

**THE UNIVERSITY OF ZAMBIA**

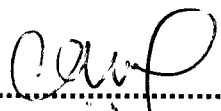
**SCHOOL OF LAW**

I recommend that the obligatory essay prepared under my supervision by Major Constantine Hara entitled:

**Repression of War Crimes Through International Tribunals**

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to formality as laid down in the regulations governing obligatory essays.

Date: ..... 12 May 2007 .....

Signed : .....  .....  
Professor C Anyangwe  
Supervisor

**TABLE OF CONTENTS**

	<b>Page</b>
Dedication .....	i
Acknowledgments.....	ii
Abstract .....	iii

**CHAPTER ONE**

Chapter 1: Criminal Responsibility for violation of International Law.....	1
1. Responsibility of States and individuals Distinguished .....	1
2. The Basic Features of the Law Relating to Armed Conflict .....	5

**CHAPTER TWO**

Chapter II: International Criminal Tribunals of the Past .....	23
1. The Earliest International Criminal Tribunals .....	24
2. The Trials Following the Second World War .....	28

**CHAPTER THREE**

Chapter III: The Ad hoc Tribunal for the former Yugoslavia .....	34
1. Background .....	35
2. Jurisdiction .....	42

**CHAPTER FOUR**

Chapter iv: The Adhoc Tribunal For Rwanda .....	58
1. Background .....	58
2. Jurisdiction.....	61

**CHAPTER FIVE**

Chapter V: The Contribution made by the ICTY and ICTR to International Law..... 66

1. The Definition of Armed Conflict by the ICTY ..... 66

2. The Jurisprudence on War Crimes under the Statutes ..... 70

3. The Jurispendence on Crimes Against Humanity and Genocide under the Statutes ..... 79

**CHAPTER SIX**

Chapter vi: Conclusion ..... 89

Bibliography ..... 93

## **DEDICATION**

This essay is dedicated to my late wife, Dorothy, who was there when the writing of this essay began, but did not live long enough to see it finish.

## **ACKNOWLEDGEMENTS**

Now that the writing is done I am faced with a task which I fulfil with pleasure, but find by no means easy. I wish to acknowledge with thanks the help of those without whom I would not have undertaken this essay. Many hands helped to make these pages, and the degrees of contribution vary. Acknowledgements themselves appear casual and say little about the individuals whose criticisms, suggestions, assistance, and ideas, often expressed in casual conversation, rendered invaluable service. Those I here mention by no means exhaust the list but, as I have said, I do not find it easy to record in full my indebtedness to friends and colleagues.

There are, however, a special few who made most valuable contributions to the writing of the essay. First is Professor C. Anyangwe, my faculty supervisor, without whose guidance, valuable comments and materials this essay would have been extremely difficult to complete.

My thanks also go to Brigadier General P M Mulwanda, who provided me with invaluable information and advice, in his private capacity.

My warmest thanks go to my children, Elina, Edson and Edna, for their unfailing understanding that I had to be away from "home". Last but not the least, I am also indebted to my nephew, Abraham Zulu, for his support.

## **ABSTRACT**

War or armed conflict, the technically preferable general term, represents a major breakdown of the "normal" conduct of International relations. It is also, tragically, a recurrent feature of the modern world and provisions are accordingly made for its occurrence in public international law. The provisions comprises principally the *jus ad bellum* relating to resort armed forces in conduct of international relations and the *jus in bello*, relating to constraints upon actual conduct of hostilities, and forms the subject matter of this directed research.

Events such as the armed conflicts in Angola, the Democratic Republic of Congo, the Great Lakes region, and the former Yugoslavia confront us day after day with the cruelty of war and the suffering, death and destruction it causes. They also raise an obvious question: is the behaviour of the belligerent parties subject to any limitations? The answer to this question is not hard to give: such limits do exist, even though they may not be entirely unequivocal in all cases. To the extent that they belong to the realm of law (rather than that of morality alone) they constitute the body of "International Humanitarian Law applicable in armed conflict". The purpose of the essay will, therefore, be to examine the role played by international tribunals in the enforcement of international humanitarm law and other related laws.

This seems useful for two reasons. For one thing, the humanitarian law of armed conflict depends for its realization on the degree to which it is known to the largest possible number of people. For another, an intensive process of international deliberation and negotiation has been recently resulted in the adoption of a number new treaties on humanitarian law, and it is important that public opinion be given an opportunity to take cognisance of these. It is for these two preceding reasons, that credence and weight has been given to an essay on this subject matter.

The choice of subject has been motivated partly by a feeling that it has not received that attention in this country from the government, legal profession and the armed forces, which is its due; and partly by a conviction that recent changes in technology and strategy have given a new significance to the legal regulation of the use of force.

A short comment on the content of the essay would now seem to be apposite. The title of the essay seems broad, but development of the essay will be confined to the pursuit of a main theme, viz, an examination of the role played by international tribunals in the enforcement of international humanitarian law. The essay will start with a general introduction. Under Chapter I where the concept of criminal responsibility and the basic features of the law governing the use of armed force will be explained. This will be followed, in Chapter II, by a

discussion of the set-up and work of international tribunals of the past. Against this background, the establishment and activities of the International Criminal Tribunal for the former Social Federal Republic of Yugoslavia (ICTY) will be dealt with in Chapter III, followed by an examination of the background, the establishment and activities of International Criminal Tribunal for Rwanda (ICTR) in Chapter IV. Chapter V will be devoted to a discussion of some of the significant contributions which the ICTY and the ICTR have made to the development of international criminal law in general and international humanitarian law in particular. In concluding, under Chapter IV, an appraisal of the efficacy of the mechanism for repression of war crimes through international tribunals will be made.

## CHAPTER 1

### CRIMINAL RESPONSIBILITY FOR VIOLATIONS OF INTERNATIONAL LAW

#### 1. RESPONSIBILITY OF STATES AND INDIVIDUALS DISTINGUISHED

It is a long established principle of international law that every internationally wrongful act of a state entails the international responsibility of that state.<sup>1</sup> Apart from the traditional category of state - to - state international wrongs there are certain serious violations of international law which may constitute internationally recognised wrongs. In the Barcelona Traction case, the International Court of Justice acknowledged the existence of:

*"obligations of a state towards the international community as a whole, which by their very nature .... are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection, they are obligations erga omnes."*<sup>2</sup>

Thus, the distinctive feature of internationally recognised wrongs is that they have legal implications erga omnes, affecting the international community of states as a whole. The types of obligations mentioned by the ICJ in the Barcelona Traction case were the prohibition of genocide, the abolition of slavery and racial discrimination and the outlawing of aggression in international law.<sup>3</sup>

Breaches of the latter norm are probably among the most universally accepted internationally recognised wrongs. The International Law Commission has since long suggested that the prohibition of armed force in international relations is peremptory (*jus cogens*),<sup>4</sup> and the ICJ has subscribed to this view in the 1986 Nicaragua case.<sup>5</sup> Furthermore, in the ILC's draft on state responsibility, the aggressive use of armed force in violation of the UN Charter is qualified as an international crime.<sup>6</sup> According to Article 19 of the ILC's draft on state responsibility, an international crime is a wrongful act which results from the breach by a state of :

*"an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole."*<sup>7</sup>

The suggestion, by the ILC, that there are two types of international state wrongs - crimes and delicts - has attracted great controversy.<sup>8</sup> Nevertheless, most sceptics seem to acknowledge that there may be different categories of violations of primary obligations in international law, which should entail different consequences based on the seriousness of the international wrong. Furthermore, even the most passionate critics appear less reticent to label the use of force by a state in violation of Articles of the UN Charter, as a theoretical or potential state crime.<sup>9</sup>

Apart from state responsibility however, international law increasingly recognises the principle of individual criminal responsibility of the perpetrators of international wrongs. While the questions are undoubtedly linked, it is important to keep the matters of the responsibility of states and of individuals separate. The former deals with the theory and consequences of wrongs committed by the traditional subjects of international law, that is, states. The second question deals with the international wrongs committed by individuals in so far as the latter are recognised as subjects of international duties.<sup>10</sup>

"The principle of individual responsibility for crimes under international law was clearly established at Nuremberg. As will be seen in more detail later, Article 6 of the Nuremberg Charter annexed to the London Agreement of 8 August 1945 provided for individual criminal responsibility for war crimes proper and for what it described as crimes against humanity, as well as for crimes against the peace, that is, for the crime of aggressive war. In a celebrated judgment, the International Military Tribunal of Nuremberg confirmed the direct applicability of international criminal law with respect to the responsibility and punishment of individuals for violations of this law in the following terms:

*"It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that the act in question is act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the of the state. In the opinion of the Tribunal, both these submission must be rejected. Crimes 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."*<sup>11</sup>

Since Nuremberg, there has been a clear trend towards the expansion of individual responsibility directly established under international law. Apart from breaches related to the resort to armed force in violation of international law (*jus ad bellum*), individual criminal responsibility under international law has been explicitly affirmed or established amongst other crimes, in relation to genocide,<sup>12</sup> torture,<sup>13</sup> "grave breaches" of the Geneva Conventions,<sup>14</sup> and certain means and methods of warfare:

Chemical weapons, and anti-personnel mines.<sup>15</sup> Furthermore, universal jurisdiction over piracy has been accepted under international customary law for many centuries.<sup>16</sup> Apart from that, several treaties lay down the obligation for parties to either prosecute or extradite individuals concerned. Example of such crimes, defined by treaty, include conventions against hostage taking, terrorism and drug trafficking.<sup>17</sup>

At the end of the legal spectrum one finds the ILC Draft Code of Crimes against the Peace and Security of Mankind, which enumerates the following crimes as entailing individual criminal responsibility under international law: aggression (Article 15); genocide (Article 19); apartheid (Article 20); exceptionally serious war crimes (Article 22); recruitment, use, financing and training of mercenaries (Article 23); international terrorism (Article 24); illicit traffic in narcotic substances (Article 25); and willful and severe damage to the environment (Article 26). Many

of these suggestions are considered controversial. This has been confirmed by the difficult negotiations surrounding the jurisdiction and the triggering mechanisms for the future International Criminal Court. A more recent example of the legal and political sensitivities surrounding the concept of universal or "third party" jurisdiction has been offered by the Pinochet case in 1998 - 9.<sup>18</sup> As is well known, in 1998, the Spanish authorities instituted proceedings in the United Kingdom to have the former General extradited from the UK to Spain. The charges laid against the General include, inter alia, crimes against humanity such as torture, committed on Chilean territory against victims of various nationalities. These extradition proceedings have not yet reached their conclusion.<sup>19</sup>

## 2. **THE BASIC FEATURES OF THE LAW RELATING TO ARMED CONFLICT.**

The law of war occupies a rather unusual place in the international legal system since the great majority of its norms are binding not only upon states but also upon their nationals, whether members of their armed forces or not.<sup>20</sup>

Unlike human rights treaties, whose provisions are usually cast in general terms suited to application by a court or tribunal, the treaties on the laws of war are designed to be applied by military personnel, and contain detailed and practical provisions.<sup>21</sup>

Because of their obvious importance to the mandate of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTY), the basic features of the laws regulating armed conflict need to be understood. In what follows, the differences between jus ad bellum and jus in bello will be discussed. This will be followed by an explanation of the regulatory differences in international humanitarian law between international and internal armed conflicts. The final part of this sub-chapter will deal with the special features of the grave breaches regime of the Geneva Conventions and the obligation for states to enact systems of mandatory universal jurisdiction over individual perpetrators of this particular class of war crimes.

#### A. **JUS AD BELLUM AND JUS IN BELLO**

Mankind has long sought to restrain war through law, by prescribing both when war is permissible and what is permissible in war, if and when it has begun. The contemporary law of armed conflict still encompasses this classical dichotomy. Any use of armed force in international relations is subject to a two tier scrutiny of rules regulating the resort to armed force (jus ad bellum) on the one hand, and rules governing the use of armed force (jus in bello) on the other.<sup>22</sup>

The modern jus ad bellum consists primarily of the United Nations Charter. Under the collective security system that came into force with UN, war and the use of force have become, in the words of Kelsen, either a delict, if waged in violation of the law; a sanction, if carried out in its defence or enforcement.<sup>23</sup> As is clear from the preamble, the drafters of the UN Charter were determined "to save succeeding generations from the scourge of war". To achieve this end, Article 2(4) of the Charter replaces the much abused term "war" with the more objective threshold of "threat or use of force".

*"All Members shall refrain in their international relation from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."*

Moreover, exceptions to Article 2 (4) are narrowly circumscribed: the right to use armed force is bestowed on states individually or collectively, but only when acting in self-defence, and until the Security Council has taken measures necessary to maintain international peace and security under Chapter VII of the Charter.<sup>24</sup> The Security Council's actions under Chapter VII are conditional on the determination of the existence of three events - threat to peace, breach of peace or act of aggression - after which it can make either a recommendation or a binding decision pursuant to Article 39. The measures which the Security Council can decide upon accordingly are "measures not involving the use of force" (Article 42). Article 48 provides that Chapter VII actions shall be taken by all UN members or by some of them, as determined by the Council, whilst

Articles 52 and 53 of the Charter provide that regional organisations may undertake enforcement actions with Security Council authorisation. As will be seen below, the ICTY and ICTR owe their establishment to the exercise by the Security Council of its authority under Chapter VII of the UN Charter.

The modern *jus ad bellum* (or *jus contra bellum*) is aimed at preventing the outbreak of armed conflict while the purpose of the *jus in bello* is to moderate or humanise armed conflict. This difference in legal objective leads to a crucial difference: *jus ad bellum* allows the international community to pass judgment on the merits of resort to armed force. Such a judgment is predicated on a distinction between victims and aggressors. By contrast, *jus in bello* applies equally to all parties to an armed conflict, regardless of the legality of their actions under *jus ad bellum*.<sup>25</sup>

In sharp contrast to the relative simplicity of *jus ad bellum*, *jus in bello* may appear as a daunting list of successive and increasingly elaborate treaty instruments that reflect the many attempts by the international community to restrain the worst excesses of past armed conflict.<sup>26</sup> Traditionally, *jus in bello* treaties have been imperfectly categorised as belonging either to the Hague Law or to the Geneva Law, after the cities in which most of the conventions were negotiated.<sup>27</sup> The former tradition is said to be concerned mainly with the conduct of armies in the field whereas the latter with the protection of war

victims.<sup>28</sup> In accordance with modern practice, the term “international humanitarian law” as used here, refers to the international applicable law to armed conflicts, encompassing provisions of the “Hague type” and the “Geneva type”.

The 1907 Hague Conventions and the 1949 Geneva Conventions have been largely recognised as customary law.<sup>29</sup> The latter are among the most widely ratified international instruments. On 15 August 1999, 185 states were members of the UN. However, by that date, the Geneva Conventions, had attracted 185 ratifications or accessions. Of the 185 members of the United Nations, only Eritrea, the Marshall Islands and Naurn were not parties to the 1949 Geneva Conventions. Additional Protocol I had 155 and Additional Protocol II, 148. However, a number of important military powers including the United States, India and Pakistan, are still not parties to the Additional Protocols. France has ratified both Protocols quite recently, on 15 May 1999.<sup>30</sup>

Many argue that the overriding majority of the *jus in bello* provisions are peremptory (*jus cogens*) under international law.<sup>31</sup> In its 1996 *Advisory Opinion on the Legality of Nuclear weapons*, the ICJ took note of this argument but found that there was no need for it to address this issue.<sup>32</sup> Nonetheless, the court observed that the great majority of these provisions had already become

customary law, that they reflected the most universally recognized humanitarian principles, and that they constituted intransgressible norms.<sup>33</sup>

## B. INTERNATIONAL AND INTERNAL ARMED CONFLICTS

Since the Second World war, the international humanitarian law of the “Geneva” strand, aimed primarily at the protection of victims of war, has been re-affirmed and updated in two major Diplomatic Conferences. The first one, held in 1949, led to the adoption of the present four Geneva Conventions. The outcome of second one, held from 1974 to 1977, was the adoption of two adoption of two additional protocols. In both of these conferences, international and non-international armed conflicts were dealt with in sharply different ways.

The four Geneva Conventions of 1949 were primarily, if not almost exclusively, enacted to apply to international armed conflicts. Article 2 common to the four 1949 Conventions gives a broad definition of these conflicts. It applies to:

*“... all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognised by one of them. The Conventions shall also apply to all cases of partial or total occupations of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”*

The Geneva Conventions were innovative in that for the first time in history, a treaty provision was adopted to the regulation of non- international armed

conflicts.<sup>34</sup> Still, the ensuing regulation was minimal. First, Common Article 3 defines non-international conflicts in a negative way: "... the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties..." Furthermore, parties to such conflicts are required to adhere only to a minimum set of standards: "Persons taking no active part in the hostilities" and other protected persons must be treated humanly; torture and other forms of physical maltreatment are forbidden, as is hostage taking; sentencing and executions need to comply with minimum due process.

At the time of its adoption in 1949, common Article 3 was seen as a kind of "mini-convention" within the Geneva Conventions."<sup>35</sup> The unique position of common Article 3 and its relationship within the rest of the Geneva Conventions was arguably confirmed by the ICJ when it considered the Nicaragua Case in 1986. The Court opined that Article 3 was declaratory of customary international law, and that it constituted "a minimum yardstick" for both international and internal armed conflicts, in addition to the more elaborate rules applicable to international armed conflicts.<sup>36</sup> Traditionally therefore, and leaving Article 3 aside, the four 1949 Geneva Conventions have no relevance to internal conflicts. The notion "conflict not of an international character" appears, in equally unelaborated form, in Article 19 of the Hague Convention on Cultural Property adopted in 1954. It was only with the negotiation in 1970s of the two Protocols Additional to the Geneva Conventions, that the differences between international and non-

international conflicts received explicit clarification in written law. The first additional protocol of 1977 (API), which deals with the protection of victim's of international armed conflicts, applies in the first instance to the same type of inter-state conflicts mentioned in Article 2, common to the 1949 Geneva Conventions. However, this category was rather controversially broadened in API Article 1 (4) to include:

*"... armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations".*

Thus, for purposes of international humanitarian law, API assimilates wars of national liberation to international armed conflicts. For its part, AP 2 of 1977, which relates explicitly to the protection of victims of non-international armed conflicts, builds on Article 3 of the 1949 Geneva Conventions but is much more restricted in scope. It exclude wars of national liberation and similar conflicts (covered by API), and sets a minimum threshold for other types of internal conflicts.<sup>37</sup>

To summarise, the above provisions results in several types of armed conflicts: (1) classic inter-state conflicts in which armies of two states or more face each other across state borders; (2) certain wars of national liberation as circumscribed in API of 1977; (3) internal wars on armed conflicts "not of an

international character" mentioned in Article 3 common to the four Geneva Convention and in Article 19 of the Hague Convention on Cultural Property; (4) non-international armed conflicts defined in AP 2 of 1977; and (5) other internal (armed) conflicts such as disturbances and riots which fall below the thresholds of Article 3 of 1949 and AP2 of 1977. The first two categories constitute international armed conflicts, the third and fourth non-international or internal armed conflicts.

It is common ground that there is a wide regulatory gap between the two main categories of armed conflict. The numbers speak for themselves: the 1949 Geneva Conventions and the 1977 Protocols alone contain close to 600 articles, of these, only Article 3 common to the 1949 Geneva Convention, and the 28 articles of 1977 AP2, apply to internal conflicts. Furthermore, the law of the Hague tradition - on methods and means of combat and conduct of armies in the field - predating the 1949 Geneva Conventions, was initially meant to apply to classic inter-state wars only.<sup>38</sup> The legal dichotomy between international and internal armed conflicts is one of the major problems affecting prosecutions before the ICTY.

c. **INDIVIDUAL CRIMINAL RESPONSIBILITY OF VIOLATIONS OF  
OF INTERNATIONAL HUMANITARIAN LAW**

There is quite a lot of terminological confusion between the concepts of war crimes and grave breaches. This may partly stem from the fact that many of the

violations mentioned as "war crimes" and "crimes against humanity" in the London (Nuremberg) Charter, have been termed "grave breaches" in the Geneva Conventions.<sup>39</sup> It is essential that the terms used in this discussion be precisely defined. In the present dissertation, the term violations of the "laws and customs of war" or "war crimes", unless indicated otherwise, will be used as a generic term referring to violations of international humanitarian law generally.<sup>40</sup> Depending on the consequences flowing from a particular breach of international humanitarian law, there are at least three different classes of war crimes: the category of grave breaches of the Geneva Conventions; the category of "other serious violations of International Humanitarian Law; and the remainder, which may be described as Minor violations of International Humanitarian Law.

Grave breaches is a technical term used in the Geneva Conventions of 1949 and the Additional Protocol 1 of 1977. Only certain violations of the Geneva Convention qualify as grave breaches.<sup>41</sup> These are specified grave violations committed willfully - either intentionally or in reckless disregard of the consequences - and against different groups of protected people by each convention: the injured and sick (Geneva Convention I), the ship - wrecked (Geneva Convention II), prisoners of war (Geneva Convention III) and civilians (Geneva Convention IV), as supplemented by Additional Protocol I, or against property referred to in these instruments.<sup>42</sup> AP1 has extended the concept of

grave breaches to certain acts forming part of the conduct of hostilities,<sup>43</sup> and contains an express reference to willful omission.<sup>44</sup>

Parties to the Geneva Conventions are under an obligation to enact legislation necessary to provide effective penal sanctions to persons committing or ordering to be committed, a grave breach of the Conventions. They are also obliged to search for persons alleged to have committed or have ordered to be committed, such grave breaches, and to bring such persons, regardless of their nationality, before their own courts. Should a state party decide not to try a suspect of grave breaches, the Geneva Conventions demand that the suspect be handled over for trial by another party making out a *prima facie* case. This obligation is known as the principle of "*aut dedere aut judicare*".<sup>45</sup> Crucially, there is no need for a link such as the nationality of the perpetrator nor for any other connecting factor between the suspect and the country in which the suspect is tried. The perpetrators of grave breaches must be tried, and any state may assert universal jurisdiction to do so. In other words, the grave breaches system confers on states the right to try persons which are non-nationals and to exert jurisdiction over crimes committed outside their territory, or as the case may be, the duty to extradite the suspect for trial elsewhere. These principles are usually known as aspects of mandatory universal principle.<sup>46</sup> Traditionally, the main principles upon which states may exercise criminal jurisdiction are:

(1) the principle of territoriality, where a state exercises jurisdiction over a crime committed on its territory; (2) the principle of active nationality or active personality, where a state exercises jurisdiction over the offender on the ground that the offender is a national of the state concerned; (3) the principle of passive nationality or passive personality, where a state exercises jurisdiction over the offender on the ground that the victim of the offence is national of the state concerned; (4) the protective principle, where a state exercises jurisdiction on the ground that the offence was prejudicial to its vital interests.<sup>47</sup>

The exercise of jurisdiction by one state on the basis of the universality principle constitutes one of the highly charged areas of international relations for it may intrude upon the sovereignty of other states.<sup>48</sup> For that reason it is generally assumed that states must have consented to the exercise of universal jurisdiction in a particular treaty, or that such exercise must follow from customary international law over a particular category of crimes.<sup>49</sup> Hence, the ICTY's Appeals Chamber correctly held that the elaborate grave breaches systems of the Geneva Conventions represents a serious limitation of the traditional sovereignty of states.<sup>50</sup>

*"The grave breaches system of the Geneva Conventions establishes a two fold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches", closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all contracting states to search for and try to extradite persons allegedly responsible for "grave breaches". The international armed conflict element generally attributed to the grave breaches provisions of*

*the Geneva conventions in merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intention on state sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other states jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system."*

This is a fortiori the case when, as is generally assumed, the Geneva Conventions and grave breaches systems constitute customary international law. Finally, it should be noted that establishment of the ICTY itself, and its jurisdiction under Article 2 of the statute, means that the jurisdictional aspects of the grave breaches system have been imported into the Tribunal.<sup>51</sup>

The offences to which the grave breaches system attaches, are regarded as the most egregious violations of the Geneva Law, leading to individual criminal responsibility of the perpetrators. The question that arise then, is whether and to what extent individual criminal responsibility attaches to other, "non-grave" breaches of the conventions. To answer this question it should be noted that the Geneva Conventions themselves divide violations into "grave breaches" and all acts contrary to the provisions (of the Conventions) other than grave breaches". With respect to the latter category, state parties have obligation to take measures necessary for the suppression of these acts,<sup>52</sup> but the Conventions themselves do not attach any of the specific jurisdictional features of the grave breaches system to these other breaches of the Conventions.<sup>53</sup> However, AP 1

has introduced a new concept in Article 50 - "serious violations" of the Geneva Conventions and the Protocol - for which the International Fact Finding Commission may be competent, and which should also be made punishable by belligerents.<sup>54</sup> Some commentators argue that whilst states are not under a duty to do so, they may assert "universal" jurisdiction over these other, "non - grave" breaches, if considered serious.<sup>55</sup> This may apply in particular to serious violations of the Hague Law.

Many recent treaty instruments reflects tendency to establish or confirm the existence of individual criminal responsibility in relation to the latter category of war crimes. This is evident from the inclusion of the latter category of crimes into the Statutes of the ICTY (1993)<sup>56</sup> and the permanent International Criminal Court (1998).<sup>57</sup> A further illustration are the treaty instruments which obligate states to take the necessary measure to prosecute and penalize individual offenders of prohibitions on certain means and methods of warfare: the 1993 Chemical Weapons Convention,<sup>58</sup> the revised Mines Protocol to the Inhumane Weapons Convention<sup>59</sup> and the 1997 Mine Bar Treaty.<sup>60</sup>

What about minor violations of International Humanitarian Law? As mentioned earlier, all states bound by the Geneva Conventions are obligated to take measures necessary for the suppression of all acts contrary to Geneva Conventions, even if they are minor violations. However, there is no explicit

provision in the conventions for any internationally recognized personal criminal responsibility similar to the grave breaches system of the Conventions. Such minor violations are more likely to be made punishable under domestic criminal law of states, or to disciplinary proceedings or criminal sanctions under military law.<sup>61</sup> In general, the effect of the "criminalisation" of these other violations of the Geneva Conventions (leaving the category of the "serious violations" introduced by Article 90 AP 1 aside) will be confined to the domestic sphere of the state enacting such legislation.<sup>62</sup> By way of illustration of this principle, it should be noted that pursuant to Article 1 of their Statutes, the ICTY and ICTR only have authority to prosecute "serious violations" of international humanitarian law. Finally, it is worth noting, that ICTY (and the ICTR) Appeals Chamber broke new ground when it asserted unequivocally that individual criminal responsibility exists for violations of the laws applicable to internal armed conflicts.<sup>63</sup> This had not previously been asserted by any international or national tribunal.

## ENDNOTES

1. Yearbook ILC, (1979), vol II, part 2, Report on 1st session, p.91.
2. Second Application, ICJ Report (1970), p.32.
3. Ibid
4. Hannikainen, L., Peremptory Norms (Jus Cogens) in International Law Helsinki, (Finnish Lawyers Publishing Co., 1998) p. 163.
5. ICJ Rep (1986) 100
6. Yearbook ILC (1975), vol II, part 2, p.92.
7. Article 19 gives some examples: aggression, colonial domination, slavery, genocide, apartheid and massive pollution of the atmosphere or of the seas.
8. Brownlie, I., System of the Law of Nations: State Responsibility (Oxford: Clarendon Press, 1983).
9. Hannikainen, op cit, p.326.
10. The ILC Draft Code of Crimes of Against the Peace and Security of Mankind, which was adopted in final form in 1996.
11. Transcript of Proceedings, p. 16, 878.
12. In Article 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, state parties "confirm" that genocide (defined in Article 2 "is a crime under international law which they undertake to prevent and punish".
13. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treat or Punishment.
14. See further below
15. Shaw, M., International Law, (Grotinuis, Cambridge, 1991). pp 242 - 3
16. Ibid p.470.
17. Ibid pp. 473 - 78
18. U.K. House of Lords: R V Bartle and the Commissioner of Police for the Police for the Metropolis and Others, Ex Parte Pinochet, decision of 25 November 1998 and 24 March 1999
19. "*Immunity verses Human Rights: The Pinochet Case,*" 10 European Journal of International Law, pp 237 - 277 (1999).

37. Atkin, op cit
38. Fischer, H., "Limitation and Prohibition of the Use of Certain Weapons in Non-International Armed Conflicts" *International Institute of Humanitarian Law, Yearbook 1989 - 90*, p.125 (1992).
39. Green, op cit., 286
40. Hampson, F., "Liability for War Crimes", in Rowe, P., *The Gulf War 1990 - 91 in International and English Law*, pp. 241 - 246 (1993).
41. Art. 50 of GC I (on the protection of wounded or sick); Art 51 of GC II (on the shipwrecked); Art. 130 of GC III (on POWS) and Art. 147 of GC IV (civilians).
42. Art. 13 GC I, Art. 13 GC II, Art. 4 GC III, Art. 4 GC IV, Art. 8, 44, 45, and 85, paras 2 - 4 AP1.
43. Art. (4) and Art. 85.
44. Arts. 86 - 7
45. Green, op cit., 43.
46. Shaw, op cit, pp 470 - 483.
47. Ibid pp. 458 - 469.
48. Wedgewood, R., "The International Criminal Court: An American View", *10 European Journal of international Law*, pp 99 - 102 (1999).
49. Shaw, op cit, p470.
50. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Tadi Jurisdiction Decision*, para 80, pp.45 -6.
51. *Tadi Jurisdiction Decision*, para 81, p.46.
52. Art. 49 (GC I), Art 50 (GC II), Art 129 (GC III), Art 146 (GC IV)
53. Although neither the ICTY nor in particular the ICC Statutes fully reflect the requirements of the universality principle.
54. Art. 90 (2) (c) (1).
55. Hampson, F., "Liability for War Crimes," p.244.
56. ICTY Statute Article 3
57. ICC Statute, Article 8 (2) (b)
58. Article VII of the 1993 Convention on the Prohibition of the Development,

- Production, Stockpiling and Use of Chemical Weapons and on their Destruction.
59. Article 14 of the revised Protocol.
60. Article 9 of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.
61. Hampson, F., op cit., p.245.
62. David, E., "Comments" in Dekker, I.F., \$ Post, H.H.G., (eds), *The Gulf War of 1980 - 88: The Iran -Iraq in International Legal Perspective*, p. 564, (1992).
63. Tad Jurisdiction Decision, paras 12 - 137, pp. 68 - 70.

## CHAPTER II

### INTERNATIONAL TRIBUNALS OF THE PAST

The foregoing indicates that certain serious violations of international humanitarian law, regardless of the source (Geneva Law or Hague Law) may constitute internationally recognised wrongs. Whilst third party states are not under a duty to do so, they may elect to exercise jurisdiction over such violations. Put differently, any state has arguably the right to exercise jurisdiction over at least a core set of serious violations of international humanitarian law, provided that these are recognised internationally as international wrongs.<sup>1</sup> In a similar vein, it was seen earlier that the norms enshrined in the UN Charter prohibiting the resort to armed force in international relations are regarded as obligations erga omnes and peremptory (jus cogens) in international law. There is little dispute that violation of these norms need to be qualified as universally recognised international wrongs.

The ensuing international norms are unusual in the sense that, unlike most other rules of international law, they apply to individuals, imposing obligations upon individuals as such and not merely upon the state responsible for their actions. Still, there are differences between the addressees of these obligations. The jus ad bellum for example, is addressed to the leaders of a

State, that is, both the civilian and military policy makers. In comparison, the scope of addressees under jus in bello is much wider. It imposes obligations not only upon the government of a belligerent, but also upon the seniors officers of its armed forces, upon all servicemen, whatever their rank, and upon the entire civilian population.<sup>2</sup>

The cornerstone of international criminal law consists of the principles of individual responsibility and punishment for crimes under international law. Pursuant to this principle, states may exercise jurisdiction over individual perpetrators of serious violations of international law. If states may exercise such jurisdiction individually, they may also exercise this jurisdiction collectively, or set up special institutions for the prosecution of such crimes. This is the theoretical basis which lies at the heart of the establishment of international criminal tribunals, although, as will be discussed in this essay, the legal basis on which the ICTY and ICTR have been established is different.

### 1. **The Earliest International Criminal Tribunals**

The earliest evidence of an institutionalised international criminal prosecution can be found in the fifteenth century. In 1474, France, Austria, the Swiss cantons and the cities of the Upper Rhines instituted criminal proceedings against the bailiff of Haute Alsace and of Brisgan.<sup>3</sup> The accused, Pierre d'Hagonbach, was charged, inter alia, with violations of natural law, as well as

the law of God and mankind, for having pillaged and massacred the inhabitants of Braschi, a city to Austria of which he was governor. He was tried before a tribunal of twenty-eight Swiss, Alsatian and German Judges of the Holy Roman Empire. Interestingly, this might be one of the earliest reported cases where the defence of superior orders was raised. The accused claimed to be acting on behalf of Charles of Burgundy. The plea was rejected and the accused was then executed.<sup>4</sup>

Close to our times are the attempts to prosecute Napoleon Bonaparte in 1815 and the German Emperor William II in 1919. By the Convention of 11 April 1814, entered into by Austria Prussia, Russia and Napoleon, the latter had formally agreed to retire to Elba. After he escaped and re-entered France with his army, the Congress of Vienna issued a declaration on 13 March 1815, stating that by having violated the agreement, Napoleon had placed himself outside the civil and social relation. Had they followed the commendation of Field Marshal Bluecher, Napoleon would have been shot on sight as an international outlaw. Instead, following his surrender after Waterloo, he was handed over to the British and deported to St. Helena.<sup>5</sup> Even if this decision was taken on political grounds, it can be regarded as a type of criminal sanction imposed for a violation of an international legal obligation by an individual.

After the end of the First World War, provisions were included in the Treaty of Versailles of 1919 aimed at punishing individual for violations of the jus ad

bellum and jus in bello. First, the Commission set up by the Preliminary Peace Conference made a recommendation that a special organ be set up to deal with the breaches of the law of nations and international good faith, and in particular the breaches upon the neutrality of Luxembourg and Belgium. The tribunal envisaged in Article 227 of the Versailles Treaty was to be judicial in character, empowered to prosecute the German Emperor for violations of the obligations not to resort to war in International relations.<sup>6</sup>

Following this recommendation, Article 227 of the Treaty of Versailles stipulated that:

*"The Allied and Associated Powers publicly arraign William II of Hohenzollern, formally German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision, the Tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligation of international undertaking and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed."*

However, these provisions remained dead letter. The USA never signed the Treaty and had also voiced its opposition to trying a head of state.<sup>7</sup> Holland, where the Kaiser had taken refuge, refused to extradite him on the grounds that the charges, as phrased, did not exist under Dutch Law<sup>8</sup> and that in any case, they were politically motivated.<sup>9</sup> Wilhelm II died in exile in Holland in 1941.<sup>10</sup>

The Versailles Treaty did also contain provisions for the prosecution of violation of the laws or customs of war. Pursuant to Articles 228 and 229, the Principal Allied and Associated Powers sought the trial “before military” tribunals of persons accused of “having committed acts in violation of the law and customs of war and required Germany to hand over any persons so accused. Those suspects would be tried before international military tribunals constituted of members of the military tribunals of the interested powers. The Allied Powers provided a list of 896 persons accused of war crimes to be tried in accordance with Article 228 of the Versailles Treaty. The list included such high-ranking officers as the son of the Kaiser, Count Bismark, and Marshalls Von Hinderburg and Ludendorf. The German Cabinet strenuously objected, warning the Allies that army leaders would resume hostilities, if the demand was pressed. The German government offered instead to try some accused before its own courts. However, it accepted only 45 cases as possibly genuine, to which Allies consented. In the end, indictments were issued against 12 accused before the Supreme Court of Leipzig. The ensuing sentences were rather mild: They resulted in 6 acquitted and 6 symbolic sentences of maximum 4 years.<sup>11</sup>

Nevertheless, this so-called “Leipzig” jurisprudence laid down important principles of international criminal law which are of continuing relevance today, in particular, the rejection of the defence of superior orders. Major Benno Crusins was found guilty of ordering the execution of wounded prisoners of war and

sentenced to two years of confinement. The other case where the principles of superior responsibility was at issue was the 1921 case of **The Llandovery Castle**, in which officers of a U-boat were sentenced for actions contrary to international law, for firing upon and killing survivors of an unlawfully torpedoed hospital ship. The court found that the commander of the U-boat 86, Patzig, contrary, to instructions of his superiors, ordered to to be torpedoed, and a British hospital ship, and subsequently gave the order of firing at the survivors of the sunken ship. As the whereabouts of Patzig were unknown to the Court, the case was chiefly concerned with the determination of the liability of the two officers of the watch in relation to the firing incident.<sup>12</sup> The latter two received the heaviest sentences meted out by the Supreme Court of the Reich at Leipzig: each was sentenced to 4 years imprisonment. Other Leipzig cases which lead to convictions are the Heymen, Mueller and Nenmann cases of 1921, in which the defendants were found guilty of ill-treating prisoners of war contrary to the German Penal Code and Military Penal Code.<sup>13</sup>

## 2. **The Trails Following the Second World War**

The ICTY and its sister tribunal, ICTR are very often compared to the Military tribunals set up after the second World War. Although there are valid parallels to be drawn, such comparisons are often misguided. There are similarities in the subject matter jurisdiction, but the legal foundations on which the tribunals rest are fundamentally different. The circumstances in which the Nuremberg and

Tokyo Military Tribunals were created are unique, and have never been replicated since. They were set by the few principal Allied Powers following the end of hostilities in Europe and in Asia and the Pacific. Their establishment was preceded by the complete surrender by Germany and Japan, and these vanquished nations' consent to jurisdiction by the victorious nations. Each of the constituent Allied Powers possessed jurisdiction to prosecute the German defendants on their own. In view of these conditions, a more apt description of the post second World War tribunals, therefore, is that they were multinational rather than international.<sup>14</sup>

The International Military Tribunal (IMT) of Nuremberg was created by the London Agreement of 8 August 1945, which contained its Statute in annex.<sup>15</sup> It was concluded between the USA, France, the UK and the USSR, but was open to any UN member State. Nineteen other states acceded. The Charter of the IMT of Tokyo, by contrast, did not come about as a result of a formal treaty. In a move which is reminiscent of the way the ICTY and the ICTR have been established. It was proclaimed by the Supreme commander of the Allied Forces, based on a series of international instruments and declarations pertaining to the end of the war in the East and the surrender of Japan.<sup>15</sup>

The main foundations of the international criminal law after the Second World War pursuant to the Charters of the Tribunals of Nuremberg and Tokyo can be

summarised as follows. First, the types of possible charges encompassed both violation of the **jus ad bellum** and **jus in bello**. Article 6 of the Nuremberg Charter conferred jurisdiction over (a) Crimes against peace, (b) War crimes and (c) Crimes against humanity.<sup>16</sup> Secondly, the Charter and the subsequent jurisprudence led to the confirmation of the existence of individual criminal responsibility for violations of **jus ad bellum** and **jus in bello**: notably of the authors themselves, but also of the co-authors, accomplices, and their responsibility for acts as well as omissions.<sup>17</sup> Thirdly, traditional principles of international criminal law such as the absence of head of state immunity, and the rejection of superior orders as a defence were also set forth.<sup>18</sup> Fourth, the range of punishments were wide. Article 27 of the Nuremberg Charter provided that the Tribunal shall have the right to impose upon a defendant on conviction, death or such other punishment as shall be determined by it to be just.<sup>19</sup> The IMT at Nuremberg pronounced 12 death sentences.<sup>20</sup> It sentenced three accused to life imprisonment, four to prison sentences of 10 to 20 years,<sup>21</sup> and acquitted three accused. The Tokyo Tribunal pronounced 7 death sentences, 16 life sentence,<sup>23</sup> one prison sentence of 7 years<sup>24</sup> and one of 20 years<sup>25</sup>.

The pace at which these trials were conducted is remarkable. The Nuremberg trials started on 20 November 1945, and all pleadings were finished by 31 August 1946.

The Tokyo trials against 28 former leaders of Japan started on 3 June 1946 and ended on 12 November 1948.<sup>26</sup> However, it should be remembered that only major war criminals, previously identified by a committee of Chief Prosecutors of the Signatory Powers, were brought before these two tribunals. There was an obvious division of labour between these Tribunals established for the sole purpose of prosecuting major war criminals and other tribunals empowered to deal with the majority of other cases. These other tribunals came in a variety of forms. Whilst they all applied international law, they cannot be considered truly international tribunals for they lacked a multinational structure. Some military tribunals were created by the occupying powers specifically for the purpose of prosecuting war criminals in their zone of occupation. For instance, several prosecutions were conducted as a result of the Allied Control Council Law No.18, which came into force on 20 December 1945. Its purpose was to give effect inter alia, to the London Agreement of 1945 and the Nuremberg Charter and to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the international Military Tribunal.<sup>27</sup> Furthermore, nothing prevented individual states from empowering their municipal courts to try perpetrators of war crimes apprehended in their territory. Nobody has kept a tally of the total number of trials held after the Second World War, but the series of Law Reports issued on these refer to more than 1700.<sup>28</sup>

## END NOTES

1. Meron, Th., "*International Criminalization of Internal Atrocities*" in 89 American Journal of International Law, p. 55 (1995).
2. Greenwood, Ch., "*The Relationship between Jus ad Bellum and Jus in Bello*," in 36 ICLQ, p.231.
3. Atkins, R.D., The Alleged Transnational Criminal: the Second Biennial International Criminal Law Seminar (Martinus Nijhoff, The Hague 1995) p.17.
4. Green, L.C., The Contemporary Law of Armed Conflict, ( Martinus Nijhoff, The Hague 1993).
5. Ibid., p. 4
6. Parks, W.H., "*Command Responsibility for War Crimes*", 62 Military Law Review, 1963
7. A principle now known as double criminality.
8. Atkins, R.D., op cit, p.18.
9. Parks, op cit, p.13,.
10. Green, op cit. p. 23.
11. Greenwood, Ch., "*The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia*," 2 Max Planck Yearbook of United Nations Law, p. 100 (1998).

12. Agreement for the prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, London, 8 August, 1945.
13. Atkins, R.D., op cit.
14. Atkins, R.D., Ibid
15. Article 6 of the Nuremberg Charter..
16. Ibid.
17. Article 7 and 8 of the Nuremberg Charter.
18. See too, corresponding Article 16 of the Tokyo Charter
19. Goering, Von Ribbentrop, Keitel, Kaltenbunner, Rosenberg, Franck, Frick, Streichen, Sauckel, Jodl, Seess-Inquart, Bormann.
20. Hege, Funk, Raeder.
21. Schacht, Von Paepen, Fritzsche
22. Dohihara, Hirota, Hagaki, Kimura, Matoni, Muto and Tojo.
23. Araki, Hasimoto, Hata, Hiranuma, Hoshino, Kido, Koiso, Minami, Oka, Oshima, Sato, Shinra, Suzuki, Kaya, Shiratori and Umezumi.
24. Shigemitsu
25. Togo
26. Parks op cit., p.115.
27. Law Reports of Trial of War Criminals, Vol. XV, UN, War Crimes Commission, p. 39 (1945).
28. Ibid.

## **CHAPTER III**

### **THE AD HOC TRIBUNAL FOR THE FORMER YUGOSLAVIA**

#### **Introduction**

In Resolution 808 (1993) of 22 February 1993, the Security Council of the United Nations took the decision to establish 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. Barely three months later, the Security Council adopted the Statute for the ICTY by Resolution 827 (1993) of 25 May 1993. The first judges were elected on 17 September 1993, and the Tribunal commenced its work in the Hague on 17 November 1993. The ICTY consists of three organs: the Chamber, the Office of the Prosecutor and a Registry. It has three trial chambers each made up of three judges, and an appeals chamber, made up of five judges. As of August 1999, the ICTY had 775 Staff members from 63 countries. Its budget has arisen from US\$276,000 in 1993 to US \$94, 103, 800 in 1999<sup>1</sup>.

Pursuant to Article 1 of its Statute the ICTY has jurisdiction in respect of four categories of "serious violations of international humanitarian law" committed by individuals in the territory of the former Yugoslavia since 1991. On 22 May 1995, the ICTY issued its most significant indictment thus far, when it charged a sitting Head of State and several other high level officials of the government of the

Federal Republic of Yugoslavia with war crimes and crimes against humanity in relation to the conflict in Kosovo.<sup>2</sup>

As indicated above, the international instrument by which the ICTY was established is not a treaty. It was created by the UN Security Council pursuant to Resolution 827 (1993) of 25 May 1993, adopted under chapter VII of the UN Charter, in order to contribute to the maintenance of international peace and security on the territory of the former Yugoslavia. It was preceded by a series of resolutions taken under the same chapter,<sup>3</sup> culminating in Resolution 808 (1993) of 22 February 1993, by which the Security Council decided to establish the ICTY and request the Secretary general to prepare statute.<sup>4</sup>

#### 1. **Background**

The circumstances in which the ICTY has been established are very different from under which the IMTs were set up after the second world war. The ICTY was set up in 1993, in a period during which the conflict in the former Yugoslavia was still ongoing.

It will be recalled that Slovenia and Croatia proclaimed their independence on 25 June 1991.<sup>5</sup> The Yugoslavia People's Army (JNA) forces moved against

Slovenia on 27 June 1991. A peace agreement was reached on 8 July 1991. Fightings in Croatia started in July 1991 between Croatia military forces on the one side and the JNA, paramilitary units and the "Army of the Republic of srpska Krajina" on the other. Major assaults on Vukovar and Dabrunik took place before the end of 1991. Macedonia has thus far not been the scene of any fighting. It sought international recognition as an independence republic from December 1991 onwards, but because of difficulties surrounding its name, it was only admitted to the UN in April 1993 under the provision name of FYROM.<sup>6</sup> Bosnia and Herzegovina proclaimed its independent on 6 March 1992. Serbs forces took the fight to that republic around that date or shortly thereafter.

The two remaining Yugoslavia republics, Serbs and Montenegro, claimed on 27 April 1992 that they continued the legal personality of the former Yugoslavia, and are since known as the FRY (Federal Republic of Yugoslavia).<sup>7</sup> Shortly thereafter, on 19 May 1992, the JNA allegedly completed its withdrawal from the territory of Bosnia and Herzegovina. In the summer of 1992, news about the establishment of concentration camps started to reach the outside world. By the end of that year, 6,000 UNPROFOR troops were sent to Bosnia. The Vance-Owen plea was agreed in January 1993. Shortly thereafter, the ICTY was established via the mechanism of Security Council Resolution, taken under Chapter VII of the UN Charter, as a measure aimed at restoring international peace and Security.<sup>8</sup> Its work commenced in November 1993. The

marketplace bombing in Sarajevo took place in February 1994. In May 1995, the Croatia army re-captured area in Slovenia. In July 1995, the safe area of Srebrenica was taken over by the Serbs; Croatia captured the Krajina area in August 1995 active hostilities ceased with the signing of the Dayton a peace agreement in December, 1996.

While wars were being conducted in Slovenia, Croatia, and Bosnia and Herzegovina, the situation in Kosovo was tense. In the mid - 1990 a fraction of the Kosovo Albanians constituted the Kosovo Liberation Army (UCK/KLA). The latter group fought the Serbia police forces since mid- 1996. According to the recently released Milo indictment, the conflicts started to escalate seriously from February 1998 onwards. The Security Council was seized of the matter, and as a result of international negotiations verifiers were deployed throughout Kosovo in the autumn and winter of 1998. This failed to stop the hostilities. In one incident, on 15 January 1999, 45 unarmed Kosovo Albanina were murdered in the village of Ra-ak. In mid March 1999, the intense peace negotiations conducted under international auspices in Ramouillet (France), collapsed. On 24 March 1999, NATO, (North Atlantic Treaty Organisation) began launching air strikes ("Operation Allied Force") against the FRY. According to the ICTY Prosecution, the FRY and Serbia had intensified their systematic campaign of persecutor, deportations and murder waged against the ethnic Albanians in Kosovo.<sup>9</sup> On June 3, the FRY accepted the terms brought to Belgrade by

suspended air strikes over the FRY on 9 June 1999, the day on which the "International Security Force" (KFOR) and military representatives of the FRY and the Republic of Serbia signed a Military Technical Agreement (MTA) which immediately entered into forces. The FRY officially lifted the state of war on 26 June 1999.<sup>10</sup>

Shortly after the discovery of what appeared to be concentration camps in Bosnia and Herzegovina, the Security Council adopted Resolution 764 (1992) of Herzegovina 13 July 1992. This re-affirmed that all parties to the conflicts were bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the conventions are individually responsible in respect of such breaches. Shortly thereafter, in resolution 771 (1992) of 13 August 1992, the Security Council expressed grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavians. The council strongly condemned such violations of international humanitarian law, including those involved in the practice of "ethnic cleansing", and demanded that all parties to the conflict in the former Yugoslavia cease and desist from all breaches of international humanitarian law. It called upon states and

breaches of international humanitarian law. It called upon states and international humanitarian organizations to collate substantiated information relating to the violations of humanitarian law, including grave breaches of the Conventions being committed in the territory of the former Yugoslavia and to make this information available to the Council.

A further significant step was taken when the Security Council by resolution 780 (1992) of 6 October 1992, requested the Secretary General to establish an impartial Commission of Experts to examine and analyse the information as requested by resolution 771 (1992), together with such further information as the commission may obtain through its own investigations or efforts, of other persons or bodies. By a letter dated 9 February 1993, the Secretary General submitted to the President of the Security Council an interim report of the Commission of Experts (S/25274), which concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including willful killing, "ethnic cleansing", mass killing, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. In its report, the Commission suggested that the establishment of an ad hoc international tribunal by the United Nations would be consistent with the direction of its work.

It was against this background that the Security Council adopted Resolution 808 (1993) On 22 February 1993. The security council expressed once again grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuations of the practice of "ethnic cleansing". Pursuants to this resolution the situation was qualified as a threat to international peace and security. The Security Council stated that it was determined to put an end to such crimes and to take effective measures to bring justice to persons who are responsible for them. It furthermore, stated its conviction, that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute the restoration and maintenance of peace. <sup>11</sup>

In accordance with the request of the Security Council, the Secretary General and his legal service prepared a report on the establishment of an ad hoc international tribunal, as well as a draft statute . According to this report, the report of the committee of jurists submitted by France (S/25266), the report of the commission of jurists by Italy (s/25300), and the report submitted permanent representative of Sweden on behalf of the Chairman-in-Office of the Conference on Security and Co-operation in Europe (CSCE) (s/25307). The Secretary General also sought the views of the Commission of Experts established

Security council Resolution 808 (1993) declared that an international tribunal would be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. It did not, however, indicate how such an international tribunal was to be established. As indicated by the Secretary General, the approach which, in the normal course of events, would be followed in establishing an international tribunal would be conclusion of a treaty by which the states parties would establish a tribunal and approve its statute. However, the treaty approach was not regarded as suitable : It would require considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that reatifications would be received from those states which should be parties to the treaty if it were to be truly effective. In the light of this, the Secretary General believed that the international tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. He agreed in his report that such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.<sup>13</sup>

requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.<sup>13</sup>

The legitimacy of the way the Tribunal was established has been widely commented upon.<sup>14</sup> It was examined in depth by the ICTY Appeals Chamber in the *Tadi Jurisdiction Case*.<sup>15</sup> The defendant Dusko Tadi had argued, inter alia, that the Security Council had exceeded its power under Chapter VII, because that Chapter did not authorise the Council to create a judicial tribunal as a measure to address a threat to international peace and security. In reply, the Appeals Chamber held that Chapter VII in general and Article 41 in particular conferred on the Security Council a broad, although not unlimited, discretion regarding the measures which are appropriate to address a threat to international peace and security. It further reasoned that since the Council had already determined that the war crimes perpetrated in the former Yugoslavia were exacerbating a threat to international peace and security and the concept of individual criminal responsibility has long been seen as one of the means by which international law seeks to deter, or prevent repetition of, war crimes, the establishment of the Tribunal could not be said to have been manifestly outside the scope of the Council's powers under Chapter VII.<sup>16</sup>

## 2 Jurisdiction

In the following sections the jurisdiction *ratione loci ratione temporis ratione personae* and *ratione materiare* of the ICTY will be discussed. It will be seen that the latter's jurisdiction is broader and at the same time, narrower than that of the Second World War tribunals.

### (i) Geographical Jurisdiction.

World War II engulfed many nations and ended up covering large parts of the globe. There was no obvious restriction to the competence *ratione loci* of the tribunals after the Second World War. By contrast, the ICTY's competence is geographically limited. The statute confers jurisdiction to try offenders for offences committed in the territory of the former Yugoslavia only.<sup>17</sup>

Before its break up, the Socialist Federal Republic of Yugoslavia (SFRY) comprised 6 republics. What is now known as the Federal Republic of Yugoslavia (FRY), only comprises the rump of what used to be the SFRY: that is Serbia (including Kosovo of course) and Montenegro. In May - June 1999, there were several press reports speculating the spread of the Kosovo crisis to Macedonia (Former Yugoslavia Republic of Macedonia - FYROM). In addition, there have also been genuine clashes between FRY troops and Albanian forces. Since Macedonia used to form part of the SFRY, the ICTY would undoubtedly be

competent to try violations of the laws of armed conflict committed on the territory of the FYROM, in the hypothesis that the Kosovo crisis would have spread to that territory. Similar conclusions would follow of the Kosovo conflict would have spread to the other republics which emerged after the collapse of the SFRY, that is, the Republic of Croatia and Slovenia, and of course, the Republic of Bosnia and Herzegovina also. On the other hand, according to the letter of the ICTY Statute competence *ratione loci* would be more difficult to establish for hostilities involving Albanian territory. However, a definitive judgment would depend on a close examination of the facts of a particular event and the ability (of the Prosecutor) to convince the Tribunal that there was sufficient territorial link with the former SFRY for the ICTY's exercise of jurisdiction.

Another question is the limitation inherent in Article 8 of the Statute, according to which the territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, "including its land surface, airspace and territorial waters". Disregarding the difficulties of defining what is meant by "national airspace".<sup>18</sup> Article 8 would seem to exclude acts of war committed in the maritime zones not covered by the term "territorial waters". One can only speculate on the reasons why this formulation was chosen. The most obvious explanation is that there are very few indications that the conflict in the SFRY had major naval components outside the territorial waters of the belligerents. There were some hostilities around the waters of Dubrovnik,<sup>19</sup> but

these were probably confined to the internal and coastal waters of the SFRY. Furthermore, whilst they may very well have been military operations in the territorial sea of the SFRY, there have probably been no hostilities involving shelling in that jurisdictional zone.

The second reason why the drafters may have omitted including any maritime zones apart from the territorial waters (which are usually understood to cover internal waters) is that the law for armed conflict at sea, including its scope of application, may have been perceived, rightly or wrongly, as unsettled. Although there have been worthwhile unofficial initiatives, leading recently to the 1994 San Remo Manual on International Law Applicable to Armed Conflict at Sea,<sup>20</sup> much of the law of naval warfare consists of customary law and is in need of codification. This has become more urgent with the coming into force, in 1994, of the 1982 UN Convention on the Law of the Sea.<sup>21</sup> The extent to which the new jurisdictional zones introduced by the "peace time" law of the sea intersect with the law of armed conflict remains to a certain degree the subject of controversy.<sup>22</sup>

In any event, it follows from the restrictions *ratione loci* included in the Statute's Article 1 and 8 that the ICTY would, at first sight, not be competent to deal with consequences of acts of warfare conducted in territorial waters of the SFRY. However, if those acts of warfare affect civilians or civilian objects on land, part

of the Geneva Law aimed of the protection of civilians may still be applicable via the mechanism enshired in Additional Protocol I of 1977.<sup>23</sup> Therefore, while the term "territorial waters" in the ICTY Statute would seem to exclude ship-to-ship and ship-to-air activities outside that maritime jurisdictional zone, it may not bar jurisdiction in case civilians or civilian objects on land are affected. The same applies *mutatis mutandis* to air warfare.

## ii **Temporal Jurisdiction**

Articles 1 and 8 of the ICTY statute indicate that there is also a temporal limitation to the jurisdiction of the ICTY. The tribunal can only be seized of cases involving offences committed in the SFRY since 1 January 1991. The concise recapitulation of the chronology of the conflict above, demonstrates that the *dies a quo* mentioned in the Statute leaves enough leeway to charge violations of the laws of armed conflict from the very beginning of the armed hostilities in the SFRY.<sup>24</sup> However, as will be explained below, the decision of the tribunal on its competence *ratione temporis* is narrowly linked with the definition of armed conflict. Except for the charge of Genocide (Article 4), the Prosecutor needs to prove for each category of charges, that there was a sufficient nexus between the alleged offence and an armed conflict.

Furthermore, there is little doubt that the conflict in Kosovo which between March and June 1999 involved the FRY, the KLA and NATO countries, and which was

waged mainly on the territory of the FRY, falls within the jurisdiction of the Tribunal. Nevertheless, it may be difficult to pinpoint the exact date on which the armed conflict in Kosovo started. The FRY side will undoubtedly claim that the FRY operations in Kosovo against the KLA were simply aimed at suppressing an intended terrorist movement, and that the ensuing hostilities did not rise to the threshold level of armed conflict required for the application of international humanitarian law. Whatever the merits of such claims, it will be more difficult for the FRY to deny the status of armed conflict to the hostilities between NATO and the FRY as a result of *Operation Allied Force*. There is little doubt that these reached the level of intensity necessary to trigger the application of international humanitarian law.

Finally, it should be noted that there is no express end to the competence *ratione temporis* of the Tribunal in its Statute. However, since the Tribunal was set up as a measure for the restoration of international peace and security, it would be up to the security Council to decide that the ICTY has served its purpose.<sup>25</sup> Another way in which the Tribunal's jurisdiction might - conceivably - end, is when there are no longer any serious violations of international humanitarian law that would need to be prosecuted before the ICTY.

### iii **Personal Jurisdiction**

Pursuant to Article 6 of its Statute, the ICTY has jurisdiction only over natural persons pursuant to the provisions of the present Statute. It is noteworthy that Article 9 of the Nuremberg Charter enshrined a procedure under which the IMT could declare certain groups or organisations criminal. If such a declaration was issued, Article 10 allowed the competent national authorities of any signatory state to bring individuals to trial for membership of these groups or organisations. In such cases the criminal nature of the group or organisation was considered proved and was no longer required. In execution of these provisions, the IMT declared the following organizations criminal: the leadership corps of the Nazi Party, the Gestapo; the SD (the State Security Service); and the SS.<sup>26</sup> A group of French jurists had suggested that a similar provision, with some safeguards, could be envisaged for the ICTY.<sup>27</sup> The suggestion was rejected by the Secretary General for reasons that are less than wholly clear.<sup>28</sup> With the same token, the Statute does not even allow for the prosecution of legal persons other than natural persons, such as corporate entities or states. Again, the latter question is still controversial under current international law.<sup>29</sup> However, it should not be overlooked that other fora or tribunals may be competent to examine the responsibility of states for violations of the laws of armed conflict. A good example are the cases which are currently pending before the ICJ: the *Genocide Case* brought in 1993 by Bosnia and Herzegovina against the FRY,<sup>30</sup>

the *Legality of the Use of Force Case*, brought in 1999 by the FRY against ten NATO countries,<sup>31</sup> and also the case brought recently by Croatia against the FRY, charging the latter with violations of the Genocide Convention.<sup>32</sup>

An important elements of the competence *ratione personae* of the ICTY, and of intentional criminal law in general, is the principle of individual criminal responsibility. Article 7 of the ICTY Statute addresses several aspects of this issue.<sup>33</sup> The first sub paragraph of this article indicates, that all persons who participated in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible. The second sub paragraph enshrines the principle that heads of state, government officials and persons acting in an official capacity should not be entitled to rely on the plea of immunity. This provision draws upon the precedents following the Second World War. The text of the article contains two further provisions. First, it affirms that a plea of head of state immunity or that an act was committed in the official capacity of the accused will not be a factor mitigating punishment.

As is clear from the Nuremberg jurisprudence, the concept of superior responsibility is a very important tenet of international criminal law. It is enshrined in Article 7(3) of the ICTY Statute. This stipulates that a person in a position of superior authority should be held individually responsible, not only for

giving the unlawful order to commit a crime under the Statute, but also for failing to prevent a crime or to deter the unlawful behaviour of his subordinates. Under ICTY Statute, this imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them. The mirror side of superior responsibility can be found in Article 7(4). This provision indicates that acting upon an order of a government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defence. Obedience to superior orders may, however, be considered a mitigating factor, should the international tribunal determine that justice so requires. For example, the Tribunal may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.

Finally, the International Tribunal must decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of Law recognized by all nations.<sup>34</sup> This brings us to the following question, which is the subject matter jurisdiction of the ICTY.

iv      **Subject-Matter Jurisdiction**

Pursuant to Article 1 of the Statute the Tribunal has in respect of four categories of "serious violations of international humanitarian law" committed by individuals in the territory of the former Yugoslavia since 1991. Grave breaches of the Geneva Conventions (Article 2); Violations of the Laws and Customs of War (Article 3); Genocide (Article 4) and Crimes against humanity (Article 5).<sup>35</sup> These provisions determine the scope of the jurisdiction of the Tribunal is required to apply.

As indicated by the Secretary General's report on the establishment of the Tribunal, out of respect for the principle of legality,<sup>36</sup> the Security Council intended the Tribunal to apply existing international humanitarian law, not to create new offences under international law.<sup>37</sup> Therefore, the Tribunal has to examine in each case whether it has jurisdiction, pursuant to the terms of its Statute, to try a particular charge. Whether the conduct charged should be considered unlawful under the applicable rules of international law at the time the alleged offences were committed, and whether that conduct leads to individual criminal responsibility are questions that cannot be answered by examining the Tribunal's Statute.<sup>38</sup> The answer to these questions must be found in existing international humanitarian law, whether treaty based or customary.<sup>39</sup> The

importance of respect for the principle of legality has been confirmed by the ICTY Trial Chambers in several cases.<sup>40</sup>

Compared to the Statutes of the Nuremberg and Tokyo Tribunals, the subject jurisdiction of the ICTY is broader in some respects and narrower in others. Unlike the Second World War Tribunals, the ICTY (nor the ICTR for that matter) is not empowered to deal with violations of *jus ad bellum*. On the other hand, the category of violations enumerated in the ICTY Statute is certainly larger than comparable ones enshrined in the Statutes of the IMTs. One reason is that many categories of crimes included in the ICTY Statute were non-existent in treaty provision at the end of the Second World War. The Statute includes, in Article 2, the grave breaches provisions which were enacted through the Geneva Conventions in 1949. Article 3 of the Statute consists of an open-ended formulation of the laws and customs of war. The crime of genocide, included in Article 4 of the ICTY Statute was only laid down in treaty form in 1948. Finally the description of the category of crime against humanity in Article 5 is much larger than the offences laid down in Article 6 (c) of the Nuremberg Charter.

### **THE DIVISION OF LABOUR BETWEEN NATIONAL JURISDICTION AND THE ICTY**

Pursuant to Article 9 (1) of the Statute, the ICTY and national tribunals have concurrent jurisdiction. However, Article 9 (2) stipulates that the ICTY shall have

primacy over national courts. Furthermore, since the ICTY (and ICTR) tribunals were set under Chapter VII of the UN Charter, all UN member states are required to cooperate with the Tribunal.<sup>41</sup> They are obligated to arrest suspects and surrender them to the Tribunals for trial. Moreover, states may not rely upon their international law as a justification for failing to comply with their international obligations in this respect. Therefore, if the ICTY has made a request for assistance to a state, the latter is bound to comply, regardless of whether it has enacted the necessary legislation and regardless of whether, for example, its municipal laws authorise extraditions or surrender of suspects in the subject matter at hand.<sup>42</sup>

On the other hand, in establishing the ICTY, it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. The Secretary General believed that national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures. Articles 9 and 10 of the Statute reflect this goal. Article 9 stipulates that there is concurrent jurisdiction of the International Tribunal and national courts. However, as indicated before, this is subject to the primacy of the International Tribunal. At any stage of proceedings, the International Tribunal may formally request the national courts to defer to the competence of the International Tribunal. Article 10 of the Statute reflects the

principle of *non-bis-in-idem*. This holds that a person shall not be tried twice for the same crime. Given the primacy of the ICTY, the principle of *non-bis-in-idem* would preclude subsequent trial before a national court. However, Article 10 stipulates also that the principle of *non-bis-in-idem* should not preclude a subsequent trial before the International Tribunal in the following two circumstances: (a) the characterization of the act by the national court did not correspond to its characterization under the Statute; or (b) conditions of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts. Should the International Tribunal decide to assume jurisdiction over a person who has already been convicted by a national court, it should take into consideration the extent to which any penalty imposed by the national court has already been served.<sup>43</sup>

## **ENDNOTES**

1. ICTY Fact Sheets, 16/9/1999, Pis/Fs - 53.
2. The Prosecutor Vs Slobodan Miloevi and others, Case No IT - 99 - 37 - 1.
3. Bethlehem, D., and Weller, M., *The Yugoslav Crisis in International Law: General Issues.*, Part 1, vol 5 Cambridge International Documents Series, (1997).
4. Report of the Secretary General, pursuant to paragraph 2 of Security Council Resolution 808 (1993).
5. Zimmerman, W., "*Origins of Catastrophe: Yugoslavia and its Destroyers America's Last Ambassador Tells What Happened and Why*" 89 AJIL (1995).
6. Rich, R., "*Recognition of States: The Collapse of Yugoslavia and the Soviet Union*", 4 *European Journal of International Law* pp. 38 - 53 (1993).
7. However, the legal status of this claim is still controversial: Rich, Ibid.
8. Likewise, the companion tribunal for Rwanda (the ICTR) was also established via the mechanism of a Security Council Resolution taken under Chapter VII.
9. The Prosecutor Vs Slobodan Miloevi and others.
10. The Security Council adopted Resolution 1244 on 10 June 1999 creating KFOR; on 20 June 1999 FRY Forces were certified as being out of Kosovo and NATO declared a formal end to its bombing campaign against the FRY.
11. Resolution 820 (1993) of 17 April 1993.
12. Report of the Secretary General, S/25704, para 13.
13. Ibid., paras 18 - 30.
14. Greenwood, Ch., *The Development of International Humanitarian Law* 93 AJIL, PP - 105, (1999)

15. Tadi Jurisdiction Decision, pp. 5 - 24.
16. Ibid., paras 28 - 40.
17. Article 1 of the ICTY statute.
18. Shaw, M., *International Law*, 3RD edn (Grotius, Cambridge, 1991) P.382
19. Zimmerman, op cit
20. Adopted in 1994 under the auspices of the International Institute of Humanitarian Law, and published by Cambridge University Press (1999).
21. Freestone & Mangone, *The Law of the Sea Convention: Unfinished Agendas and Future Challenges* 10 IJMCL 1995, Special Issue, No.2.
22. Ibid
23. Article 49, paragraphs 3 and 4.
24. Report of the Secretary General. S/25704.
25. Greenwood., Ch., p. 106.
26. Judgment of the International Military Tribunal. Nuremberg, 1 October 1999.
27. Report of the Secretary General, op cit.
28. Ibid.
29. Casillo, M., "*La competence du Tribunal Penal Pour la Yugoslavie*" XCVIII Recueil General de Droit International Public, pp 77 - 80 (19954).
30. Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia - Herzegovina v. Yugoslavia), ICJ General List No 51.
31. Legality of Use Force,(FRY v 10 Nato Countries), ICJ General List No 99.
32. ICJ Press Communique 99/38 of 2 July 1999; ICJ General List No 118.
33. Article 7 of the Statute.
34. Report of the Secretary General, op cit.

- 35. Article 1 of the Statute.
- 36. Which encompasses the principles known as *nullum crimen sine lege* and *nulla poena sine lege*.
- 37. Report of the Secretary General, op cit, para 29 & 34.
- 38. Greenwood, Ch., op cit. p. 112.
- 39. Ibid., pp. 111 - 112.
- 39. Decision on Preliminary Motions Filed by Mlado Radi and another Challenging Jurisdiction, Case No: IT - 98 - 30 - PT.
- 42. This follows from Article 25 and 103 of the UN Charter.
- 43. Greenwood, Ch., op cit, pp. 106 - 7.

## CHAPTER IV

### THE AD HOC TRIBUNAL FOR RWANDA

#### 1. Background

On 6 April 1994, President Habyarimana and other Heads of State of the region met in Dar-es-Salaam (Tanzania) to discuss the implementation of regional peace accords. The aircraft carrying President Habyarimana and the Burundian President, Nyaryamirai, who were returning from the meeting, crashed around 8:30 PM near Kigali airport. All aboard were killed. This event was followed by one of the worst cases of man slaughter in history. Estimates of the number of people killed in the spring of 1994 up until 18 July 1994, range between 500,000 and one million.<sup>1</sup>

Unlike the ICTY, which was established on the Security Council's own initiative under Chapter VII, the ICTR was created partly in response to a request by the Rwandan government. The Tribunal was established by the United Nations Security Council by its Resolution 955 of 8 November 1994.<sup>2</sup> After having reviewed various official United Nations reports,<sup>3</sup> which indicated that acts of genocide and other systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda, the Security Council concluded that the situation in Rwanda in 1994 constituted a threat to international peace and security within the meaning of Chapter VII of the United Nations Charter. Determined to put an end to such crimes and "convinced that...

the prosecution of persons responsible for such acts and violations... would contribute to the process of national reconciliation and to the restoration and maintenance of peace”, the Security Council, acting under the said Chapter VII established the Tribunal.<sup>4</sup>

Nevertheless, the Security Council created a particularly significant precedent since it was the first time an international judicial organ was given competence for violations of international humanitarian law in the context of an internal armed conflict.<sup>5</sup>

Like the ICTY, the ICTR consists of three organs: the Chambers, the Office of the Prosecutor and the Registry. Like the ICTY, the ICTR started out with only two Trial Chambers. On 30 April 1998, the UN Security Council voted to create a third Trial Chamber, further to a request by the President of the Tribunal.<sup>6</sup> The ICTY can perhaps be regarded as a sister organ of the ICTR, for there are many institutional links between these two ad hoc tribunals. First, there are quite a few similarities in the subject matter jurisdiction of both tribunals. Crucially, however, they share the same Chief Prosecutor and Appeals Chamber. The Decision to have the ICTR share structures with the ICTY is the result of a compromise reached during the negotiations preceding the adoption of Resolution 955. Some Security Council members wanted the ICTR to be set up as a completely new ad hoc Tribunal, totally independent from the ICTY. Others favoured an extension of the latter's jurisdiction. Eventually, it was decided to create a

separate ad hoc structure, but to retain some institutional links with the ICTY. The advantages of having a common Chief Prosecutor and Appeals Chamber for the ICTY and the ICTR are obvious: it promotes consistency in prosecutorial approach, procedures and operations, as well as consistent jurisprudence.

However, the overall geographical dispersal of the ICTR's activities make for less than optimal conditions for communications between the various ICTR organs. The official seat of the ICTR is Arusha, Tanzania, which was chosen since it hosted the negotiations on the political stabilization in Rwanda. Yet, the Prosecutor's staff conduct their inquiries and institute criminal proceedings in Kigali, Rwanda. Furthermore, the ICTR's Chief Prosecutor and the Appeals Chamber are based in the Hague.

Finally, it should be noted that despite its initial request, the Rwandan government voted against the adoption of the Resolution 955. It believed that the proposed temporal jurisdiction of the ICTR was too limited and would not cover the lengthy period during which preparations were made for genocide. Furthermore, the Rwandan government thought its composition, with only two Trial Chambers, would prevent it from functioning properly.<sup>7</sup>

## 2. Jurisdiction of the ICTR

A comparison between the Statutes of the ICTR and the ICTY reveals the following.

The general threshold set for crimes within the ICTR's jurisdiction is the same as for the ICTY. Pursuant to Article 1 of the Rwanda Statute, the ICTR has the power to prosecute persons responsible for serious violations of international humanitarian law.

The temporal jurisdiction of the ICTR, unlike that of the ICTY, is limited and closed, not only with respect to the *dies a quo*, but also with respect to the *dies ad quem*. Pursuant to Articles 1 and 7 of the ICTR Statute, the temporal jurisdiction of the Tribunal shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994. In response to the criticism by the Rwanda government, France intervened in the Security Council debates preceding the enactment of the ICTR Statute to indicate that (1) acts of preparation and planning of the genocide preceding the date of 6 April 1994 would in any event come within the province of the ICTR tribunal, and (2) that these included acts committed in refugee camps outside the territory of Rwanda. Finally, France also pointed out that if necessary, the Security Council could amend the date of 31 December 1994 to take account of late developments.<sup>8</sup>

The geographical circumscription of the jurisdiction of the ICTR renders the latter competent not only for offences committed on the territory of Rwanda itself, but also on the territories of neighbouring states, provided in the latter case, that they were committed by Rwandan citizens. As a result, pursuant to Articles 1 and 7, the ICTR's jurisdiction extends to offences committed in Congo (formerly Zaire), Uganda, Tanzania and Burundi. It should be noted that but for this provision, the nationality of the perpetrator is not relevant.<sup>9</sup> Neither is it relevant for the ICTY.

There are also differences in the subject - matter jurisdiction between the ICTR and the ICTY's Statutes. According to Articles 2 to 4 of the Statute relating to its *ratione materiae* jurisdiction, the ICTR has the power to prosecute persons who committed genocide as defined in Article 2 of the Statute and persons responsible for serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 on the protection of victims of war, and of Additional Protocol II thereto of 8 June 1977, a crime defined in Article 4 of the Statute.

There are no differences in the definition of the crime of genocide under both Statutes. Article 2 of the ICTR Statute and Article 4 of the ICTY Statute replicate Articles 2 and 3 of the Genocide Convention.

There are, however, discrepancies in the definition of crimes against humanity between the ICTY and ICTR Statutes. The ICTY jurisprudence on this matter indicates that Article 5 of the latter Statute, in requiring a link with armed conflict, is more restrictive than general customary international law. Moreover, the ICTY jurisprudence also indicates that the expression "in armed conflict" has a temporal connotation. Unlike Article 5 of the ICTY Statute, Article 3 of the ICTR Statute does not require a link with armed conflict. Therefore, under the Rwanda Statute the existence of an internal armed conflict is irrelevant for charges under Article 3. Crimes against humanity are punishable regardless of whether they were linked with or happened during armed conflict. Another difference with the ICTY Statute is that the ICTR Statute requires proof of discriminatory grounds for all crimes against humanity.

Article 4 of the ICTR Statute criminalizes violations of common Article 3 of the 1949 Geneva Conventions and of Additional Protocol II. By adopting the ICTR Statute, the Security Council made a significant contribution to the enforcement of international humanitarian law. It was only in 1995 that the Appeals Chamber confirmed in Tadi Jurisdiction Decision that violations of common Article 3 lead to individual criminal responsibility under international law.<sup>10</sup> The inclusion of Additional Protocol II in the Rwanda Statute may appear logical since Rwanda had been a party to the latter protocol since 19 November 1984.<sup>11</sup> It should not

be overlooked however, that in 1994, several Security Council members, among which the United States of America and the United Kingdom, were not party to Additional Protocol II.

Article 6(1) to 6(3) of the Rwanda Statute lay down the principles and implications of the concept of individual responsibility, mirroring Article 7(1) to 7(3) of the ICTY Statute. Finally, Article 8 of the ICTR Statute provides, just like Article 9 of the ICTY Statute, that the Tribunal has concurrent jurisdiction with national courts over which it, however, has primacy.

## **ENDNOTE**

- <sup>1</sup> Cisse, C., "The end of a Culture of Impunity in Rwanda" 1 Yearbook of International Humanitarian Law, pp. 161 - 2 (1998).
- <sup>2</sup> UN Document S/RES/955 of 8 November 1994.
- <sup>3</sup> UN Document S/1994/1125, UN Document S/1994/1405 and UN Document S/1994/1115.
- <sup>4</sup> UN Document S/1994/1115.
- <sup>5</sup> Wembou, D., "The International Criminal Tribunal for Rwanda - Its Role in the African Context", 37 ICRC Review, p. 685 (1997).
- <sup>6</sup> UN Document S/Res/1165 (1998), 30 April 1998.
- <sup>7</sup> Aptel, C., "The International Criminal Tribunal for Rwanda" 37 ICRC Review
- <sup>8</sup> Ibid
- <sup>9</sup> The cases brought before the ICTR thus far concern acts solely committed on Rwanda territory.
- <sup>10</sup> Tadi Jurisdiction case, ICTY Case NO IT - 94 - 1 AR 72.
- <sup>11</sup> Source: ICRC Website.

## **CHAPTER V.      THE CONTRIBUTION MADE BY THE ICTY AND THE ICTR TO INTERNATIONAL CRIMINAL LAW.**

In what follows, an account will be provided of the same notable decisions on points of Law rendered by ICTY and the ICTR thus far. The issues selected for second part of this chapter concern primarily the interpretation by the ICTY of articles 2,3,4 and 5 of its statute and by the ICTR of article 2,3 and 4 of the Rwanda statute. It is indisputable that several of the decisions of the ICTY and ICTR Trial Chambers and the Appeals Chamber have made important contributions to the development of International criminal law in general and International humanitarian law in particular. The secondary literature on this jurisprudence flourishing. What follows is a discussion of a few selected questions. Under sub-chapter (1) the tribunals interpretation of the definition of (International) armed conflict and its application to the situation in the SFRY will be examined. Sub-chapters (2) and (3) are devoted to an analysis of the ad hoc tribunals' jurisprudence on its subject-matter jurisdiction.

### **1.      THE Definition of Armed Conflict by the ICTY.**

The decisions of the ICTY indicates that articles 2, 3 and 5 of the statute, either by their terms or by virtue of the customary rules which they import, proscribe certain acts when committed in connection with an armed conflict.<sup>1</sup> Therefore, if charges are brought under these articles, the prosecution needs to prove that an armed conflict existed at all relevant times in the territory relevant to the indictment and secondly that there is a link between the alleged offences and this conflict.<sup>2</sup>

The test for the existence of armed conflict formulated by appeals chamber in the Tadi jurisdiction decision was formulated in very broad terms as follows: ... 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.<sup>3</sup> Applying this test to the facts of the case, the Appeals chambers concluded that:

“fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day .... These hostilities exceed the intensity requirements applicable to both international violence between the armed forces of different states and between government forces and organised insurgent groups. Even if substantial clashes were not occurring in the prijedor region at the time and place the crimes allegedly were committed-a factual issue on which the Appeals Chamber does not pronounce – International humanitarian law applies.”<sup>4</sup>

The test devised by the Appeals chamber was adopted and applied subsequently by the Trial Chambers in the Tadi, Elebi and the Furundija cases.<sup>5</sup> In its decision on the merits of the Tadi case, The Trial Chamber held that, until the Dayton Peace Agreement<sup>6</sup> was concluded and notwithstanding the various cease-fire agreements entered into in various parts of the BiH, no general cessation of hostilities had occurred there or elsewhere in the territory of former Yugoslavia.<sup>7</sup> This was subsequently confirmed in the Elebi case in which the trial chamber found, inter alia, that it was evident: “ that there was no general cessation of hostilities in Bosnia and Herzegovina until the Signing of the Dayton Peace Agreement in November 1995”<sup>8</sup>

Hence, the jurisprudence of the ICTY in the application of the “armed conflict.” test to the facts on the ground is fairly unanimous. It can probably no longer be seriously disputed that the hostilities in the SFRY, at least until the conclusion of the Dayton accords, reached the threshold level of armed conflict necessary to trigger the application of International humanitarian law, and in particular of the Geneva Conventions.<sup>9</sup> In the Furundija Case, for example the trial chamber noted that the defence refused to concede that a state of armed conflict existed at the relevant time, although it had called no evidence to counter the submissions of the prosecution. The defence counsel only admitted that there had been an attack by the HVO on civilians.<sup>10</sup> Applying the above test to determine the existence on an armed conflict, the trial chamber dismissed the defence objections in a cursory manner in that it found “on the clear evidence in this case, that at the material time, being mid-May 1993, a state of armed conflict existed between the HVO and the AbiH.”<sup>11</sup>

However, to prove a particular charge under either Art 2, 3 or 5 of the ICTY statute, it is not sufficient for the prosecutor to demonstrate the existence of an armed conflict which gives rise to the applicability of international humanitarian law.<sup>12</sup> The settled jurisprudence of the ICTY indicates that a sufficient nexus would exist between a crime and armed conflict if the relevant crime was committed in course of fighting or, for example, the take over of a town during an armed conflict.<sup>13</sup> However, it is not essential that the nexus be so direct. The Appeals Chamber has clearly indicated that the nexus required is only

a relationship between the conflict and the acts, not that the acts occurred in the midst of the battle.<sup>14</sup> It was stated that it is sufficient to prove that “the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”<sup>15</sup> Similarly, it was held by the Tadi Trial chamber that 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, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred, as the Appeals Chamber has indicated, nor is it necessary that crime alleged takes place during combat, that it be part of 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 policies associated with the conduct of war or in the actual interest of a party to a conflict .. The only question, to be determined in the circumstances of each individual case, is whether the offences closely related to the armed conflict as a whole.”<sup>16</sup>

In summary, the ICTY jurisprudence indicates that the geographical and temporal frame of reference for the required link between the alleged offences and the armed conflict in the SFRY is broad. It is sufficient for the prosecutor 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 to show that armed conflict was occurring at the exact time and place of the alleged crime, nor is it necessary that the alleged crime takes place during armed combat, or that it was part of a policy, or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act was in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict.<sup>17</sup>

As indicated above, the only provision under the ICTR statute that requires proof of a link between the conduct of the accused and a particular charge, is article 4, which deals with violations of common Article 3 of the Geneva Conventions and Additional Protocol Thereto.

## 2. THE JURISPRUDENCE ON WAR CRIMES UNDER THE STATUTES.

### A. GRAVE BREACHES OF THE GENEVA CONVENTIONS, AND ARTICLE 2 OF THE ICTY STATUTE

In the Tadi case, which was the very first case to come to a full trial at the ICTY, the jurisdiction scope of the ICTY's statute was debated in depth, both before the Trial Chamber and in the interlocutory appeal on the jurisdiction before the Appeals Chamber. In reply to various challenges, the Appeals Chamber interpreted the jurisdictional scope of the articles relevant for this discussion.

Article 2 of the statute, entitled "Grave breaches of the Geneva Conventions of 1949" stipulates that the ICTY:

"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) willful killing; (b) Torture or inhuman treatment, including biological experiments; (c) willfully 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) willfully 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."

In its decision of 2 October 1995 on jurisdictional matters in the Tadi case, the Appeals Chamber held that the trial chamber had misinterpreted the scope of that article, when it decided that the character of the conflict was irrelevant for the purpose of that provision. In the Appeals Chambers view, although Article 2 of the statute makes no reference to the type of conflict, the substantive law which this provision empowers the tribunal to apply are the Geneva Conventions of 1949, which determine the concept of Grave breaches. Furthermore, the Appeals Chamber stressed that the Geneva Conventions link the concept of Grave breaches to that of protected persons or protected property, terms which are defined in such a way that they can exist only in an international armed conflict.<sup>18</sup>

However, the Appeals chamber indicated also that a change in customary law may be occurring so that the Grave breaches system may eventually operate regardless of whether the armed conflict is international or internal.<sup>19</sup> The chamber discussed some of the factors indicating a possible change in state practice and doctrine. First, the Appeals Chamber referred to its analysis of substantive law applicable to internal armed conflicts, intimating that the traditional dichotomy between international and internal armed conflicts is becoming increasingly blurred. It also noted the contention made by the government of the United States in an *amicus curiae* before the chamber, according to which the Grave breaches provisions of Art 2 of the statute apply to international and internal armed conflicts. The chamber also pointed to the

provisions of the German military manual pursuant to which Grave breaches apply to violations of common Art 3. Another indicator cited by the chamber is the agreement made on 1 October 1992<sup>20</sup> by the warring parties in Bosnia and Herzegovina “clearly made within the frame work of an internal armed conflict”, to apply the Grave breaches provisions. Finally the chamber also cited the judgement rendered on 25 November 1994 by a Danish court in the case of Refik Sari, in which the Grave breaches provisions of the conventions were on the face of it – applied without an examination of the character of the conflict. This judgement was viewed as indication that some national courts are also taking the view that the Grave breaches “system” may operate regardless of whether the owned conflict is international or internal.<sup>21</sup>

The latter suggestion was seized on two subsequent decisions rendered by Trial Chambers. In its judgement of 16 November 1998, the Elebi Trial Chamber opined that there was a possibility that customary law had already reached the stage of development referred to by the Appeals Chamber.<sup>22</sup> Furthermore, in a recent decision of 2 March 1999 in the Kordi and Erkez case the trial chamber took note of the decision of the Appeals Chamber and Elebi Trial Chamber on this question.<sup>23</sup>

There is a distinct doctrinal trend favouring the application of substantive humanitarian law to internal armed conflicts.<sup>24</sup> In addition, there is undeniably evidence of a growing state practice and *opinio juris* on the need to “criminalise”

violations committed in internal armed conflicts. However, most of the evidence in this regard relates to the recognition of the individual criminal responsibility for violations of substantive law applicable to internal armed conflicts.<sup>25</sup> It is a considered opinion that, there is not sufficient evidence to support the claim that customary law has changed to such an extent that the Grave breaches provisions of the Geneva Conventions would apply to all armed conflict, including internal ones. Nevertheless, the Tadi jurisdiction decision was a definite trend-setter in the move towards uniformisation of the substantive laws applicable to international and internal armed conflicts.

The above developments notwithstanding, the judgement delivered on 15 July 1999 in the Tadi, case confirms that, at least in the view of the ICTY and ICTR Appeals Chamber, the general legal ingredients of charges under Article 2 of statute are (1) the international nature of the underlying armed conflict, (2) status of the victims as protected person under one of the four Geneva Conventions.<sup>26</sup>

B. VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR UNDER ARTICLE 3 OF THE ICTY STATUTE AND ARTICLE 4 OF THE ICTR STATUTE

Art. 3 of the ICTY statute, entitled "Violations of the laws or customs of war." Stipulates that the ICTY:

"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 willful 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.”

In sharp contrast to its strict interpretation of Art. 2 of the ICTY statute the Appeals Chamber gave an expansive interpretation of Art 3 of the statute. The provision was construed as a residual basis of jurisdiction that may, be invoked when more specialised provisions of the statute do not apply. Thus the “Laws or Customs”, referred to Art. 3 of the Statute were held to constitute a general and residual clause covering all violations of humanitarian law not falling under Art. 2 or covered by Arts. 4 and 5, more specifically: (1) violations of the Hague law on International conflicts; (2) infringements of provision of the Geneva Convention other than those classified as “Grave breaches” by those conventions (3) violations of common Art. 3 and other customary rules on internal conflicts and (4) violations of agreements binding upon the parties to the conflict, considered qua treaty law i.e., agreements which have not turned into customary International law.<sup>27</sup>

The other major contribution by the ICTY to the further development of international law applicable to internal armed conflict came as a result of the answers given by the Appeals Chamber to the questions of substance and criminality. In an important sense, the Tadi jurisdiction decision on these points was foreshadowed by the decision of the security council to include violations of

common Art. 3 and Additional Protocol II in Article 4 of the ICTR Statute.<sup>28</sup> Furthermore the municipal law of some countries already provided for individual criminal responsibility for certain offences committed in the latter type of conflicts.<sup>29</sup>

Nonetheless, the Tadi jurisdiction decision broke new ground for it asserted in unequivocal terms that individual criminal responsibility exists for violations of the laws applicable to internal armed conflicts. This had not previously been asserted by any international or national tribunal.

On this point the Appeals Chambers decision was warmly received internationally and it has since exerted considerable influence. The question whether this recognition of individual criminal responsibility violates the principle of legality is not that difficult to answer, at least not in the opinion of Professor Greenwood who argues that if "violations of the International laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why, once those laws came to be extended (albeit in attenuated form) to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of clear indications to the contrary."<sup>30</sup>

The last point in this regard is the question of the substantive contents of the law applicable to internal armed conflicts. Here also, the Tadi jurisdiction decision is of paramount importance. The Appeals Chamber confirmed the

earlier opinion rendered by the ICJ in the Nicaragua case, that part of the body of substantive Customary International law applicable to all types of armed conflict.<sup>31</sup>

In addition, the Appeals Chamber took the opportunity to explore to what extent rules relating to conduct of hostilities which traditionally belong to the Hague Law Sphere, might now be binding for parties to internal armed conflicts as well. The Chamber concluded that there had now developed a body of customary international law regulating the conduct of hostilities in internal armed conflicts, the principal features of which were: (a) rules relating to the protection of civilians and civilian objects; (b) a general duty to avoid unnecessary harm; (c) certain rules on means and methods of warfare, in particular a ban on the use of chemical weapons and perfidious means of warfare; (d) protection of certain objects, such as cultural property.<sup>32</sup> The Appeals Chamber cautioned however, that: (1) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal armed conflicts: and (2) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts, rather, the general essence of the rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.<sup>33</sup>

The rules on conduct of hostilities were not material to the Tadi Case, and the opinion of the Appeals Chamber is therefore, at least on this part of the law

applicable to internal armed conflicts, obiter dicta. Nevertheless, they may play a part as evidence of *Opinio Juris* in the formation of new rules of customary international law.

The academic literature is divided over the approach which the ICTY has taken to interpreting the scope and the relationship between Art. 2 and 3 of the Statute. Whilst some consider the net results awkward,<sup>34</sup> others have expressed disappointment with the Appeals Chambers decision in that an opportunity to further the cause of international humanitarian law would have been missed.<sup>35</sup> However, it should be noted that the detractors' criticism is often directed at different parts of the Appeals Chamber decision, and it would certainly be an overstatement to conclude that the decision on the jurisdiction scope of Arts. 2 and 3 has been criticised across the board.<sup>36</sup> A great deal of the faultfinding, it seems, is reserved for the Appeals Chamber and ICTY Trial Chambers analysis of the nature conflict in the former Yugoslavia, which has been discussed above.<sup>37</sup>

### C. Narrowing of the Regulatory Gap.

In subsequent decisions of the ICTY and ICTR, the trend set by the Appeals chamber in the Tadi case, has been confirmed and continued. The Trial Chambers have faithfully abided by the two-box regulatory system, but they also issued decisions which show that the substantive content of the crimes under the various provisions of the statutes may be fairly similar. The net result of this

jurisprudence is a “rapprochement” of the substantive regulatory content of war crimes committed in international and internal armed conflict.

For instance, the term “willful killing” is used by the provisions on grave breaches in the Geneva Conventions – Arts 50, 51, 130 and 147 – whereas the concept of “murder” is used in common Art. 3 of the Geneva Conventions and in Art. 5 (a) of the tribunal’s statute. However, the Trial Chambers in the Elebi and Akayesu cases confirmed that there is no qualitative difference between these terms such as to render the elements constituting these offences materially different.<sup>38</sup>

Similarly, the Elebi judgement indicates that the umbrella charge of “inhuman treatment” of the grave breaches provisions of the Geneva Conventions, which can be charged under Art. 2 of the statute, carries the same meaning as the charge of “cruel treatment” under common article 3 of the Geneva Conventions, which can be charged under Art 3 of the statute.<sup>39</sup>

The Trial Chambers in the Elebi and Furundija cases contain also significant contributions to the prohibition of torture under international law. They confirmed that torture is prohibited by a general rule of international law, both in internal and international armed conflicts.<sup>40</sup> They also confirmed that the prohibition of torture is absolute and non-derogable in any circumstances, and that is not only considered a norm of customary law, but constitutes a norm of jus

cogens. Furthermore, their decisions also indicate that the prosecution is justified in relying in the wider definition of torture contained in the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"), which is regarded as reflecting customary international law.<sup>41</sup> It was also held that these norms are applicable in any armed conflict. Likewise, the Trial chamber in the Elebi Case considered it indisputable that rape and other serious sexual assaults in armed conflict entail the indisputable criminal liability of the perpetrators.<sup>42</sup> The ICTY jurisprudence indicates that rape should be considered the most serious form of sexual abuse, and that it is forbidden by customary international law in any circumstances.

At the same time, the Trial Chambers have also made clear that it makes no difference to the prohibition of the norm whether the victim was female or male, and that a person can be guilty of rape, even if he did not physically commit the act himself.

(3) THE JURISPRUDENCE ON CRIMES AGAINST HUMANITY AND GENOCIDE UNDER THE STATUTES

A. GENOCIDE.

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The ICTY and the ICTR Statutes, as indicated before, incorporate the relevant provisions of the Genocide Convention. Article 2 of the ICTR Statute

and Art. 4 of ICTY Statute empower the respective tribunals to prosecute persons committing genocide as defined in paragraph 2 of those articles or of committing any of the other acts enumerated in paragraph 3 of the articles.

They further stipulate as follow:

“Genocide means any of the following acts committed with interest to destroy, in whole or in part, national, ethnical racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily harm or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculation to bring about its physical destruction in whole or in part. (d) imposing measures intended to prevent births within the group; (e) forcibly transforming 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.”

In the scheme of international criminal law, genocide is the ultimate crime.

The difficulty for the prosecutor is that its needs to be proven that acts in question were carried out with the so-called “*dolus specialis*”, i.e., with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such”<sup>43</sup> in the Karadi and Mladi Rule 61 decision, the ICTY Trial Chamber held that the intent necessary for genocide need not be clearly expressed but could be inferred from surrounding circumstances, such a “the combined effect of speeches or projects laying the ground work for and justifying the acts, from the massive scale of their destructive effect and from new specific nature which aims at undermining what is considered to be the foundation of the group.”<sup>44</sup>

The jurisprudence of the ICTY on the crime of genocide is to date, rather sparse. Further useful ICTY jurisprudence will no doubt emerge from the current trial against Goran Jelesić and upcoming trial against General Radislav Krstić. By contrast, the elements of the crime of genocide have been examined in depth by the ICTR Trial Chamber, which rendered judgement in the Akayesu case. The ICTR Trial of chamber confirmed that the Genocide Convention is undeniably considered part of customary international law,<sup>45</sup> and that the crime of genocide is distinct from other crimes in as much as it embodies a special intent or *dolus specialis*.” The Akayesu Trial Chamber further held that the crime of Genocide does not imply the actual extermination of a group in its entirety, but covers any one of the acts enumerated in the Rwanda Statute,<sup>46</sup> provided that it is committed with the specific intent to destroy “in whole or in part”, a national, ethnical, racial or religious group, as such.<sup>47</sup>

Finally, the Akayesu decision confirmed the ICTY jurisprudence in so far as it was held that:

“... in the absence of a confession from the accused, his intent can be inferred from a number of presumptions of fact. The chamber considers that it is possible to deduce the genocide 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 region or a 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.”<sup>48</sup>

## B. Crimes Against Humanity

Crimes against humanity refer to inhumane acts of a very serious nature, such as willful 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. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called “ethnic cleansing” and widespread and systematic rape and other forms of sexual assault, including enforced prostitution. As indicated before, crimes against humanity were first recognised in the charter and judgement of the Nuremberg Tribunal. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in any armed conflict, international or internal in character.

Article 5 of the ICTY Statute is drafted in a manner which is in some respect more restrictive than that of customary international laws, but which also omits reference to some of the requirements of crimes against humanity under general international law. Unlike Article 5 of the ICTY Statute, Article 3 of the ICTR Statute does not require a link with armed conflict, but it requires proof of discriminatory grounds for all crimes against humanity. Unlike the ICTY statute, the ICTR statute also makes express reference to the concept of ‘attack’ against the civilian population.

The first case in which the scope and contents of Article 5 of the ICTY Statute was examined in depth was the Tadi case. In the merits phase of this case the Trial Chamber examined the requirements of Art. 5 and elaborated in detail on the definition of crimes against humanity.<sup>49</sup>

Based on this judgement and customary international law, if charges under Article 5 of ICTY Statute are brought, the prosecutor must prove, *inter alia*, that the acts or omissions were committed during an armed conflict, although the character of the conflict (whether international or internal) is irrelevant. As noted in the Tadi opinion and judgement, the inclusion of the condition that crime against humanity be committed “in armed conflict” is no longer required by customary international law.<sup>50</sup> It is a limitation inserted by the drafters of the statute, which is temporal, rather than substantive in character, as indicated by the term “when” committed in armed conflict. Accordingly, the terms “in armed conflict”, indicate that it is not necessary to show that there is any connection with a war crime nor that there is any substantive connection to an armed conflict.<sup>51</sup>

The jurisprudence on crimes against humanity indicates furthermore, that the prosecutor must – not only under ICTR statute but also under the ICTY statute – prove that the crimes were committed against a civilian population on a “widespread” or “systematic” basis. It was noted in the Tadi judgement that the term “population” does mean that the entire population of a given state or territory must be victimised by the alleged acts in order for the acts to constitute crimes

against humanity. Rather, the word “population” in this context implies crimes of a collective nature and is meant to exclude single or isolated acts which, although possibly constituting war crimes or crimes against national criminal law, do not rise to the levels of crimes against humanity.

The term “population” therefore signifies that the acts alleged must be undertaken as part of a widespread or systematic basis.<sup>52</sup> The Tadi Trial Chamber also held that individuals who at one time performed acts of resistance may in certain circumstances be victims of crimes against humanity.<sup>53</sup> This may be supported, *inter alia*, by the Barbie case, the Vukovar Hospital Decision and the Commission of Experts Reports.<sup>54</sup>

Furthermore, the jurisprudence of the ICTY and ICTR has confirmed the prosecutor's position, that it only needs to prove that the campaign or attack waged against the population was either widespread or systematic.<sup>55</sup> As for the meaning to be accorded each of these terms, the Trial Chambers in the Tadi and Akayesu cases held that “widespread” refers to the number of victims whereas “systematic” implies policy or planning.<sup>56</sup> Moreover, the “widespread or systematic” requirements does not signify that a single act by a perpetrator can not constitute a crime against humanity. Indeed, in the Vukovar Hospital Decision and in the Tadi judgement, the Trial Chambers held that a single act by a perpetrator taken within the context of a widespread or systematic attack

against a civilian population entails criminal liability and that an individual perpetrator need not commit numerous offences to be held liable.<sup>57</sup>

It should be noted moreover, that the concept of “attack” which forms implicitly or explicitly part of the definition of crimes against humanity under both statutes, cannot be equated with the technical term “attack” under the laws of war.<sup>58</sup> The term “campaign” could be substituted for the word “attack” in most crimes against humanity. The term “attack” is not used either in Article 5 of ICTY Statute, nor in Article 6(c) of the Nuremberg Charter. It has been inserted into Art. 3 of the ICTR statute and Art 7 of the ICC statute, but presumable not with intent to restrict the scope of this category of crimes only to conduct of hostilities. This has been confirmed by the ICTR judgement in the Akayesu case.<sup>59</sup>

It has been noted above that the ICTR statute requires evidence of discriminatory grounds for all crimes against humanity under Article 3, but that the ICTY statute has no such restriction under Article 5. In its 1997, decision the Tadi Trial Chamber ruled that all crimes against humanity under Article 5 of the ICTY statute must be committed on discriminatory intent.<sup>60</sup> This particular was challenged by the prosecutor and in its recent judgement the Appeals chamber confirmed that customary International law does not include a general requirement of “discriminatory intent” for crimes against humanity,<sup>61</sup> but distinguishes between two categories of crimes against humanity, the “murder

type” and the “persecution type” and requires discriminatory grounds only for the latter.<sup>62</sup>

Finally, the nexus to armed conflict included in Article 5 of the ICTY Statute demands that the perpetrator must know of the broader context in which his acts were committed. However, the knowledge of the accused or the subordinate may be factually implied from the circumstances.<sup>63</sup> At the same time however, the Tadi judgement also held that the acts of the accused (or a subordinate) which constitute crimes against humanity may not be taken for purely personal reasons unrelated to the armed conflict although personal motives may be present.<sup>64</sup> The prosecutor appealed this particular aspect of the Tadi judgement and the Appeals Chamber, in its recent judgement of 15 July 1999, agreed that the prosecutor’s position was correct in law.<sup>65</sup>

## END NOTES

---

- 1 Inter alia, Tadi Jurisdiction Decision, pp 36-37
- 2 Tadi Opinion and Judgement, pp 201-202
- 3 Tadi Jurisdiction Decision, p 37
- 4 Ibid, pp. 37-38
- 5 Op cit, p. 202 and p 204
- 6 General Agreement on Peace for Bosnia and Herzegovina, concluded in Dayton, Ohio, November 1995
- 7 Tadi Opinion and Judgement, pp. 204-205
- 8 Elebi Judgement, p. 7
- 9 Leaving the classification of the character of the conflict (whether it was International or internal), aside for the moment
- 10 Furudija Judgment, p. 24
- 11 Ibid, p. 25
- 12 See further in Tadi Opinion and Judgement pp 207-208
- 13 Elebi Judgement, p 74
- 14 Tadi Jurisdiction Decision, p 37
- 15 Ibid, p 38
- 16 Ibid
- 17 Ibid, pp. 36-38
- 18 Tadi Jurisdiction Decision, p 46
- 19 Ibid, pp 47
- 20 The date of the agreement mentioned in paragraph 83 p. 47 of the jurisdiction decision is most probably wrong; the decision itself refers to an earlier discussion at p. 40, para 73, where the agreement is dated 22 May 1992
- 21 Tadi Jurisdiction Decision, p. 47-48
- 22 Elebi Judgement, p. 76
- 23 Prosecutor v Kordi and Erkez, 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, p. 11
- 24 Mc Donald:- Atkins, R.D., op cit.
- 25 Meron, Th., "International Criminalization of Internal Atrocities," 89 American Journal of International Law, p. 554
- 26 Prosecutor v Duko Tadi, App Ch., Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, pp. 44-48
- 27 Tadi Jurisdiction Decision, p. 51
- 28 Article 4 of the Rwanda Statute; Report of the Secretary-General pursuant to para 5 of SC Res 955 (1994)
- 29 Inter alia, the Belgian law of 15 June 1993 concerning repression of grave breaches of the Geneva Convention and their Additional Protocol
- 30 David Principles:- Atkins, R.D., op cit.
- 31 Tadi Jurisdiction, pp. 56-57
- 32 Ibid, pp. 53-68
- 33 Ibid, p. 67
- 34 Murphy, S., "Progress and Jurisprudence of the International Criminal Tribunal

---

for the Former Yugoslavia,” 93 AJIL, p. 57 (1995)

35 Meron, Th., “Classification of Armed Conflict in the Former Yugoslavia:  
Nicaragua’s Fallout”, 92 American Journal of International Law, pp 237-238

36 The following author, for example agrees with the Appeals Chamber’s  
characterisation of the conflicts as encompassing aspects of international and  
internal armed conflicts Muellerson, R., “International Humanitarian Law in  
Internal Armed Conflicts,” 2 Journal of Armed Conflict Law, p. 109

37 Meron, Th., “International Criminalization of Internal Atrocities”, 89 American  
Journal of International Law, p. 554

38 Elebi Judgement, pp. 154-155; see too: Akayesu Judgement p. 238

39 Elebi Judgement, pp. 161-162

40 Elebi Judgement, p. 163; Furundija Judgement, p. 53

41 Elebi Judgement, pp. 165-167; Furundija Judgement, pp. 55-64

42 Furundija Judgement, p. 73

43 Elebi Judgement, P. 172

44 Article 4(3) of the ICTY Statute and Article II of the Convention on the  
Prevention and Punishment of the Crime of Genocide, 1948; Advisory  
Opinion of the ICJ in the Nuclear Weapons Case, ICJ Rep. 1996  
45 Prosecutor v Karadi and Mladi, Review of the Indictment Punishment to Rule 61  
of the Rules of Procedure and Evidence, pp 53-54

46 Akayesu Judgement, para 495

47 Ibid, paras 497-498

48 Article 2(2)(a) through 2(2)(e) (=ICTY Statute, Art 4(2)(a)-(e)

49 Akayesu Judgement, paras 497-458

50 Ibid, par 523

51 Tadi Opinion and Judgement, pp 232-255

52 Ibid, pp 236-237

53 Ibid, p. 239

54 Ibid, p 244

55 Ibid, pp. 241-243

56 Ibid, p. 243

57 Ibid, p. 245

58 Tadi Opinion and Judgement, pp. 246-247; Akayesu Judgement pp. 235-236

59 Vukovar Hospital Decision, para 30

60 CF. Article 49(1) of Additional Protocol 1

61 Akayesu Judgement, p. 236

62 Tadi Opinion and Judgement pp. 248-250

63 This is confirmed, inter alia, by the Nuremberg Charter, the judgement of the  
Nuremberg Tribunal, Control Council Law No. 10, Tokyo Charter, the  
Memorandum of the Secretary-General on The Charter and Judgement of  
Nuremberg Tribunal.

64 Tadi Opinion and Judgement, pp 252-254

65 Prosecutor v Duko Tadi, App Ch., pp. 121-122

## CHAPTER VI

### CONCLUSION

The “laws of wars” consist of the limit set by international law within which the force required to overpower the enemy may be used, and the principles thereunder governing the treatment of individuals in the course of the war and armed conflict. In the absence of such rules, the barbarism and brutality of war would have known no bounds. These laws and customs have arisen from the long standing practices of belligerents; their history goes back to the Middle Ages when the influence of christianity and of the spirit of chivalry of that epoch combined to restrict the excesses of belligerents. Under present rules such acts as the killing of civilians, the ill-treatment of prisoners of war, and military use of gas, and the sinking of merchant ships without securing the safety of the crew are unlawful.

The essential purpose of these rules is not to provide a code governing the “game” of war, but for humanitarian reasons to reduce or limit the suffering of individuals, and to circumscribe the area within which the savagery of armed conflict is permissible.

In as much as the rules of international humanitarian law exist for the benefit of individuals, it would appear that in the case of unlawful conflict, waged by an aggressor state, these rules nevertheless bind the state attacked and member of

its armed forces in favour of the aggressor and its armed forces. However, the aggressor state may be penalised to the extent that, during the course of the conflict, neutral or non-contestant states may discriminate against it, or by reason of the fact that at the termination of hostilities it may have to bear the reparations or to restore territory acquired. The rules of international humanitarian law are binding not only on states as such, but on individuals, including members of the armed forces, heads of states, ministers, and other officials. They are also necessarily binding upon United Nations forces engaged in military conflict, mainly because the United Nations is a subject of international law and bound by the entirety of its rules, of which the laws of war form part. There is also the consideration that if United Nations forces were not so bound, and became involved in operations against a state, the forces of the latter would be subject to the laws of war, but not United Nations forces.

While the rules of international humanitarian law are frequently violated, international law is not entirely without means of compelling states to observe them. One such method is the reprisal, although it is at best a crude and arbitrary forum of redress. Another sanction of the laws of war is the punishment both during and after hostilities of war criminals, following upon a proper trial.

In this connection, the trials of war criminals by Allied tribunals after the Second World War and the ongoing Tribunals in the former Yugoslavia and Rwanda provide significant precedents as this essay has amply demonstrated.

In the past, domestic courts have played a role in the enforcement of international criminal law, and there are clear signs of increased activism of these courts, particularly with respect to the prosecution of war crimes.

Nevertheless, international tribunals have a strong symbolic function and are more likely to be perceived as impartial fora. This essay examined the antecedents of the existing international tribunals by briefly discussing the background, jurisdiction and case load of the tribunals that were planned or actually set up in the aftermath of the First and Second World Wars.

The main part of this essay was devoted to the international criminal tribunals which are currently operating, and which are the first ones to be set up since the Second World War. The ICTY was established by the UN Security Council in 1993. Whilst the ICTR was set up by the UN Security Council one year later, in 1994, in the immediate aftermath of the widespread massacres which took place in Rwanda during the first half of 1994.

It is difficult to deny that from the perspective of international criminal law, the creation of ad hoc international criminal tribunals by the Security Council has some clear disadvantages: Consensus may not be always be easy to reach within the council, whilst the creation of ad hoc judicial bodies for particular problems and particular situations may leave an impression of selectivity in the enforcement of international criminal law.

Nevertheless, this study has demonstrated that the ICTY and the ICTR occupies a unique position in the international legal system. After a discussion of the circumstances surrounding their establishment, their jurisdictions were examined in addition to some of the significant contributions which their jurisprudence has made to international criminal law to date.

The uniqueness of the ICTY and ICTR has been put in relief even more by the outcome of the Rome negotiations for a permanent International Criminal Court (ICC). A cursory analysis of the ICC statute reveals that there are significant differences with the statutes of the existing international criminal tribunals. Whilst the ICTY and the ICTR were set up for a specific purpose under chapter VII of UN Charter, the ICC will per definition be a permanent institution. Unlike the ICTY and the ICTR, however, the ICC will not enjoy supremacy over domestic jurisdictions, but will only be allowed a complementary role.

## BIBLIOGRAPHY

### BOOKS

1. Atkins, R. D., The Alleged Transnational Criminal: The Second Biennial International Criminal Law Seminar, (Martinus Nijhoff, The Hague, 1995)
2. Brownlie, I., System of the Law of Nations: State Responsibility (Clarendon Press, Oxford, 1983)
3. Green, L. C., The Contemporary Law of Armed Conflict, (A.W. Sijhoff, The Hague, 1993)
4. Greenspan, M., The Modern Law of Land Warfare, (University of California Press, Oxford, 1959)
5. Hannikainen, L., Peremptory Norms (Jus Cogens) in International Law, (Finnish lawyers Publishing Co., Helsinki, 1988)
6. Hannikainen, et al., Implementing Humanitarian Law Applicable in Armed conflicts: The case of Finland (Finnish Lawyers Publishing Co., Helsinki 1992)
7. Oppenheim's International Law, 8th edn (edn) H. Lauterpact (Longman, London, 1955)

8. Pictet, J., The Geneva Conventions of 12 August 1949: Commentary (International Committee of the Red Cross, 1952)
9. Schindlaw, D., & Toman, J., The Laws of Armed Conflict, (Martinus Nijhoff, The Hague, 1981)
10. Shaw, M., International Law, (Grotius, Cambridge, 1991)

## **ARTICLES**

1. Aptel, C. "The International Criminal Tribunal For Rwanda, " 37 ICRC Review (1997)
2. Bethelem, D., and Weller, M., "The Yugoslav Crisis in International Law: General Issues", Volume 5 Cambridge International Documents Series, (1997)
3. Cisse, C., "The End of a Culture of Impurity in Rwanda" 1 Yearbook of International Humanitarian Law, (1998)
4. Fischer, H., "Limitation and Prohibition of the use of certain Weapons in Non-International Armed Conflicts", in International Institute of Humanitarian law Yearbook 1989 - 90, (1992)

5. Freestone & Mangone, "The Law of the Sea Convention: Unfinished Agendas and Future challenges, " 10 IJMCL 1995, Special Issue, No. 2
6. Greenwood, Ch., "Rights at the Frontier - Protecting the Individual in time of War" in Law at the Centre - The Institute of Advanced Legal Studies at Fifty, (1999)
7. Greenwood, Ch., "The Relationship between Jus ad Bellum and Jus in Bello" in 36 ICLQ
8. Greenwood, Ch., "The Development of International Humanitarian Law by the International Criminal Tribunal for the former Yugoslavia" in 2 Max Planck Yearbook of United Nations Law, (1998)
9. Hans Kelsen cited in Rumpf, H., "The Concepts of Peace and War in International Law". 27 German Yearbook of International Law, (1984)
10. Meron, Th., "International Criminalization of Internal Atrocities, " in 89 American Journal of International Law, (1995).
11. Meron, Th., "Classification of Armed Conflict in the former Yugoslavia: Nicaragua's Fallout, " in 92 American Journal of International law, (1995).
12. Muellerson, R., "International Humanitarian Law in Internal Armed Conflicts," in 2 Journal of Armed Conflict Law (1997)

13. Murphy, S., "Progress and Jurisprudence of International Criminal Tribunal for the former Yugoslavia", in 93 American Journal of International Law, 1995.
14. Parks, W.H., "Command Responsibility for War Crimes" in 62 Military Law Review, (1963)
15. Rich, R., "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", in 4 European Journal of International Law, (1993).
16. Wedgewood, R., "The International Criminal Court: An American View" in 10 European Journal of International Law, (1999).
17. Wembou, D., "The International Criminal Tribunal for Rwanda", in 37 ICRC Review, (1997)
18. Zimmerman, W., "Origins of Catastrophe: Yugoslavia and its Destroyers, America's Last Ambassador Tells what Happened and Why" in 89 American Journal of International Law, (1995)

## **STATUTES OF INTERNATIONAL TRIBUNAL**

1. Statute of the International Tribunal for the Prosecution of Persons Responsible for serious Violations of International Humanitarian Law committed in the territory of the Former Yugoslavia since 1991, adopted by Security Council on 25 May 1993.
2. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territories of neighbouring States, between 1 January 1994 and 31 December 1994, adopted by Security Council on 8 November 1994.

## **INTERNATIONAL INSTRUMENTS**

1. Charter of the United Nations
2. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

3. Convention on the Prevention and Punishment of the Crime of Genocide of 12 January 1951.
4. The Four Geneva Conventions of 1949 and their Additional Protocols of 1977.