[85] This approach was also followed by the ICTR in the *Judgement of Kayishema and Ruzindana Case.*[86]

However, the ruling of the Trial Chamber that crimes against humanity cannot be committed for purely personal reasons or motives in the *Tadic Judgement* was appealed by the Prosecution Service of the ICTY which argued that the Trial Chamber erred in its findings in this regard and that crimes against humanity could be committed for purely personal reasons.[87] Having examined Article 5 of the Statute,[88] the object and purpose of the Statute[89] and the case law as evidence of customary international law,[90] the Appeals Chamber concluded that 'the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisite necessary conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal's Statute'.[91]

The way adopted by the Appeals Chamber in relation to this specific aspect of the *mens rea* requirement of crimes against humanity in the *Tadic Judgement* has already taken its place in the practice of the ICTY.[92] In this context, there cannot be any doubt that the practice of the *ad hoc* tribunals should be considered as a major contribution to international humanitarian law in making clear the mental element requirement of crimes against humanity, and most importantly, it will create a precedential

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83. *See* Arts. 5 and 3 of the ICTY and the ICTR Statues, respectively.
84. Trial Chamber, *Tadic Case, Judgement*, para. 656.
85. Ibid. The concluding part of the Trial Chamber's Decision in this respect can be quoted as follows: 'Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity.Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict' (para. 659).
86. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 133–4.
87. Appeals Chamber, *Tadic Case, Judgement*, paras. 240–3.
88. Ibid., paras. 248–52.
89. Ibid., paras. 253–4.
90. Ibid., paras. 255–70.
91. Ibid., para. 272.
92. After the Appeals Chamber's Decision, in the ICTY practice, the first case concerning crimes against humanity is the *Judgement of Kupreskic and Others Case* rendered by the ICTY on 14 January 2000. *See* Trial Chamber, *Kupreskic and Others Case, Judgement*, para. 558.

value for the ICC in its case law since the ICC Statute expressly deploys the terms 'with knowledge of the attack' in its definition of crimes against humanity.[93] In this regard, it should also be noted that the International Tribunals, in particular the ICTY, now have perfectly interpreted and applied the *mens rea* requirement of crimes against humanity, in accordance with the regulation of the ICC Statute as evidence of current customary international law, despite its exclusion in their Statutes.

The Acts

The last requirement of crimes against humanity is that there must be an act constituting a crime against humanity. These acts are enumerated, in the same way, in Articles 3 and 5 of the ICTR and the ICTY Statutes, respectively. Which acts constitute crimes against humanity and the practice of the *ad hoc* tribunals and their impact on the ICC will be examined below.

The Substantive Content of Crimes Against Humanity

The Statutes of the *ad hoc* tribunals enumerate the offences constituting crimes against humanity as follows: '(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts'.[94]

As with war crimes and the crime of genocide, the ICTY and the ICTR, in addition to the requirements of crimes against humanity, have to examine the elements of each crime not to violate the principle of legality or *nullum crimen sine lege*.

As has been clearly inferred from the regulations of the Statutes of the ICTY and the ICTR, some of these offences are very clear and easy to apply to specific events like murder while the others are vague in nature such as 'other inhumane acts'. For this reason, the practice of the *ad hoc* tribunals has a significant place in international humanitarian law in terms of interpreting and applying the elements of crimes and of determining the scope of some crimes in the sense of which types of acts fall within the meaning of some categories of offences; in particular, the crime of persecution and other inhumane acts should be noted in this respect. In this context, there cannot be any doubt that the ICC will be guided by the practice of the *ad hoc* tribunals with regard to the interpretation and application of the substantive content of crimes against humanity in its case law.

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93. Art. 7 (1) of the ICC Statute.
94. Art. 3 of the ICTR Statute; Art. 5 of the ICTY Statute. The related Article of the ICC Statute enumerates more acts constituting crimes against humanity than the Statutes of the *ad hoc* tribunals and also provides definitions of these acts. For example, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity, enforced disappearance of persons and the crime of apartheid can be indicated in this regard. *See* Art. 7 of the ICC Statute.

Murder

When the prerequisite elements of crimes against humanity are met the crime of murder[95] falls within the meaning of this category of international crime.[96]

Extermination

The difference between murder and extermination lies in the scale of the offence and 'extermination can be said to be murder on a massive scale'.[97] Under Articles 3 (b) and 5 (b) of the ICTR and the ICTY Statutes, respectively, extermination constitutes a crime against humanity provided that the prerequisite elements of crimes against humanity are present.[98]

Enslavement

As long as the elements of crimes against humanity are met the crime of enslavement falls within the category of this international crime.[99] When the practice of the *ad hoc* tribunals is examined in this respect, the best example dealing with the crime of enslavement can be found in the practice of the ICTY since first convictions of enslavement as a crime against humanity were delivered by the Trial Chamber in the *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic Case.*[100] In the *Kunarac and Others Case,* the Trial Chamber, first of all examined the Slavery Convention of 1926, Nuremberg, Tokyo and other Second World War war crimes trials, 1949 Geneva Conventions and 1977 Additional Protocol II, international human rights law treaties such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights of 1966, European Convention on Human Rights and American Convention on Human Rights,[101] then provided the definition of crime in

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95. For the elements of murder, the practice of the *ad hoc* tribunals, their contribution to international humanitarian law and possible impact on the ICC in this regard, *see supra* Chapter 4, p. 148, Wilful Killing.
96. Art. 3 (a) of the ICTR Statute; Art. 5 (a) of the ICTY Statute; Art. 7 (1) (a) of the ICC Statute. In this context, *see* Trial Chamber, *Akayesu Case, Judgement*, paras. 6.4.98–105; Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, paras. 136–40; Trial Chamber, *Kupreskic and Others Case, Judgement*, paras. 560–1.
97. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 142, and *see* also paras. 143–7; Trial Chamber, *Akayesu Case, Judgement*, paras. 6.4.106–10.
98. Article 7 (1) (b) of the ICC Statute also includes extermination as a crime against humanity and in Article 7 (2) (b) defines it in an illustrative way as follows: '"[e]xtermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'.
99. Art. 3 (c) of the ICTR Statute; Art. 5 (c) of the ICTY Statute; Art. 7 (1) (c) of the ICC Statute. Article 7 (2) (c) of the ICC Statute defines enslavement as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'.
100. Trial Chamber, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Judgement*, Case No. IT-96-23 and IT-96-23/1 'Foca' (22 February 2001) (hereinafter *Kunarac and Others Case, Judgement*).
101. Trial Chamber, *Kunarac and Others Case, Judgement*, paras. 519–38.

question as follows:'… enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person'.[102] According to the Trial Chamber, 'the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers.'[103] As has clearly been inferred from the approach taken by the ICTY, the definition is 'broader than the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law':[104]

> Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement, and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction or forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.[105]

However, the broad definition of the crime of enslavement was appealed by the defence:

> The Appellants propose to substitute the following elements for those considered by the Trial Chamber for the crime of enslavement: the accused must have considered the victim 'as its own ownership', there must have been the constant and clear lack of consent of the victim, the victim must have been detained for an indefinite or at least for a prolonged period of time and the accused must have had the intent to detain the victim under constant control for a prolonged period in order to use the victim for sexual acts. However, the Appeals Chamber does not accept the premise that lack of consent is a constituent element of the crime. It abides by the Trial Chamber's decision attributing a relative importance to the duration of the detention and not considering it an element of the crime. It concurs with the Trial Chamber that the required *mens rea* for this crime consists of the intentional exercise of a power attached to the right of ownership over the victims without it being necessary to prove that the accused intended to detain the victims under constant control for a prolonged period in order to use them

102. Ibid., para. 539.
103. Ibid., para. 540.
104. Ibid., para. 541.
105. Ibid., para. 542.

> for sexual acts. Consequently, the Appeals Chamber is of the opinion that the Trial Chamber's definition of the crime of enslavement is not too broad and does indeed reflect customary international law at the time when the alleged crimes were committed. The grounds of appeal relating to the definition of the crime of enslavement are therefore rejected.[106]

There cannot be any doubt that the view taken by the Trial Chamber and Appeals Chamber of the ICTY considering the crime of enslavement will create a precedential value for the ICC on the ground that the ICC Statute includes this offence as constituting a crime against humanity in its Article 7 (1) (c). The ICC Statute also provides the definition of the crime as follows: 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.'[107] When the definition of the ICC Statute is compared to the one provided by the Trial Chamber and the Appeals Chamber of the ICTY, it can clearly be seen that the same definition was accepted by the *ad hoc* tribunals. For this reason, it would not be wrong to say that, in a sense, the Statute of the ICC has already been applied by the International Tribunals, that the impact of the ICC on the *ad hoc* tribunals can also be witnessed by the international community. The ICC in its case law will not be faced with the same problems which the *ad hoc* tribunals have to solve in relation to the cases brought before them since the examples will be in front of the ICC.

Deportation

According to the Statutes of the ICTY and the ICTR, deportation[108] can constitute a crime against humanity when its prerequisite elements are met.[109]

Imprisonment

The act of imprisonment is the other category of offence which constitutes a crime against humanity under the Statutes of the *ad hoc* tribunals.[110] Although

106. Press Release, 'Appeals Chamber Judgement in the Kunarac, Kovac and Vukovic (Foca) Case', Doc. No. CVO/P.I.S./679-E (The Hague, 12 June 2002); Appeals Chamber, *Prosecutor v. Draguljob Kunarac, Radomir Kovac and Zoran Vukovic, Judgement*, Case No. IT-96-23 and 96-23/1 'Foca' (12 June 2002), paras. 116–24.
107. Art. 7 (2) (c) of the ICC.
108. For the practice of the *ad hoc* tribunals, their contribution to international humanitarian law and their impact on the ICC in this regard, *see supra* Chapter 4, p. 173, Unlawful Deportation or Transfer of a Civilian.
109. Art. 3 (d) of the ICTR Statute; Art. 5 (d) of the ICTY Statute; Art. 7 (1) (d) of the ICC Statute. In particular, the indictment charging Slobodan Milosevic and other high-ranking officials of the Federal Republic of Yugoslavia with the forced deportation of approximately 740,000 Kosovo Albanian civilians should be noted in the practice of the *ad hoc* tribunals. *See Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic and Vlajko Stojilkovic, Indictment* (22 May 1999), para. 100.
110. Art. 3 (e) of the ICTR Statute; Art. 5 (e) of the ICTY Statute; Art. 7 (1) (e) of the ICC Statute.

the *ad hoc* tribunals and the ICC have jurisdiction over the crime of imprisonment constituting a crime against humanity, the definition of the crime was not provided in these instruments. The first ever definition of the crime of imprisonment was provided by the Trial Chamber of the ICTY in the *Kordic and Cerkez Case*. The related part of the decision can be quoted as follows:

> The Trial Chamber concludes that the term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population. In that respect, the Trial Chamber will have to determine the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question, before determining whether or not they occurred as part of a widespread or systematic attack directed against a civilian population.[111]

The definition provided by the ICTY will have a significant impact on the ICC on the premise that the ICC Statute does not provide any definition for the crime in question, and will have a precedential value for the ICC in its case law.

Torture

According to the Statutes of the *ad hoc* tribunals, the crime of torture[112] constitutes a crime against humanity if the prerequisite elements of this category of international crime are met.[113]

Rape

The crime of rape[114] is also a punishable act which can be treated as constituting crimes against humanity provided that the elements of crimes against humanity are present in a specific situation.[115] Considering the crime of rape as giving rise to a crime against humanity, the practice of the ICTY in the *Kunarac and Others Case* in which first convictions by the ICTY of rape as a crime against humanity delivered should be indicated here.[116]

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111. Trial Chamber, *Kordic and Cerkez Case, Judgement*, para. 302.
112. For the elements of torture, the practice of the *ad hoc* tribunals, their contribution to international humanitarian law and their impact on the ICC in this regard, *see supra*, Chapter 4, p. 151, Torture.
113. Art. 3 (f) of the ICTR Statute; Art. 5 (f) of the ICTY Statute; Art. 7 (1) (f) of the ICC Statute; Trial Chamber, *Akayesu Case, Judgement*, paras. 6.4.111–16.
114. For the elements of rape, the practice of the *ad hoc* tribunals, their contribution to international humanitarian law and their impact on the ICC in this regard, *see supra* Chapter 4, p. 156, Rape and Any Other Forms of Sexual Violence as Torture under the Grave Breaches System.
115. Art. 3 (g) of the ICTR Statute; Art. 5 (g) of the ICTY Statute; Art. 7 (1) (g) of the ICC Statute; Trial Chamber, *Akayesu Case, Judgement*, paras. 6.4.117–22.
116. Trial Chamber, *Kunarac and Others Case, Judgement*, paras. 436–64; Press Release, 'Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case', Doc. No. JL/P.I.S./566-e (The Hague, 22 February 2001).

Persecutions on Political, Racial and Religious Grounds

The crime of persecution is one of the offences constituting crimes against humanity on which the ICTY and the ICTR have power to try and punish responsible individuals when the requirements of crimes against humanity are met.[117]

The ICTY first dealt with the crime of persecution in the *Tadic Judgement*.[118] According to the Trial Chamber's decision in the *Tadic Judgement*, persecution is a form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights. Additionally, this discrimination must be on specific grounds, namely, race, religion or politics.[119] Furthermore, 'the crime of persecution encompasses a variety of acts, including, *inter alia,* those of a physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights'.[120] In light of this explanation, the elements of the crime of persecution are indicated as follows: (a) the existence of a persecutory act or omission which can be either enumerated elsewhere in the ICTY Statute or not enumerated elsewhere in the Statute;[121] (b) the existence of discriminatory basis that can be political, racial or religious.[122]

In the *Judgement of the Kupreskic and Others Case*, the International Tribunal further elaborated the elements of persecution and provided a clear definition of the crime of persecution, for the first time in international law by an international criminal institution, on the ground that the *Tadic Judgement* was very broad and it was needed to be better clarified.[123] For this reason, the Tribunal defined persecution as '*the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5*'.[124] In accordance with this definition, the International Tribunal indicated the elements of persecution as follows: '(a) those elements required for all crimes against humanity under the Statute; (b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5; (c) discriminatory grounds'.[125] As has been clearly understood from the definition and elements of persecution, the *actus reus* (physical element, persecutory act or omission) of the offence can be in different forms which cannot be even expressly prohibited either in Article 5 or elsewhere

117. Art. 3 (h) of the ICTR Statute; Art. 5 (h) of the ICTY Statute.
118. Trial Chamber, *Tadic Case, Judgement*, paras. 694–713.
119. Ibid., para. 697.
120. Ibid., para. 710. In paragraph 704 of the *Tadic Judgement*, the Trial Chamber indicates this fact as follows: '… the crime of persecution encompasses acts of varying severity, from killing to a limitation on the type of professions open to the targeted group'.
121. Ibid., paras. 698–710.
122. Ibid., paras. 711–13. Although the Statutes of the *ad hoc* tribunals regulate the concept of discriminatory basis in a conjunctive way (political, racial *and* religious), the International Tribunal interpreted it in a disjunctive manner which is consistent with the customary rules of international humanitarian law (paras. 712–13) and also consistent with the latest international humanitarian law instruments. (*See* Art. 18 (e) of the 1996 ILC Draft Code; Art. 7 (1) (h) of the ICC Statute.)
123. Trial Chamber, *Kupreskic and Others Case, Judgement*, paras. 616, 618.
124. Ibid., para. 621 (emphasis in original).
125. Ibid., para. 627.

in the ICTY Statute.[126] Although the *actus reus* of persecution can be the same as other categories of crimes against humanity or as war crimes, the distinguishing feature of this crime is the mental requirement (*mens rea*) of the offence, that is to say, it must be committed on discriminatory grounds which may be political, racial or religious.[127] As has been indicated by the International Tribunal, 'the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide'.[128] Having set out these facts, the ICTY in the *Kupreskic and Others Case* also indicated the relationship between the crime of genocide and persecution. According to the Tribunal, '[p]ersecution is only one step away from genocide' and the main difference can be examined in the *mens rea* requirements of each crime as follows:

> [i]n the crime of genocide the criminal intent is to destroy the group or its members; in the crime of persecution the criminal intent is instead to forcibly discriminate against a group or members thereof by grossly and systematically violating their fundamental human rights.[129]

From the aspects of international humanitarian law, the importance of the practice of the International Tribunal in relation to the crime of persecution can be seen in the following points. By means of the practice, the international community has witnessed the first ever definition of the crime of persecution. Its elements, substantive content were clarified. The similarities and differences between the crime of genocide and persecution were outlined and a guideline was created in terms of distinguishing the *mens rea* requirements of the crime of genocide and persecution. This last point is so significant in international humanitarian law on the premise that most of the atrocities or offences that occurred in the different parts of the world can easily qualify the crime of persecution, not the crime of genocide, on the basis of collectivity of human beings which may be based on economic, political, social, cultural, racial, gender, national, religious or any other grounds.[130] This wide coverage of persecution does not leave any room for responsible individuals to go unpunished in the cases of human rights atrocities, that cannot be regarded as constituting genocide, that occurred either in time of peace or in time of war. It should also be noted that the crime of persecution provides protection for any identifiable group or collectivity on a political, social, economic or cultural basis. The significance of this point lies in the extension of the protected groups which cannot be protected under the crime of genocide. In terms of

126. For the distinguished features of the *actus reus* requirement of persecution, *see* ibid., para. 615.
127. Ibid., para. 607.
128. Ibid., para. 636. This fact was also indicated in the *Jelisic Case*. For the *Jelisic Case* and how to assess the existence of a discriminatory ground, *see supra* Chapter 5, notes 18, 88 and accompanying texts.
129. Trial Chamber, *Kupreskic and Others Case, Judgement*, paras. 636, 751.
130. Article 7 (1) (h) of the ICC Statute includes these discriminatory grounds which are much more than the corresponding provisions of the Statutes of the *ad hoc* tribunals.
131. In this context, *see supra* Chapter 5, p. 209, The Victimised Group.

indicating that any identifiable group is under the protection of international humanitarian law, it is crucial to refute the criticisms in relation to the crime of genocide that economic, political or social groups are not protected by international humanitarian law instruments.[131]

Lastly, it should be indicated that the practice of the International Tribunal in the *Kupreskic and Others Case* with regard to the definition and application of the crime of persecution is much more in compliance with customary international law than the ICC Statute which defines persecution in a very broad manner and introduces a condition of being connected with any other crime within the jurisdiction of the ICC to be applicable to any specific event.[132] However, whatever the differences are between the practice of the *ad hoc* tribunals and the regulation of the ICC Statute there cannot be any doubt that the ICC will be, to a significant degree, guided in its case law by the approach taken by the *ad hoc* tribunals in relation to the crime of persecution.

Other Inhumane Acts

The last category of crimes against humanity is called 'other inhumane acts' under the Statutes of the ICTY and the ICTR.[133] As has been clearly understood from the regulations of the Statutes, the deployment of the terms without its definition 'other inhumane acts' makes the substantive content of crimes against humanity illustrative rather than exhaustive.

On this ground, the ICTY and the ICTR had to define this concept not to violate the principle of *nullum crimen sine lege*. In the *Tadic Case*, the International Tribunal depended upon the definition made in Article 18 (k) of the 1996 ILC Draft Code which states: 'other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm'.[134] In light of this guidance, the Tribunal regarded the acts of cruel treatment such as beatings, acts of violence and forced removals of civilians from their homes as equivalent to other inhumane acts under the category of crimes against humanity.[135] In the following cases, the ICTR and the ICTY have already taken into account the definition provided in Article 7 (1) (k) of the ICC Statute[136] as a legal base for the application of the concept in specific cases.[137] Even the

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132. Article 7 (2) (g) of the ICC Statute defines persecution as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'. Article 7 (1) (h) of the ICC Statute also states: '[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender … or other grounds that are universally recognised as impermissible under international law, *in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*' (emphasis added).

    In fact, this reality was indicated by the ICTY in the *Judgement of Kupreskic and Others Case* (*see* paras. 579–81, 617).

133. Art. 3 (i) of the ICTR Statute; Art. 5 (i) of the ICTY Statute.

134. Trial Chamber, *Tadic Case, Judgement*, para. 729.

135. Ibid., paras. 730, 764–5.

136. Article 7 (1) (k) of the ICC Statute states: 'Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.

137. Trial Chamber, *Kayishema and Ruzindana Case, Judgement*, para. 150; Trial Chamber, *Kupreskic and Others Case, Judgement*, para. 565.

scope of other inhumane acts was made clearer by means of providing examples which may fall within this subheading of crimes against humanity. Amongst them, serious forms of cruel, degrading or humiliating treatment of persons, for example, forcible transfer of a group of civilians, enforced prostitution, enforced disappearance of persons can be mentioned.[138]

In international humanitarian law, the practice of the ICTY and the ICTR in relation to the concept of other inhumane acts should be regarded as in compliance with the customary rules of international law and it will have a precedential value for the ICC in terms of providing a guideline as to which types of acts may fall within the meaning of other inhumane acts.[139]

Conclusions

The concept of crimes against humanity is universally prohibited by the customary rules of international humanitarian law irrespective of whether committed in time of peace or in time of war. Its prohibition, as different from war crimes and the crime of genocide, does not have a conventional base with the exception of the regulation of the ICC Statute. Although the concept has, for the first time in positive international law, taken its place in the Nuremberg Charter to cover some acts which may not be regarded as either war crimes or crimes against peace, it has evolved and become an independent category of international crimes. Moreover, today, it is well established that the norms governing crimes against humanity enjoy the status of *jus cogens* and in consequence, States are obliged to prosecute, punish or extradite the individuals responsible for crimes against humanity. However, apart from the practice of the International Military Tribunals after the Second World War and of some domestic applications, the concept of crimes against humanity had not been applied at the international level. The establishment of the ICTY and the ICTR by the Security Council in 1993 and 1994 respectively, both of which have jurisdiction over crimes against humanity, has provided an opportunity for the interpretation and application of the norms governing crimes against humanity. This was particularly important on the grounds that the elements and substantive content of crimes against humanity were not clear enough in international humanitarian law. For this reason, the practice of the ICTY and the ICTR has a significant place in international law.

As with war crimes and the crime of genocide, the importance of the practice of the *ad hoc* tribunals with regard to crimes against humanity can be examined in two ways: Firstly, they interpret and apply the requirements or elements of crimes against humanity. Secondly, they clarify the

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138. Trial Chamber, *Kupreskic and Others Case, Judgement*, para. 566.

139. In this context, it should be noted that some examples indicated by the *ad hoc* tribunals as constituting other inhuman acts have already taken their place in the ICC Statute as independent categories of offences constituting crimes against humanity such as enforced prostitution (Art. 7 (1) (g)) and enforced disappearance of persons (Art. 7 (1) (i)).

substantive content of this category of international crime – in other words, they examine the specific elements of each crime regarded as constituting a crime against humanity.

As has been indicated by the International Tribunal, the first requirement of crimes against humanity is the existence of an armed conflict, whether international or internal, according to the Statute of the ICTY. However, the ICTR Statute does not require such an element for the applicability of crimes against humanity. Despite the regulation of its Statute, the ICTY in the *Tadic Jurisdiction Decision, Tadic Judgement* and the *Kupreskic and Others Case Judgement* decided that under customary international law, crimes against humanity do not need to have any connection to armed conflicts, whether international or internal, and that they do not need to have any nexus to other crimes, either crimes against peace or war crimes. These two facets of crimes against humanity are significant in terms of indicating the independence of the concept from other crimes and of providing protection for civilians in the cases of human rights violations occurring in time of peace. The approach taken by the International Tribunal should be regarded as solving one of the most important issues, that is to say, whether the presence of an armed conflict is a prerequisite condition for the applicability of crimes against humanity or not. The ruling of the Tribunal is also in compliance with the latest international humanitarian law instruments such as the 1996 ILC Draft Code and the ICC Statute.

The second requirement of crimes against humanity is that there must be an attack or act directed against any civilian population. This requirement inherits several elements in it, namely, 'civilian population', 'widespread or systematic attack', and the 'policy element'. In this regard, the contribution of the practice of the *ad hoc* tribunals in the *Cases of Tadic, Akayesu, Kayishema and Ruzindana, Rutaganda, Kupreskic and Others* to international humanitarian law can be indicated as follows: the broad definition of 'civilian' and 'population'; the interpretation of widespread or systematic attacks that are disjunctive rather than conjunctive; indicating the possibility of one single act can constitute a crime against humanity; the examination of policy element despite its non-inclusion in the Statutes of the *ad hoc* tribunals; creating a guideline on how to decide whether such a policy requirement exists in a specific case. There cannot be any doubt that the practice of the ICTY and the ICTR will create a precedential value in these aspects for the ICC in its case law since the ICC Statute expressly requires all these elements. In this context, it should also be noted how this requirement of crimes against humanity has been truly interpreted and applied by the *ad hoc* tribunals in light of the customary rules of international humanitarian law, rather than their Statutes in the literal meaning.

The third requirement of crimes against humanity is that crimes must be committed on a discriminatory basis: namely, national, political, ethnic, racial or religious grounds under the Statute of the ICTR. In accordance with its Statute, the ICTR has looked for the presence of this element in the *Judgements of Akayesu, Kayishema and Ruzindana*, and *Rutaganda Cases*. On the other hand, despite the fact that the ICTY Statute does not contain the existence of discriminatory intent for all crimes against humanity, the

ICTY in the *Tadic Judgement* decided that the presence of discriminatory intent was a condition for all crimes against humanity, not only for the crime of persecution, contrary to the customary rules of international humanitarian law. Fortunately, the decision of the Trial Chamber in the *Tadic Judgement* was appealed by the Prosecution Service of the ICTY and was reversed. According to the Appeals Chamber, the notion of discriminatory intent was not required for all crimes against humanity and it was only necessary for the persecution types of crimes. In this context, the ruling of the Appeals Chamber should be regarded as a major contribution to international humanitarian law on the premise that the view of the Appeals Chamber does not limit the scope of crimes against humanity by way of requiring that all of them be committed on discriminatory grounds. This is particularly significant in terms of providing protection for civilians whose fundamental human rights may be violated in a widespread or systematic manner in time of peace and their status may not fall into any of the categories as indicated in the ICTR Statute. The approach taken by the Appeals Chamber in the *Tadic Judgement* is also consistent with the regulations of the 1996 ILC Draft Code and of the ICC Statute.

The fourth requirement of crimes against humanity is the existence of *mens rea* (mental element) which means the accused must have the knowledge of the context within which his/her actions are taken. Although this element transforms an ordinary crime into an international one it is not expressly included in the Statutes of the *ad hoc* tribunals. However, the International Tribunals have examined the *mens rea* requirement of crimes against humanity because of its significance. The main importance of the practice of the *ad hoc* tribunals can be seen in the clarification or interpretation of this requirement. In this context, the ruling of the Appeals Chamber in the *Tadic Judgement* should also be indicated in terms of reversing the decision of the Trial Chamber that crimes against humanity cannot be committed for purely personal reasons or motives. In this sense, there should not be any doubt that the practice of the *ad hoc* tribunals will have a clear impact on the ICC since the ICC Statute explicitly includes this element by deploying the terms 'with knowledge of the attack' in its definition of crimes against humanity.

The last requirement of crimes against humanity is that there must be an act constituting this category of international crime. The acts regarded as constituting crimes against humanity are enumerated in Articles 3 and 5 of the ICTR and the ICTY Statutes, respectively.

The second major contribution of the practice of the *ad hoc* tribunals to international humanitarian law and possible impact on the ICC can be examined in relation to the interpretation and application of the substantive content of crimes against humanity. In this context, the significance of the practice of the *ad hoc* tribunals lies in the interpretation and application of the elements of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial or religious grounds and of other inhumane acts. In particular, the view taken by the International Tribunals – especially in the *Judgement of Kupreskic and Others Case* – with regard to the crime of persecution and of other inhumane acts should be indicated as follows: the first ever definition of

the crime of persecution by an international criminal institution; the clarification of its elements and substantive content; the explanation of similarities and differences between the crime of genocide and persecution; distinguishing the *mens rea* requirement of persecution from the intent (*mens rea*) requirement of genocide; the definition of the category of 'other inhumane acts' as a crime against humanity; the creation of a guideline on which types of acts can fall within the meaning of 'other inhumane acts'. As has been clearly inferred from these significant aspects of international humanitarian law, the practice of the ICTY and the ICTR will, undoubtedly, create a precedential value for the ICC in its case law. In this regard, lastly, it should also be noted that some points in the practice of the International Tribunals, as has been seen in the *Judgement of Kupreskic and Others Case* with regard to the definition and application of the crime of persecution, should be considered as much more in compliance with the customary rules of international humanitarian law than the ICC Statute which defines the crime of persecution in a very broad manner and introduces a condition of being connected with any other crime within the jurisdiction of the ICC to be applicable to any specific situation.

7

Concluding Remarks

The international community has witnessed many human rights violations which have also constituted violations of international humanitarian law throughout the twentieth century. After the Second World War the nature of armed conflicts and the method of warfare have changed remarkably; armed conflicts mainly become internal or internationalised in character, and civilians and civilian objects are often targeted. Two of the worst violations of human rights and of international humanitarian law occurred in the territories of the former Yugoslavia and in Rwanda in the last decade of the twentieth century. There cannot be any doubt that the situations in the former Yugoslavia and in Rwanda constituted threats to international peace and security. The large-scale killings, rape and other forms of sexual violence, 'ethnic cleansing', genocide and other types of crimes committed in these two regions of the world impelled the international community to bring those responsible for such crimes to justice. To achieve this purpose and to contribute to the maintenance of international peace and security, the only way was to establish an international criminal tribunal by means of a Security Council Resolution which was in compliance with the urgency of the events that had occurred in the former Yugoslavia and Rwanda. With this background, the UN Security Council established the ICTY and the ICTR acting under Chapter VII of the UN Charter 'to do justice, to deter further crimes, and to contribute to the restoration and main-tenance of peace'.[1]

In contrast to the Nuremberg and Tokyo Tribunals, the ICTY and the ICTR were established neither by the victors as a 'victor's court or justice' nor by the parties involved in the conflict, but rather by the UN Security Council on behalf of the entire international community in order to protect international peace and security. For this reason, the establishment of these International Tribunals was innovative in character, and their establishment should be seen as a contemporary example of the application of international humanitarian law for enforcing individual responsibility when the violations of international humanitarian law and of human rights law occurred.[2]

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1. *See* Chapter 1, note 109.
2. *See* Chapter 1, note 110.

The response of the international community to the situations of former Yugoslavia and Rwanda by means of establishing *ad hoc* tribunals paved the way for the establishment of an international criminal court. The concept of creating an international criminal court to prosecute and punish individuals who are responsible for violations of international humanitarian law has been discussed by the international community for almost 100 years and its establishment became possible just before the new millennium through the adoption of the Statute of the ICC in the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy, between 15 June and 17 July 1998. This was one of the major achievements of the international community in the twentieth century. In this context, it should be noted that whatever the contribution of the *ad hoc* tribunals to international humanitarian law is, the real contribution can be seen in leading to the establishment of the ICC. If the *ad hoc* tribunals had not been established by the Security Council the international community would have been discussing the possibility of the establishment of an international criminal organisation, perhaps, for another 100 years.

Having indicated the significance of the establishment of the ICTY and the ICTR, some of the general conclusions drawn from this work will be summarised below. As has been indicated in the introductory remarks, the purpose of this study was to try to examine the international humanitarian law rules and their application by the *ad hoc* tribunals in relation to the substantive law of the ICTY and the ICTR, and their contribution to international humanitarian law and their potential impact on the ICC.

1. Individual Criminal Responsibility in International Law

One of the main purposes of international humanitarian law is to enforce individual criminal responsibility through either domestic courts or international criminal institutions. At the international level, until recently, the most authoritative precedents with regard to the implementation of the concept of individual criminal responsibility was the practice of the International Military Tribunals at Nuremberg and Tokyo and Subsequent Proceedings that the international community witnessed after the Second World War. However, the practice of these institutions was strongly criticised on the basis of their not constituting real precedents in international law. In this sense, the establishment of the ICTY and the ICTR by the Security Council on behalf of the international community and their practice in relation to interpreting and applying the principle of individual criminal responsibility have a significant place in the development of international humanitarian law in terms of proving the enforceability of individual criminal responsibility at the international level for the crimes which are of concern to the international community. The adoption of the ICC Statute by a large number of States followed this and indicated that the principle of individual criminal responsibility and its implementation was one of the most important desires of the international community in achieving universal justice for human beings.

In light of the practice of the ICTY and the ICTR, the contribution of the *ad hoc* tribunals to international humanitarian law and impact on the ICC can be examined in the following aspects of individual criminal responsibility:

(a) As is well known from the customary and conventional law rules of international humanitarian law, the notion of individual criminal responsibility is not only just for the persons who directly committed the crime (as principal), but also for the persons who facilitated the commission of the offence by way of planning, instigating, ordering, or otherwise aiding, abetting in the planning, preparation or execution of a crime (as participant). The real problem in international law lies in establishing individual criminal responsibility in relation to the degree of participation necessary to result in criminal culpability. At this point, the Nuremberg and the post-Second World War war crimes trials failed to reach a specific criterion. For this reason, the application of the concept of individual criminal responsibility by the *ad hoc* tribunals holds an important place for interpreting and drawing the line for the scope of individual responsibility and also for setting up general criteria making clear the degree of participation to be considered as individually criminally responsible in international humanitarian law. These general criteria, which fulfil one major gap in international humanitarian law, can be drawn in light of the practice of the ICTY in the *Tadic* and *Furundzija Cases* as follows: An individual is criminally responsible for any conduct when it is determined that he/she *intentionally or knowingly* participated in the commission of an illegal act that violates international humanitarian law and his/her participation *substantially* affected the commission of that illegal act through supporting the actual commission before, during, or after the incident. There cannot be any doubt that the approach taken by the International Tribunal has a precedential value for the ICC since the ICC Statute regulates the concept of individual criminal responsibility in a similar way in Article 25.[3]

(b) The enforcement of individual criminal responsibility for State officials either as Head of State or Government or government senior officials and non-recognition of the notion of sovereign immunity and as a consequence impunity as a defence has a significant place in international law in terms of implementing the principles of international humanitarian law.[4]

(c) The concept of superior responsibility, its legal status and elements were, for the first time in international law, examined in detail in the *Celebici Camp Case* by the ICTY. In this context, the real contribution of the *ad hoc* tribunals to international humanitarian law and possible impact on the ICC can be found in the examination of the elements of the concept of superior responsibility by way of making clear its conditions and providing precedents for future cases of the ICTY and the ICTR on the ground

3. *See* Chapter 3, p. 84, Individual Criminal Responsibility under Article 7 (1) of the ICTY Statute and Article 6 (1) of the ICTR Statute.
4. In this sense, *see Kambanda* and *Akayesu Judgements* of the ICTR in Chapter 3, p. 94, Individual Criminal Responsibility under Article 7 (2) of the ICTY Statute and Article 6 (2) of the ICTR Statute.

that the principle of individual criminal responsibility of superiors for failure to take necessary and reasonable measures to prevent or repress the unlawful conduct of their subordinates has evolved after the post-Second World War war crimes trials in which it was not possible to set up a clear principle in this regard.[5]

(d) The existence of a superior order does not constitute a complete defence rendering subordinates not criminally accountable, and may not even constitute a mitigating factor in punishment since its application relies on some additional special circumstances such as a combination of a superior order with duress. This was one of the main issues of international humanitarian law which is clarified by the Trial and Appeals Chamber of the ICTY in the *Erdemovic Case*.[6]

2. War Crimes

The concept of war crimes and the practice of the *ad hoc* tribunals, their contribution to international humanitarian law and impact on the ICC, because of the artificial distinction between international and non-international armed conflicts and the laws applicable to them, can be examined by way of dividing the concept into two principal categories: 'The Grave Breaches System' and 'Violations of the Laws or Customs of War'.

The Grave Breaches System

Under Article 2 of the ICTY Statute, the ICTY has jurisdiction over the grave breaches of the Geneva Conventions of 1949 and the 1977 Additional Protocol I thereto. The ICTR Statute does not include such a provision on the premise that the conflict in Rwanda is considered as internal in character.

The significance of the practice of the International Tribunal with regard to grave breaches can be examined in the following aspects of international humanitarian law:

(a) For the first time in international law, the Geneva Conventions and the Additional Protocols thereto have been interpreted and applied by the ICTY.

(b) The conditions for the applicability of the grave breaches system are clarified: These are: General Conditions: (i) the existence of an armed conflict and (ii) the link (nexus) between the acts of the accused and the armed conflict. Specific Conditions: (i) the existence of an international armed conflict and (ii) the acts must be committed against persons or property protected by the Geneva Conventions and the Additional Protocol. The main decisions rendered by the ICTY in this regard can be

5. For the criticism of the view taken by the ICTY in the *Celebici Camp Case* in relation to the interpretation of the mental element of superior responsibility, and the reasons why this concept should be named as 'objective responsibility', *see* Chapter 3, p. 100, Individual Criminal Responsibility under Article 7 (3) of the ICTY Statute and Article 6 (3) of the ICTR Statute.
6. *See* Chapter 3, p. 97, Individual Criminal Responsibility under Article 7 (4) of the ICTY Statute and Article 6 (4) of the ICTR Statute.

indicated as follows: *Tadic Jurisdiction Decision* (at the Trial Chamber and Appeals Chamber levels); *Tadic Case, Celebici Camp Case, Aleksovski Case Final Judgements* (in the Trial Chamber); *Tadic Case, Judgement* (in the Appeals Chamber).

(c) The substantive content of the grave breaches system, in other words, the scope of international crimes and their elements are examined in detail. In most cases definitions of offences are provided by means of the practice of the *ad hoc* tribunals. In this sense, the view taken by the International Tribunal with regard to the crimes such as wilful killing or murder, torture, inhuman or cruel treatment, rape or any other forms of sexual violence, first ever definition of rape and sexual violence and its treatment as constituting a form of torture, and so on, should be noted. There cannot be any doubt that the approach taken by the International Tribunals in this respect will create a precedential value for the ICC in its case law on the basis that the ICC Statute grants power to the ICC over the grave breaches of the Geneva Conventions.[7]

Violations of the Laws or Customs of War

One of the major contributions of the practice of the *ad hoc* tribunals is the interpretation and application of the concept of violations of the laws or customs of war. In particular, the following points need to be indicated:

(a) The recognition of crimes committed in internal armed conflicts as international crimes and of individual criminal responsibility for these offences are able to be practised by the *ad hoc* tribunals for the first time in international humanitarian law. This should be perceived as a turning point in the history of international humanitarian law since it provides protection for civilians who are in internal armed conflicts at the international level.

(b) The conditions for the applicability of violations of the laws or customs of war are examined in detail.

(c) The substantive content of the violations of the laws or customs of war is clarified, and crimes under this sub-category of war crimes are examined.

The approach taken by the ICTY and the ICTR in relation to this concept undoubtedly constitutes a precedential value for the ICC since the ICC Statute includes similar or even more detailed provisions in this regard.[8]

However, the view taken by the ICTY, that the international character of an armed conflict is a prerequisite for the applicability of the grave breaches system (which derives from the artificial distinction between international and non-international armed conflicts), should not be perceived as in compliance with the development of international and human rights law as far as the protection of innocent civilians in a wartime situation is concerned. This criticism is also valid in relation to the

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7. *See* Chapter 4, p. 115, The Grave Breaches System.
8. *See* Chapter 4, p. 181, Violations of the Laws or Customs of War.

approach taken by the ICTY with regard to the concept of protected persons or property. This is because the nature of armed conflicts must not preclude the protection of innocent lives in cases of armed conflicts either international or internal in character.[9]

3. The Crime of Genocide

The crime of genocide is universally prohibited by conventional and customary rules of international law irrespective of whether it is committed in time of peace or in time of war. Despite its extensive prohibition, until the practice of the ICTY and the ICTR it was not possible to enforce the rules governing the crime of genocide, in other words, the Genocide Convention in international humanitarian law.

In the light of this, the practice of the *ad hoc* tribunals has a crucial importance in terms of providing the first ever interpretation and application of the crime of genocide at the international level, and undoubtedly constitutes a precedential value for the ICC in its case law since the ICC has jurisdiction over this horrendous international crime. The significant aspects of the practice of the *ad hoc* tribunals in light of the Judgements of the *Akayesu, Kayishema and Ruzindana, Rutaganda, Kristic and Jelisic Cases* can be summarised as follows:

(a) It is proven that the crime of genocide is not a second category of crimes against humanity as consisting of the persecution of individuals on political, racial or religious grounds.[10]

(b) The definition of genocide is provided by means of interpreting and applying the rules governing this crime in a manner which prevents the misuse or abuse of the concept of genocide.[11]

(c) The requirements of genocide, for the first time in international law, are interpreted and applied. In this context, the elements of 'the victimised group or protected group', 'the intent' and 'the acts' constituting genocide are applied in accordance with the development of international humanitarian and human rights law.[12]

(d) The substantive content of the crime of genocide is interpreted and applied. The international community witnessed the applications of the concepts of killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group into a specific event. In this regard, the recognition of rape and sexual violence as constituting the crime of genocide under the categories of 'causing serious bodily or mental harm to members of the group' and of 'imposing measures intended to prevent births within the group' by the International

9. *See* Chapter 4, p. 135, The Nature of Armed Conflicts Must Not Have Any Significance in International Humanitarian Law, and p. 147, The Concept of Protected Persons or Property.
10. *See* Chapter 5, p. 204, Distinguishing the Crime of Genocide from Crimes Against Humanity.
11. *See* Chapter 5, p. 206, The Definition of Genocide.
12. *See* Chapter 5, p. 209, The Elements of the Crime of Genocide.

Tribunal should be noted as creating a historical precedence in international humanitarian law.[13]

(e) The establishment of individual criminal responsibility for the crime of genocide, as different from the general regulation of individual criminal responsibility, is examined in detail by the ICTR. In this context, the punishable acts of genocide, which are (i) genocide, (ii) conspiracy to commit genocide, (iii) direct and public incitement to commit genocide, (iv) attempt to commit genocide, and (v) complicity in genocide are interpreted and applied. As the practice of the *ad hoc* tribunals demonstrates, specific regulation of individual criminal responsibility for the crime of genocide has a significant place in international humanitarian law on the basis of the preventive nature of this type of regulation. For this reason, the view adopted in the Statutes of the *ad hoc* tribunals in this respect should be seen as an advancement over the view adopted in the ICC Statute since it does not include a specific provision indicating punishable acts of genocide, apart from the crime of direct and public incitement to commit genocide.[14]

4. Crimes Against Humanity

Crimes against humanity are universally prohibited by the customary rules of international humanitarian law whether committed in time of peace or in time of war. Although the concept of crimes against humanity has, for the first time in positive international law, taken its place in the Nuremberg Charter to cover some acts which may not be regarded as either war crimes or crimes against peace, it has evolved and become an independent category of international crimes.

On the basis of this ground, the practice of the *ad hoc* tribunals has a significant role in clarifying the notion of crimes against humanity. The contribution of the practice of the ICTY and the ICTR to international humanitarian law and their impact on the ICC in this respect, in light of the Judgements of the *Tadic Case* (*Jurisdiction Decision, Judgements* rendered by the Trial and Appeals Chamber of the ICTY), *Kupreskic and Others, Akayesu, Kayishema and Ruzindana, Rutaganda Cases*, can be indicated as follows:

(a) The elements of crimes against humanity are examined in detail by the *ad hoc* tribunals. In this context, it is proven that the existence of an armed conflict, whether international or internal, is not a prerequisite condition for the applicability of crimes against humanity.The requirement that there must be an attack or act directed against any civilian population and its content are clarified. The concepts of 'civilian population', 'widespread or systematic attack', the 'policy element' are interpreted and applied in accordance with the customary rules of international humanitarian law.The mental element of crimes against humanity, that is to say, the accused must have the knowledge of the context within which his/her

13. *See* Chapter 5, p. 221,The Substantive Content of the Crime of Genocide.
14. *See* Chapter 5, p. 227, Individual Criminal Responsibility for the Crime of Genocide.

actions are taken is clarified in international law. It is well established by the practice of the ICTY that the discriminatory basis on national, political, ethnic, racial or religious grounds is not required for all crimes against humanity, but only for the persecution types of crimes.[15]

(b) The substantive content of crimes against humanity is interpreted and applied in detail by the *ad hoc* tribunals. In other words, the elements of murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial or religious grounds, and of other inhumane acts are clarified in international humanitarian law. In this sense, in particular, the *Judgement of Kupreskic and Others Case* should be noted in terms of providing the first ever definition of persecution by an international criminal institution, and of interpreting and applying its elements and substantive content in compliance with the customary rules of international humanitarian law.

(c) The similarities and differences between the crime of genocide and persecution and the *mens rea* requirements of these offences, in other words, genocidal intent and discriminatory intent are clarified by means of the practice of the ICTY and the ICTR.[16]

In general, as this study demonstrates, the practice of the ICTY and the ICTR in relation to their substantive law contributes to international humanitarian law and creates an immense precedential value for the ICC in its case law. However, it should be noted that the ICTY and the ICTR have been functioning under very difficult circumstances and their success extensively depends upon the co-operation of States with them. This is the only way to bring major responsible individuals to justice. Although it is clear that not all responsible individuals will be brought before the ICTY and the ICTR, it should not be forgotten that one of the real achievements of the *ad hoc* tribunals lies in giving warnings to possible perpetrators of international crimes that they will not go unpunished.[17]

As far as international humanitarian law is concerned, it should be noted that '[i]nternational humanitarian law has developed faster since the beginning of the atrocities in the former Yugoslavia than in the four-and-a-half decades since the Nuremberg Tribunals and the adoption of the Geneva Conventions for the Protection of Victims of War of August 12, 1949'.[18] The establishment of the ICTY and the ICTR and their practice are the main reasons for such a conclusion. The establishment of the ICC also indicates this. The international community has started the new millennium with two *ad hoc* tribunals currently functioning and the ICC became operational on 1 July 2002.[19] In parallel with these developments, it should also be noted that the international community has a guideline in terms of implementing the

15. *See* Chapter 6, p. 245, The Conditions for the Applicability of the Concept of Crimes Against Humanity.
16. *See* Chapter 6, p. 255, The Substantive Content of Crimes Against Humanity.
17. For example, as of 4 February 2000, the ICTY have publicly indicted only 93 individuals. For information in this regard, *see* Press Release, Fact Sheet, UN Doc. PIS/FS-62 (4 February 2000).
18. *See* Chapter 3, note 21.
19. The ICC Statute entered into force in accordance with its Article 126 on 1 July 2002. As of November 2002, the number of States parties to the Statute has reached 82 and the signatories to it 139.

rules of international humanitarian law through legislation in accordance with the ICC Statute at the national level.

Lastly, in this context, it should also be indicated that the Cold War is over, and the world has been changing significantly. The new world order will hopefully not tolerate any more violations of international humanitarian and of human rights law either committed in international or internal armed conflicts; in time of peace or in time of war. The establishment of the *ad hoc* tribunals and the ICC in the last decade of the twentieth century should be seen as examples of this trend. There are likely to be more 'humanitarian interventions' in order to restore or maintain international peace and security throughout the twenty-first century. The international community as a whole (as being witnessed in the Gulf-War) or NATO as an international organisation (as being witnessed in the Kosovo conflict) can play the central role in making possible 'humanitarian interventions' to prevent violations of international humanitarian and of human rights law occurring in different parts of the world. In consequence of this, individuals responsible for such violations can be easily brought to justice (before the ICC). This way of understanding should lead us to the conclusion that there is only one world for all human beings and the ICC, with the exception of the principle of complementarity, is the 'World Court' to punish individuals who are violating the world order. This must be the main target to be achieved by the international community in the twenty-first century. However, while this work has been in process, the Chechnya conflict has been ongoing, and the silence of the international community in relation to the massive human rights and humanitarian law violations that have taken place in that conflict indicates that there is still a long way to go to achieve this target.

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