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The Jurisprudence Of The Yugoslav And Rwandan Criminal Tribunals On Their Jurisdiction And On International Crimes (2004-2013)

By Robert Kolb*

I. Introduction

Two earlier contributions to this *Yearbook* reviewed the substantive case-law of the two *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in the period from 1995 to 1999[1] and 2000-2004.[2] The present article covers the period from 2004 to 2013. As in the earlier instalments the discussion is limited to matters of substantive law, to the exclusion of procedural points, participation in crimes (apart from superior responsibility and some genocide-related offences), and sentencing. It deals with the crimes within the jurisdiction of the Tribunals, defences and some other questions of general interest. At first sight, the overwhelming wealth of material since 2004 and its often sheer length seems to render the task of a succinct review arduous if not Herculean. However, the year 2004 proves after the fact to have been a good watershed: the case-law after that date has been settled on most points dealt with in the present contributions. In other words, the substantive novelties after 2004 are limited and when they occur rather circumscribed. The developments on the law were thus mainly consolidated and sometimes extended.[3] On this account, it proved unnecessary to repeat the chapter headings of the previous contributions and to fill them with new details or additions. Rather, the matter has been wrapped up in a new

*Professor of International Law at the University of Geneva. Robert.Kolb@unige.ch.

[1] R Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes' (2000) 71 BYIL 259-315. Hereinafter Kolb (2000).

[2] R Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes' (2004) 75 BYIL 269-335. Hereinafter Kolb (2004).

[3] This is due to a consolidation of the case law, but also to the substantive necessity of coherence and previsibility, notions which are particularly important in the realm of criminal law (*nullum crimen sine lege*, *Bestimmtheitsgrundsatz*). The way is now paved for the end of the experience of the two *ad hoc* Tribunals of 1993 and 1995. They have proved to be the icebreakers in the context of the birth of modern criminal international law.

way, in order to bring to bear the main points in the post-2004 jurisprudence.

There are three areas in which important developments took place since 2004:[4] first, the definition of 'non-international armed conflict', second, the definition of the civilian persons susceptible to become victims of crimes against humanity, and third, but in a scattered way, a series of issues concerning the elements of crime and certain interpretive issues in the context of the various offences. There have also been some important developments in the 'participation' limb of the jurisprudence, notably with regard to the 'joint criminal enterprise'.[5] But these developments fall outside the scope of the present contribution.

In the period under review, the number of judgments has increased greatly. Some selectivity becomes unavoidable. The focus of this article will be on the case-law of the ICTY, which has taken the lead on most points of substantive law (with the exception of certain offences linked to genocide, where the ICTR has been more active). There are 39 substantive judgments of the ICTY to be reviewed.[6] The ICTR has for the first time been even more prolix than the ICTY; the number of substantive judgments has been more than fifty. However, the relative innovation in its judgments is lesser than in the case of the ICTY. For this reason, but also for reasons of space, its jurisprudence will only be mentioned in passing, where appropriate.[7] The case-law of the International Criminal Court (ICC) on the offences listed in its statute is still too fragmentary to stand a thorough analysis; it is also outside the scope of the present contribution. For the time being, the only important complement to the jurisprudence of the ICTY and ICTR (on the plane of the crimes) is with regard to child soldiers.[8]

[4] Overall, large sections of the substantive law are repeated from judgment to judgment. This makes the reading of the entire case law a somewhat daunting enterprise: one frequently reads similar or even identical passages.

[5] See on this issue, for example, C Barthe, *Joint Criminal Enterprise (JCE): Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?*(Duncker & Humblot 2009).

[6] These are the following: *Kordić* (Appeal), 2004; *Blagojević* (Trial Chamber), 2005; *Strugar* (Trial Chamber), 2005; *Kvocka e.a* (Appeal), 2005; *Halilović* (Trial Chamber), 2005; *Limaj e.a*. (Trial Chamber), 2005; *Hadzihasanović* (Trial Chamber), 2006; *Stakić* (Appeal), 2006; *Orić* (Trial Chamber), 2006; *Krajisnik* (Trial Chamber), 2006; *Simić* (Appeal), 2006; *Galić* (Appeal), 2006; *Brdjanin* (Appeal), 2007; *Blagojević and Jokić* (Appeal), 2007; *Martić* (Trial Chamber), 2007; *Mrksić* (Trial Chamber), 2007; *D Milosević* (Trial Chamber), 2007; *Haradinaj* (Trial Chamber), 2008; *Hadzihasanović* (Appeal), 2008; *Boskoski* (Trial Chamber), 2008; *Strugar* (Appeal), 2008; *Delić* (Trial Chamber), 2008; *Martić* (Appeal), 2008; *Milutinović* (Trial Chamber), 2009; *Krajisnik* (Appeal), 2009; *Mrksić* (Appeal), 2009; *Lukić* (Trial Chamber), 2009; *D Milosević* (Appeal), 2009; *Boskoski* (Appeal), 2010; *Popović* (Trial Chamber), 2010; *Dordević* (Trial Chamber), 2011; *Gotovina* (Trial Chamber), 2011; *Perisić* (Trial Chamber), 2013; *Haradinaj* (Trial Chamber, Retrial), 2012; *Lukić* (Appeal), 2012; *Tolimir* (Trial Chamber), 2012; *M Stanisić* (Trial Chamber), 2013; *Prlić* (Trial Chamber), 2013; *J Stanisić* (Trial Chamber), 2013. These judgments can be consulted on the internet site of the ICTY: www.icty.org.

[7] Notably: *Serugendo* (Trial Chamber), 2006; *Seromba* (Trial Chamber), 2006; *Nahimana* (Appeal), 2007; *Bikindi* (Trial Chamber), 2008; *Bagosora* (Trial Chamber), 2008; *Ntabakuze* (Appeal), 2012; *Nzabonimana* (Trial Chamber), 2012. These judgments and the other ones can be consulted on the internet site of the ICTR: http://www.unictr.org/.

[8] See *T Dyilo* (Democratic Republic of Congo), Judgment of 14th March 2012, §568ff.

II. Conditions for the Jurisdiction of the Tribunals, Especially the Definition of Non-International Armed Conflict

A. Jurisdictional issues

A significant discussion on jurisdictional issues took place in the context of article 3 of the ICTY Statute, dealing with war crimes (violations of laws and customs of war) to the exclusion of grave breaches of the Geneva Conventions (GCs) of 1949. To a lesser degree, this discussion was rooted in the context of article 4 of the ICTR Statute, dealing with serious violations of Common article 3 of the GCs or of Additional Protocol II (AP II) of 1977. For the ICTY only, a jurisdictional issue appears also in the context of crimes against humanity (CAH), since article 5 of its Statute makes their prosecution dependent on the fact of being committed 'in armed conflict'.[9] This requirement does not reflect customary international law, nor is it an aspect of substantive law related to the definition of crimes against humanity; it is limited to the Statute of the ICTY and concerns the scope of competence of this Tribunal. However, it erects a jurisdictional hurdle: in the absence of an armed conflict and of a nexus of the acts complained of with the armed conflict, a CAH may have been committed, but the ICTY would have no jurisdiction over it. The 'armed conflict' for the purposes of article 5 does not differ from the armed conflict necessary to the application of article 3. It covers both international armed conflicts (IACs) and non-international armed conflicts (NIACs). But it does differ from the armed conflict required for the application of article 2 of the ICTY Statute, the grave breaches régime. The latter requires the existence of an IAC.[10]

In the context of article 3, the ICTY has listed a series of jurisdictional requirements:[11]

1. the existence of an armed conflict, international or non-international;
2. a nexus between the alleged offence and the armed conflict (a close relation to the hostilities, that is, the crime is shaped by or is dependent upon the armed conflict);
3. the so-called four *Tadić* conditions: the infringement of a rule of international humanitarian law; having its basis in customary international law or in conventional law[12] unquestionably binding the parties; a serious violation

[9] See e.g *Blagojević and Jokić* (TC, 2005), §542.
[10] Kolb (2000), 273ff.
[11] A good summary can be found in *Dordević* (TC, 2011), §1521ff.
[12] In *M Stanisić* (TC, 2013), §35, it has been stressed that the relevant conventional rule must not conflict with or derogate from peremptory norms. This utterance may seem strange in reference to the great conventions on IHL, which reflect customary international law and do not detract from any peremptory norm of international law. But the point has some justification if one includes the various special agreements the parties in armed conflict may conclude and in fact do conclude (articles 6/6/6/7 of Geneva Conventions I-IV of 1949).

infringing rules protecting important values or having grave consequences for the victim; and a violation which entails, under customary international law or under conventional law, individual criminal responsibility;

4. for the application of Common article 3 of the GCs, the victim must not have been actively taking part in hostilities at the time the crime was committed.[13] Indeed, Common article 3 protects specifically persons not taking active part in hostilities, that is, persons hors de combat.

B. Notion of non-international armed conflict

The most interesting point in this case-law relates to the definition of 'non-international armed conflict'. The ICTY had to venture into that question on account of a series of events which belonged to the realm of NIACs. One of these events related to the fighting between the Kosovo Liberation Army (KLA) and Serb forces in 1998.[14] Since Kosovo was at that time undoubtedly a province of Serbia and Montenegro, the armed conflict there could only be non-international (unless the KLA could be said to be controlled by a third State, *quod non*). The borderline was even more delicate in the context of the 'terrorist' activities going on in Macedonia (FYROM) in 2001.[15] And the question arose also in other contexts, such as fighting in certain municipalities of Central Bosnia between Muslim and Bosno-Croat forces, where an external control of the Croat forces had not been shown.[16] It is not by accident that these cases came to the fore in a later phase of the Tribunal's jurisprudence. Their greater legal complexities accounted for a lengthier instruction phase.

The ICTY had initially given a single definition of the armed conflict, comprising both the elements of an international and non-international armed conflict: '[An armed conflict exists] whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[17] The ICTY then went on to refer to the criteria which are used in international humanitarian law (IHL) to define the threshold of NIACs: the intensity of the conflict; and the organization of

[13] These requirements are discussed in: *Blagojević and Jokić* (TC, 2005), §535ff; *Strugar* (TC, 2005), §215ff; *Halilović* (TC, 2005), §22ff; *Hadzihasanović* (TC, 2006), §12ff; *Orić* (TC, 2006), §251ff; *Martić* (TC, 2007), §39ff; *Delić* (TC, 2008), 38ff; *Milutinović*, TC, 2009), §124ff; *Lukić* (TC, 2009), §868ff; *Popović* (TC, 2010), §739ff; *Dordević* (TC, 2011), §1521ff; *Gotovina* (TC, 2011), §1669ff; *Perisić* (TC, 2011), §71ff; *Haradinaj* (TC, Retrial, 2012), §388ff; *Tolimir* (TC, 2012), §681ff; *M Stanisić* (TC, 2013), §31ff; *Prlić* (TC, 2013), §140ff; *J Stanisić* (TC, 2013), §949ff.

[14] *Limaj* (TC, 2005), §36ff; *Haradinaj* (TC, 2008), §37ff.

[15] *Boskoski* (TC, 2008), §175ff.

[16] *Hadzihasanović* (TC, 2006), §20ff.

[17] *Tadić* (AC, 1995), §70. Compare the complexity of the question in the very articulated contribution of M Milanovic and V Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict', in N White and C Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad bellum jus in bello and jus post bellum* (Elgar 2013) 256ff.

the armed forces involved.[18] First, the rebel forces must display a *minimum of organization*. These forces must appear as an armed force and not simply as a non-coordinated mass of rioters. Hence, the rebels must be militarily organized, that is, possess a responsible command, abide by military discipline, and be capable of respecting the rules of IHL. Even in NIAC, the existence of an armed conflict supposes that 'armed forces' fight against one another and that there are some responsible persons who can be held answerable. Second, the armed conflict must present a *minimum of intensity*. This means that there must be a fight of a collective kind triggering a non-negligible number of victims. As a first rule, it may be possible to consider that in order to crush the insurrection, police forces of the State are not any more enough and that the army has to be mobilized. The conflict, however, need not be 'protracted' in the sense that it must last for a certain and determined amount of time.[19] Protraction is simply a way of expressing the intensity criterion: it stands to reason that a protracted conflict will more readily present the necessary intensity. In the period under review, the ICTY clarified the fact that the protraction-criterion was indeed not an independent one with respect to the two controlling criteria under IHL. It also gave a series of indications as to when a situation would fulfil these criteria. These developments are welcome, especially since in IHL the exact meaning of the two thresholds had rarely been analyzed in such detail.

i) The first issue is the downgrading of the "protracted conflict" criterion. In the *Haradinaj* case (TC, 2008),[20] the Trial Chamber stated that since the *Tadić* decision of 1995, the protracted-conflict criterion referred more to the intensity of the conflict than to its duration (for NIAC).[21] The Chamber sought to align its jurisprudence to the usual concepts of IHL. However, when the criterion of 'protraction' was first used it was noted as a certain departure from the classical IHL expressions. The criterion is not mentioned in the relevant conventions, in particular Common article 3 or AP II. There was therefore a debate over the true scope of the ICTY's new formula.[22] In particular, if the protracted-conflict criterion meant that a

[18] The criteria were developed in the *Rapport de la Commission d'experts chargés d'examiner la question de l'application des principes humanitaires en cas de troubles intérieurs*, Genève, 3-8 août 1955, Publication n° 480 du CICR (Genève 1955) 6-7; and in the *Rapport de la Commission d'experts chargée d'examiner la question de l'aide aux victimes des conflits internes* (RICR 1963) 78-79 (originals in French).

[19] Thus, in the famous *La Tablada* case, the Inter-American Commission of Human Rights held that a NIAC had taken place in the context of a 'intense' fighting around a military base which had lasted 30 hours: see M Sassoli, A Bouvier and A Quintin, *How Does Law Protect in War?* Vol III (3rd ed., ICRC 2011) 1639ff.

[20] At §39ff.

[21] §49. The *Boskoski* Trial Chamber seems however to hold that the protracted criterion imports a time-element in the equation: (TC, 2008), §186.

[22] See M Sassoli, ' 'Humanitarian Law and International Criminal Law'', A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 120; M Sassoli and J Grignon, ''Les limites du droit international pénal et de la justice pénale dans la mise en œuvre du droit international humanitaire'', A Biad and P Tavernier (eds), *Le droit international humanitaire face aux défis du XXIe siècle* (Bruylant 2012) 144-146; S Kuefner, ''The Threshold of Non-International Armed

conflict had to last a certain amount of time, this would have amounted to a supplementary condition for the application of IHL and would have produced certain gaps in protection. Furthermore, an interpretive question with regard to the relation of protraction and intensity would appear. To what extent could the one be autonomous from the other? Moreover, would the protracted-conflict criterion operate retroactively? In other words, would the armed conflict exist since the first day of armed clashes, but only after a certain time had passed? This might suggest that a certain amount of time would have to elapse in order to know where we stand; and from the point of view of the actors, in order to know what obligations are imposed on them. This is at odds with the protective aim of IHL. It is also at odds with the principles of criminal (including international criminal) law: if an actor in the conflict could not be sure that the situation would turn out to be an armed conflict, he or she could claim the lack of a criminally relevant *mens rea*; or at least an excusable error of fact. Difficult questions as to excusable and non-excusable mistake would arise. We may now consider that the time for these doubts and interrogations has passed.[23] This is a welcome development. It is not true that international criminal law must be based on the same concepts as those of IHL; each branch of the law has its own peculiarities and functional needs. However, there had never been a cogent reason for a departure from the time-honored conceptions of IHL in this area of jurisdictional law. With the disappearance of this double conceptual presence, a point of legal uncertainty has been removed.

ii) The second issue is the configuration of the two criteria of intensity and organization. In the *Limaj* case (TC, 2005), the problem surfaced for the first time in an acute manner. To start with, the Trial Chamber emphasized certain general points. First, the ICTY has jurisdiction over crimes committed everywhere on the territory under the control of a party to the conflict.[24] This statement does obviously not imply any extraterritorial reach, since the ICTY is limited by its Statute to crimes committed on the territory of the former Yugoslavia.[25] The true meaning of the phrase is thus that the whole territory is covered and that the nexus requirement can be fulfilled even in parts of the territory where there is no actual fighting. Second, the Trial Chamber recalls that there are no formal requirements to be fulfilled, e.g. recognition of insurgency or the formation of a State-like authority.[26] This is certainly true for Common article 3 purposes. It also does not imply a stretching of the conditions of application of AP II in regard of its article 1 (where a territorial control of the rebels is required), since it is abundantly clear that no State-like authority must be established beyond the mere territorial control mentioned. Third, the Trial Chamber stresses the main aim of the intensity/organization criteria: they serve to distinguish armed conflict from banditry, short-lived riots and other internal

Conflict: The Tadic Formula and its First Criterion Intensity'' (2009) 102 Militair-Rechtelijk Tijdschrift 301.

[23] Unless the quoted *Boskoski* Trial Chamber utterance (see footnote 21) is to be given a different weight

[24] §84.

[25] See the Preamble and article 1 of the Statute.

[26] §86.

disturbances.[27] This assessment must be made case by case, in accordance with criteria such as: seriousness of the attacks; spread of clashes in the territory and over time; number of involved armed forces; UN Security Council involvement, etc. For the 'organization requirement', relevant factors are e.g. the existence of headquarters or zones of occupation; or logistical considerations.[28] The Trial Chamber then turned to the facts of the case at hand with regard to the KLA. As regards the organization of that Army, it mentioned the following factors, which all showed a sufficient degree of military organization (as distinguished from unorganized rioters): existence of a General Staff; zone commanders; Army Regulations; public communiqués; a hierarchy; a military police; military training of soldiers; uniforms and badges; and a practice of negotiation with the EU on behalf of the KLA.[29] As regards the 'intensity' requirement, the following factors were mentioned: the great devastation of the military operations of 1998; the use of heavy weapons; and the periodic armed clashes virtually continuously at intervals averaging 3-7 days over a widespread and expanding area.[30] The conclusion of the Trial Chamber was that by end of May 1998 there existed an armed conflict of non-international character.[31]

After some further consolidating judicial practice in this area in *Hadzihasanović* (TC, 2006)[32] and in *Mrksić* (TC, 2007),[33] the ICTY returned importantly to this issue in the *Haradinaj* and *Boskoski* cases. In *Haradinaj* (TC, 2008), the issues of 'intensity'[34] and 'organization'[35] were again canvassed, with some new examples of relevant factors, e.g. for intensity, the number of fleeing civilians; and for organization, the existence of headquarters and the ability to conclude agreements. The Trial Chamber then turned to the facts of the case, concerning again the KLA.[36] It confirmed the findings of the *Limaj* Chamber. In particular, as to organization, stress was laid on the following factors: existence of headquarters and command structure; disciplinary rules and mechanisms; control of territory; presence of military weapons and other military equipment; fundraising and recruiting campaigns; military training; military operations, strategy, and tactics; ability to speak with one voice and negotiate agreements.[37] The intensity criterion is addressed at §90ff of the decision.

The *Boskoski* case (TC, 2008) is the most developed judicial expression of the ICTY on this issue. The facts of the case were particularly delicate, since they concerned the situation in Macedonia (FYROM). It was described as one of subversion, instability, and terrorism. Was there

[27] §89.
[28] §90.
[29] §93ff.
[30] §135ff, 168.
[31] §171.
[32] At §20off.
[33] At §407ff.
[34] §39ff.
[35] §50off.
[36] §63ff.
[37] §89.

a NIAC? The Trial Chamber emphasized that the formal label is not decisive. A situation of terrorism could be an armed conflict, as shown by many instances of State practice, e.g. Peru, US (Al-Qaeda), Israel (Palestine), etc. The UN Commission of Inquiry also mentioned this for the situation in Lebanon (2006).[38] Conversely, isolated acts of terrorism fail to reach the threshold of required intensity.[39] The list of the factors accounting for 'organization' and 'intensity' draws on the whole previous case-law and is the most complete.

As to *intensity*, the following factors are mentioned:

> Various indicative factors have been taken into account by Trial Chambers to assess the 'intensity' of the conflict. These include the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed. Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements.[40]

As to the *organization* requirement, the Trial Chamber stressed that the group must have a hierarchical structure and its leadership (chains of command) must be vested with the requisite authority to exert authority over its members.[41] Certain groups, as they existed in Somalia in 1993, were too anarchical to meet this test.[42] On the other hand, the warring groups do not need to be as organized as the armed forces of a State; nor need they control a part of the territory in order to be able to carry out sustained and concerted military operations, as required by article 1 AP II.[43]The Trial Chamber then turns to the factors showing the existence of a sufficient degree of organization. The list is as follows:[44]

> 199. Trial Chambers have taken into account a number of factors when assessing the organization of an armed group. These fall into five broad groups. In the

[38] §180ff, 188.
[39] §190.
[40] §177, footnotes omitted.
[41] §195.
[42] §196.
[43] §197.
[44] §199-203, footnotes omitted.

first group are those factors signaling the presence of a command structure, such as the establishment of a general staff or high command, which appoints and gives directions to commanders, disseminates internal regulations, organises the weapons supply, authorises military action, assigns tasks to individuals in the organisation, and issues political statements and communiqués, and which is informed by the operational units of all developments within the unit's area of responsibility. Also included in this group are factors such as the existence of internal regulations setting out the organisation and structure of the armed group; the assignment of an official spokesperson; the communication through communiqués reporting military actions and operations undertaken by the armed group; the existence of headquarters; internal regulations establishing ranks of servicemen and defining duties of commanders and deputy commanders of a unit, company, platoon or squad, creating a chain of military hierarchy between the various levels of commanders; and the dissemination of internal regulations to the soldiers and operational units.

200. Secondly, factors indicating that the group could carry out operations in an organized manner have been considered, such as the group's ability to determine a unified military strategy and to conduct large scale military operations, the capacity to control territory, whether there is territorial division into zones of responsibility in which the respective commanders are responsible for the establishment of Brigades and other units and appoint commanding officers for such units; the capacity of operational units to coordinate their actions, and the effective dissemination of written and oral orders and decisions.

201. In the third group are factors indicating a level of logistics have been taken into account, such as the ability to recruit new members; the providing of military training; the organized supply of military weapons; the supply and use of uniforms; and the existence of communications equipment for linking headquarters with units or between units.

202. In a fourth group, factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3 have been considered, such as the establishment of disciplinary rules and mechanisms; proper training; and the existence of internal regulations and whether these are effectively disseminated to members.

203. A fifth group includes those factors indicating that the armed group was able to speak with one voice, such as its capacity to act on behalf of its members in political negotiations with representatives of international organisations and foreign countries; and its ability to negotiate and conclude agreements such as cease fire or peace accords.

The conclusion of the Trial Chamber was that there was a NIAC in FYROM in August 2001.[45]

This jurisprudence provides a welcome wealth of new material for the qualification of NIACs, in particular for the interpretation of the notions of 'intensity' and 'organization'. Not all the factors mentioned are of the same importance; but they provide a good exemplification of the issues at

[45] §292.

stake. Some of these criteria are innovatory, such as the one looking to the involvement of the UN Security Council in order to determine the intensity of the conflict. An external appreciation by a UN organ is here used to assess a quality of the conflict, whereas legal doctrine had previously privileged intrinsic criteria, stemming from events on the spot.

C. Control criteria

The ICTY also pursued its consolidated case-law on the issue of 'overall/global control'. If some local armed forces in Bosnia could be shown to depend in such a way upon a third State (Serbia or Croatia) that they could not have maintained themselves without such external support, the armed conflict was internationalized.[46] This overall control test was more precisely described by the *Gotovina* Tribunal: 'This test [of overall control] is satisfied where, *inter alia*, a State has a role in organizing, coordinating or planning the military actions of the organized armed group and that State finances, trains, equips or provides operational support to that group'.[47] It has been added that for an overall control to be established it is not sufficient to equip and to finance, but that there must also be the coordination and the planning of the military operations.[48] Conversely, it is not necessary that the third State should have given specific orders or issued specific instructions.[49] The overall control test here serves for the qualification of an armed conflict as internationalized: through overall foreign control an armed conflict that was or would have been only internal in character is turned at least partly into an armed conflict international in nature. All the rules of IHL and not only the rules for NIAC are thus applicable to the internationalized part of the conflict. As is known, the International Court of Justice (ICJ) has repudiated the 'overall control' criterion only in its application to issues of State responsibility. The Court held that the applicable legal standard in this distinct area of the law is that of 'effective control' (for agents) or 'complete dependence' (for *de facto* organs).[50] However, the ICJ acknowledged that for the qualification of an armed conflict the overall control-criterion could be appropriate, even if it declined to decide the point.[51] In the view of the present author, the overall control-test is correct in the context of the qualification of an armed conflict. The analysis of the *Tadić* Tribunal is unimpeachable

[46] See *Gotovina* (TC, 2011), §1675; *Prlić* (TC, 2013), §85-86; *Ţ Stakić* (TC, 2013), §953-954.
[47] *Gotovina* (TC, 2011), §1675.
[48] *Prlić* (TC, 2013), §86.
[49] *Ţ Stanisić* (TC, 2013), §954.
[50] See the *Genocide* case, (2007) ICJ Reports, 204ff, §391ff.
[51] Ibid, 210, §404: 'Insofar as the 'overall control' test is employed to determine whether or not an armed conflict is international [. . .] it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment'.

on this point; the only mistake it perhaps committed was to think that all rules of attribution must follow those in the specific area of State responsibility. This, however, is wrong; there are many rules of attribution in international law, each one following the particular legal purposes of the relevant subject matter. One may mention for example the rules of attribution in the context of the treaty-making power (e.g. article 7(2)(a) of the Vienna Convention on the Law of Treaties (VCLT) of 1969); of the formation of customary international law (whose acts count?[52]); in the acquisition of territory (whose acts or omissions create a title or an *effectivité*?[53]); in the law of immunities (whose acts are accounted as *jure imperii* and in what contexts?[54]); in the jurisdiction of a State over a certain place (e.g. an extraterritorial control by virtue of 'general overall control', as in Northern Cyprus, *Loizidou* case[55]); etc. Overall, there are no marked novelties in this area of the jurisprudence of the ICTY.

III. The Issue of the Protected Person in Crimes Against Humanity

The most controversial substantive point in the jurisprudence of the ICTY in the period under review is undoubtedly the question of the protected persons under the umbrella of CAH. As is known, the offence supposes that certain attacks must occur against 'any civilian population'.[56] There has been for a long time – and to a certain extent there remains – an ambiguity as to the definition of the single victims within that cluster of the civilian population, and perhaps also to some extent on the definition of that population itself. The point of contention turns on the question whether the offence of CAH contains an autonomous definition of who is a civilian, for its own protective purposes, or whether a reference to IHL, with its definition of civilians in article 50 of Additional Protocol I (AP I) of 1977, is required. In IHL, the concept of civilian is opposed to that of combatant; there are only these two categories of persons, namely civilians and combatants; *tertium non datur*. Civilians taking an active part in hostilities (without being legally allowed to do so) remain civilians but lose their immunity against attack

[52] See e.g. M Mendelson, ''The Formation of Customary International Law'' (1998) 232 RCADI 198.

[53] See e.g. L I Sanchez Rodriguez, ''L'uti possidetis et les effectivités dans les contentieux territoriaux et frontaliers'' (1997) 263 RCADI 244.

[54] See e.g. H Fox and P Webb, *The Law of State Immunity* (3rd edn, OUP 2013).

[55] See 108 ILR 443ff.

[56] On the definitional elements of the CAH in the period under review, the following judgments can be consulted: *Blagojević and Jokić* (TC, 2005), §541ff; *Limaj* (TC, 2005), §180ff; *Stakić* (AC, 2006), §244ff; *Martić* (TC, 2007), §48ff; *Mrksić* (TC, 2007), §429ff; *D Milosević* (TC, 2007), §914ff; *Haradinaj* (TC, 2008), §101ff; *Milutinović* (TC, 2009), §140ff; *Lukić* (TC, 2009), §871ff; *Popović* (TC, 2010), §749ff; *Dordević* (TC, 2011), §1585ff; *Gotovina* (TC, 2011), §1699ff; *Perisić* (TC, 2011), §79ff; *Tolimir* (TC, 2012), §689ff; *M Stanisić* (TC, 2013), §22ff; *Prlić* (TC, 2013), §31ff; *J Stanisić* (TC, 2013), §959ff. For the ICTR, see e.g. *Nahimana* (AC, 2007), §913ff.

for the time of their engagement.[57] Conversely, combatants violating the rules of armed conflict and/or committing war crimes remain combatants, but can be prosecuted and punished for their misdeeds. Moreover, the two categories exist only in the context of IAC; in NIAC, there are no 'lawful' combatants at all. Thus, in principle, all persons are civilians, in the legal sense of the word. However, for operational purposes, e.g. in the context of the principle of distinction of article 13 AP II, a differentiation is made between 'fighters' and 'civilians'. But these fighters are distinguished only for targeting issues. They do not enjoy the so-called privilege of the combatant, and therefore are not entitled to any prisoner of war status if captured. It must also be stressed that it is generally accepted that the presence of some combatants within a civilian population does not alter the civilian character of that population, neither in IHL[58] nor for CAH.[59] As will be seen in the following lines, the legal position on the main point of controversy is confused to say the least:[60]

i) Certain Trial Chambers of the ICTY have leaned (and continue to do so, even after the Appeals Chamber has quashed that reasoning) towards the concept of an autonomous definition of the civilian in CAH. CAH would thus contain its own determination of protected persons. Under the CAH perspective, these persons must be all those who are defenceless against any form of organized violence ('widespread and systematic attack') at the moment of the commission of the relevant acts or omissions. The formal status of these persons would not be relevant; only the material criterion of defencelessness in the circumstances would be controlling. Hence, combatants *hors de combat*, who are defenceless at the moment of the perpetration of the crimes, would be covered not only by the protection of the war crimes provisions (IHL), if applicable, but also by the reach of the CAH-offence. Before the period here under review, the Trial Chamber in *Blaskić* had upheld this interpretation[61]; but it was reversed in the Appeal Chamber. Many other Chambers have continued the same jurisprudence on this point, by favouring a broad and functional interpretation: *Strugar* (TC, 2005);[62] *Limaj* (TC, 2005);[63] *Haradinaj* (TC, 2008);[64] *Milutinović* (TC, 2009);[65] and probably still *Lukić* (TC, 2009).[66] The main aim of that extensive interpretation is to provide a protection by CAH in all situations where defenceless persons are attacked.

ii) Conversely, there have been Trial Chambers that favoured the non-autonomous definition of the victim in CAH, that is, they defined the victim as a

[57] Article 51, §3, AP I of 1977.
[58] Article 50, §3, AP I of 1977.
[59] See e.g. *Limaj* (TC, 2005), §186.
[60] On this jurisprudence, see the recent account of O de Frouville, *Droit international penal* (Pedone 2012) 130.
[61] *Blaskić* (TC, 2000), §208ff. Rejected in *Blaskić* (AC, 2004), §114-115.
[62] §282.
[63] §186.
[64] §107.
[65] §146-147.
[66] §878: 'Article 5 is applicable not only to civilians, but also to persons hors de combat'

civilian in accordance with article 50(1) AP I, in line with IHL. A civilian is then a person who is not a combatant. A combatant, even if defenceless at the time of perpetration of the crimes, remains outside the scope of CAH. This is the position in *Kordić* (AC, 2004);[67] *Martić* (TC, 2007),[68] and *Mrksić* (TC, 2007).[69] The reasoning justifying this position is as follows. The *Martić* Trial Chamber emphasized that article 5 of the ICTY Statute defines CAH more narrowly than under customary international law by including a nexus requirement with the armed conflict. A link is thus established to the armed conflict and to IHL, which accounts for the relevance of the IHL-distinction between civilians and combatants. (Notably, the *Milutinović* (2009) Trial Chamber held the opposite: since under customary international law a CAH need not occur in armed conflict, the Chamber is not limited by the definition of civilian status under IHL[70]). The *Mrksić* Trial Chamber added that the distinction is relevant even in NIAC, since the principle of distinction applies there too; the absence of combatants is compensated by the existence of 'fighters'.[71] It added that certain crimes under CAH can be committed only against civilians and not against combatants, e.g. deportation.[72] Finally, that Chamber noted that since combatants are covered by war crimes, a protection gap would normally not arise. Such a gap can exist only if CAH are committed in peacetime; but according to the Chamber, there must be limits to the teleological and expansive interpretation of the term 'civilian population'.[73] It cannot by any stretch of meaning be used to cover combatants, even if *hors de combat*.

iii) In some decisions the position is not clear. Thus, the *Krajisnik* Trial Chamber (2006)[74] held that for defining the civilian in CAH, article 50 of AP I is relevant, but added that so is Common article 3, which refers to persons '*hors de combat*'. This could suggest that at least 'fighters' *hors de combat* in NIAC would be covered by CAH. If true, this would lead us back to the position under (i).

iv) The Appeals Chamber has finally chosen a middle path, trying to conciliate these two 'extreme' positions. In the fundamental *Martić* case (AC, 2008),[75] the Chamber stressed that legal terms must be interpreted according to their natural meaning.[76] The definition of the civilian for IHL purposes is to be found in article 50 AP I. The fundamental character of the notion of 'civilian' militates against giving a different meaning to it in the context of article 3 and article 5 of the Statute (war crimes and CAH).[77] In the context of a NIAC, article 13 of AP II, with its principle of distinction, is

[67] §97.
[68] §55-56.
[69] §454ff.
[70] At §146.
[71] §457.
[72] §458.
[73] §460.
[74] §706.
[75] At §292ff.
[76] §297.
[77] §299.

controlling; it distinguishes the 'fighter' from non-fighters.[78] The global result is thus that under a natural meaning approach combatants *hors de combat* are not protected by CAH. However, there remains a distinct question as to whether this condition of civilian status in the chapeau of article 5 requires that all *individual victims* of an attack have a civilian status. An interpretation according to the natural meaning of the words shows that there is nowhere a requirement that all individual victims be civilians.[79] The Tribunal emphasizes that this approach reflects customary international law (see the *High Command* Trial, the *Barbie* and *Thouvier* trials).[80] Thus, persons *hors de combat* fall within the purview of article 5 of the Statute (CAH).[81] The overall result is that within the context of a widespread or systematic attack against a civilian population (as defined under article 50 AP I) there can be some attacks encompassing defenceless combatants, and these attacks can also be accounted as CAH. This construction rests on a sort of application of the underlying logic of article 50(3) of AP I, according to which the 'presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character'. The limited number of non-civilian persons concerned by such an attack would be protected by CAH, unless they are not defenceless, that is, not *hors de combat*. This middle-ground jurisprudence was confirmed in *Mrksić* (AC, 2009);[82] and in *D Milosević*(AC, 2009).[83] It was also followed by Trial Chambers, such as in *Dordević* (TC, 2011),[84] *Gotovina* (TC, 2011),[85] *Perisić* (TC, 2011),[86] *Tolimir* (TC, 2012),[87] *M Stanisić* (TC, 2013),[88] *Prlić* (TC, 2013),[89] and *Ỹ Stanisić* (TC, 2013)[90] into what now seems the consolidated line of jurisprudence.

As can be seen, there has been a somewhat disorderly struggle in the jurisprudence through different positions, ending up in the new mainstream solution around the harmonizing interpretation of the Appeals Chamber. The present commentator can live with this harmonizing reading. However, the reasons given for a non-autonomous definition of the civilian in CAH (as against the civilian in IHL) are far from convincing. Five such arguments have been proffered in the case law. All of them can be rebutted.

First, the argument has been that the ICTY Statute defines CAH in a narrower way than customary international law, by requiring a nexus

[78] §300.
[79] §307.
[80] §309.
[81] §311.
[82] At §20ff.
[83] §50.
[84] §1593.
[85] §1705.
[86] §85.
[87] §697.
[88] §27.
[89] §38.
[90] §965.

with an armed conflict. On this account, it would be understandable that the definition of the civilian for *this* special CAH must be linked with the one prevailing in the context of the armed conflict, namely the IHL definition of civilians. However, this chain of argument does not prove anything. The nexus requirement is a jurisdictional, not a substantive issue. The CAH must have been committed in the context of an armed conflict, not in peacetime. But by that it is not said that the substantive definition of the CAH should also be transformed by importing into it different material elements of IHL. If the drafters of the Statute had intended such a substantive modification of the CAH, they would assuredly have adapted the elements of the crime in its material definition in article 5. In other words, an inference from the jurisdictional plane to the substantive one would have to be proven by specific elements. The mere mention of the jurisdictional nexus-requirement is certainly insufficient. This is all the more true as there is a reasonable presumption that the drafters of criminal statutes do not intend to depart from the common definition of a crime, if only on account of the issues of legal certainty, particularly paramount in the realm of criminal law.

Second, it has been said that certain CAH can be committed only against civilians, not against combatants (prisoners of war). The crime of deportation has here been mentioned. Again, the argument is extremely weak. There is no doubt that *certain* offences can be committed only against specific persons; this is true even under IHL, where there is a distinction between civilians (GC IV) and prisoners of war (GC III). This issue however pertains only to the personal and material scope of application of that particular offence and not to the definition of generally protected persons under CAH. Moreover, the fact that in one or some offences the persons protected are only civilians does not prove that an overall crime such as CAH or other specific offences must also necessarily concern only those persons. Once more: additional elements would have been necessary to buttress the conclusion reached. None were given.

Third, it has been stressed that a position excluding combatants *hors de combat* from the purview of CAH does not create any gap in protection, since the mentioned combatants would in most cases be covered by the relevant war crimes provisions (articles 2 and 3 of the ICTY Statute). Once more this argument does not prove anything at all. It certainly lessens the need to cover such persons by the CAH offence, but is does not prove that legally such persons are not covered. There are many cumulative offences under criminal law (international as well as municipal). Thus, there are war crimes which at the same time constitute CAH, for example almost all crimes against civilians. It is a common and consolidated practice to enter a multiple conviction in such cases, if and when the elements of both crimes are fulfilled.[91] It would be necessary to

[91] The criteria for such multiple convictions were aptly recalled in *Lukić* (TC, 2009), §1041: 'Cumulative convictions, that is, multiple convictions entered under different statutory provisions

completely refashion our conception of criminal law and also the crimes themselves, if every interpretation of them was geared towards the aim of avoiding any type of overlap. But, oddly, this seems the intellectual starting point of the argument here presented.

Fourth, the Appeals Chamber emphasizes the 'natural meaning' of the words 'civilian population', putting itself in the best tradition of the VCLT.[92] However, the words 'civilian population' under CAH do not necessarily connote civilians in armed conflict. Each branch of the law contains its own terms and its own definitions of legal terms; these are essentially relative.[93] The word 'family' need not mean the same in family law and in tax law, since both areas have their own assumptions and their own legal aims. It need not even mean the same thing if used in two different norms of the same criminal code. The natural meaning of the words in the context of CAH would have to be found within the four corners of the definition of such crimes. It is far from obvious to seek it in another area of the law, without having first established by specific arguments that both areas share the same parameters and aims. The distinction between combatants and civilians has its own reach and justification in IHL. It is not meant to determine the scope of protection or coverage (as was done by the ICTY Appeals Chamber in the context of CAH). It is meant to take account of the different status of the persons at stake with regard to targeting issues and with regard to the time and type of protection (in combat/*hors de combat*). It is to be noted that under IHL both categories of persons are protected. On this basis, it is not absurd to say that under CAH, the essential criterion for 'civilian' status must be simply for a person to be removed from the combat context (the criterion of defencelessness). This would anyway be the case in peacetime, where there are no civilians and combatants. To sum up, the point is that it is wrong to assume without further ado that the natural meaning of a word in the context of CAH must be elucidated by recourse to IHL's attributed natural meaning of the same word. The word is the same only externally, in its appearance; it is not the same in its contexts, structure and normative environment. Therefore, a further effort in explaining why the analogy holds would have to be made; it cannot be taken for granted. The point is thus not necessarily that the analogy is wrong; it is that its legal correctness has not been established. At best, the reader is left unconvinced.

Fifth, the Appeals Chamber held that the fundamental nature of the concept of 'civilian' militates against a different interpretation in the

in relation to the same conduct, are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other element'. An example is precisely the relation of article 3 to article 5, since the latter requires proof of a widespread or systematic attack against any civilian population, which the former does not: ibid, §1044.

[92] See in particular VCLT article 31(1).

[93] K. Engisch, *Einführung in das juristische Denken* (3rd edn,Kohlhammer 1964) 12ff has written nice and dense pages on the structure of legal terms.

context of CAH and IHL. In view of what has been said, this seems hardly a justification for the non-autonomous definition; it is rather a *petitio principii*. The so-called 'fundamental nature' of a concept does not dispose of the necessity to inquire exactly into the reasons for an analogy; it rather makes it more urgent. The fact that a term is 'fundamental' is in itself no reason to define it in exactly the same way in different branches of the law. It may be added that in IHL itself, the proposition that combatants *hors de combat* may no longer be attacked can be construed as an analogy to the protection of civilians. Combatants *hors de combat* do not become civilians but are protected to some extent,[94] as are civilians against attacks. This would militate in favour of coverage of combatants *hors de combat* under CAH. The point of this argument is not to say that such an analogy is necessarily correct. It is simply to show that other analogies are possible which would produce opposite results. It is not warranted to avoid such a specific analysis by using catchwords such as the 'fundamental nature' of a concept, which in themselves prove nothing.

Even taken in combination, these arguments do not seem to be sufficient to establish the non-autonomous definition of civilians in CAH. In aggregate, they may seem stronger than in isolation, but the weaknesses of each remain too great to form solid ground overall. But in terms of the end result, as already noted, one can live with the definition of the Appeals Chamber–on certain conditions.

First, the protection of persons *hors de combat* should not be limited to article 50(3) AP I. In other words, it should encompass not only attacks on a civilian population or group as defined under AP I, where some combatants (here probably *hors de combat*) are amidst the civilians. No such unity of the attack in time and space should be necessary, nor any too strict a nexus. It must be sufficient that there exists an attack against a non-fighting population, or in peacetime a population not exercising force.[95] If there is such a general attack in times of armed conflict, criminal acts committed against defenceless combatants (e.g. prisoners of war) should be accounted CAH. The only condition has to be that the other elements of CAH are fulfilled and that these attacks are encompassed within the more general attack. As said, a particular geographical or temporal link to a specific action within the general attack should not be required for the latter offences.[96] It suffices that they are overall part and parcel of the widespread or systematic attack on the population.

[94] For some authors with an exception in the context of calculation of collateral damages: civilians would always be counted, whereas combatants *hors de combat* would not (see e.g. I Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff 2009) 206. This distinction does however not seem convincing. The proportionality issue comes to bear in both cases, perhaps in a slightly looser way in the case of combatants *hors de combat*.

[95] This excludes e.g. policemen and other public order officials insofar as they are not defenceless. See ICTR, *Kayishema* case (TC, 1999), §127.

[96] For a possibly more restrictive view, see e.g. G Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) 169, with the requirement that the attack on the persons *hors de combat* be the

Second, no distinction should be made between IAC and NIAC. For CAH, so-called 'fighters' under NIAC should enjoy the same position as combatants under IAC. Moreover, strictly speaking these fighters are civilians under the law of NIAC (since there is no legally recognized other status).[97] The natural meaning of the word taken in conjunction with IHL could here possibly lead to the conclusion that all persons are protected as civilians under the law of NIAC; this would then have to be the case also under CAH.

Third, there remains the practically important notion of 'direct participation in hostilities'. There are some civilians participating in hostilities without becoming combatants; notwithstanding their civilian status, such persons are not *hors de combat*. It is necessary at least for this category to have recourse to the criterion of being *hors de combat* in order to determine the scope of the prohibition of CAH. The definition of civilian in IHL is not sufficient to that end, since it would hardly be consistent with principle to extend protection under the rubric of CAH to persons in respect of their active participation in hostilities.

Finally, it must be noted that under this middle-ground definition of the Appeals Chamber, attacks directed in the first place and only against combatants *hors de combat* are excluded from the reach of CAH.[98] But this looming gap is not too grave from the point of view of effective protection, since the persons concerned should normally (and if necessary on a teleological interpretation) be covered by the relevant war crimes provisions.

IV. The Elements of the Different Crimes

The purpose of the present section is twofold: first, to refer to those passages in the substantive judgments where the ICTY treats the different offences; and second to discuss selected points where the case-law has ventured into hitherto uncharted ground. We will deal first with war crimes; then CAH; lastly genocide.

By way of preliminary, one aspect may be singled out. The ICTY has sometimes had recourse to municipal law analogies (general principles of law) in the construction of some offences. Two examples may suffice. In *Milutinović* (TC, 2009), the offence of 'sexual assault'/persecution was construed by having recourse to municipal criminal law, especially as to the coercive element, that is, the absence of consent of the victim.[99]

'direct or indirect consequence' of the targeting of the civilian population. The question remains, obviously, how broadly the term 'indirect' should be understood.

[97] On the whole issue, see now G Aïvo, *Le statut de combattant dans les conflits armés non internationaux* (Bruylant 2013).

[98] This is rightly noted by M Bettati, ''Le crime contre l'humanité'', H Ascensio, E Decaux and A Pellet (eds), *Droit international pénal* (2nd edn, Paris 2012) 115.

[99] §198.

Further, in *Popović* (TC, 2010), the term 'conspiracy' (to commit genocide) was qualified as a term of art in common law systems; reference was made to those systems in order to properly construe it.[100] This latter example shows a conception of 'regional general principles' in operation. Contrary to what is often said, approaches based on general principles of law can provide a vivid and resourceful argument in international law.

A. War crimes

1. *General observations*

On the general plane, three aspects of the case-law on war crimes deserve to be mentioned.

First, the ICTY has always considered that the legal basis of the crimes it has jurisdiction to try rests either on customary international law or on the conventional law applicable on the territory of the former Yugoslavia.[101] Since the time of the Report of the Secretary General which served as the basis for the establishment of the ICTY,[102] the customary-law limb has been considered the primary source. Paradoxically perhaps, when judged by standards of municipal law, the unwritten customary rules were considered to be more in line with the principle *nulla poena sine lege* than the written conventional provisions. The rules of customary international law were considered to establish beyond doubt and without thorny issues of ratification or reservations a series of standards of general application. In the *Galić* case (AC, 2006),[103] the Tribunal gave a further reason for the preference accorded to customary law. It stressed that the ICTY has looked most often for customary rules since treaty provisions do not generally extend beyond the prohibition of a conduct. In other words, the latter are silent on the criminalization of the prohibited conduct. The customary rules referred to are obviously not simply the rules of IHL; these do not deal with criminal issues any more than the analogous treaty rules. The Tribunal rather refers to the customary rules of international criminal law, as they were shaped since the Nuremberg Trials. However, it must also be said that the treaty rules applicable on the territory of the former Yugoslavia had given rise to criminal law provisions in the Yugoslav Criminal Code or other municipal legislation. If those statutes were taken into account, both sources could prove similarly productive. The main difference is that customary international law is more flexible and that the ICTY is more easily in a position to authoritatively state what it contains. This increases the powers of the Tribunal.

[100] §872ff.
[101] Kolb (2000)260ff; Kolb (2004) 271-273.
[102] UN Doc., S/25/704.
[103] §83.

A further aspect concerning the applicable treaty law was emphasized in the *M Stanisić* case (TC, 2013).[104] It was there held that the treaty provisions at stake must not conflict with or derogate from peremptory norms of international law. As has already been stressed, the great codification conventions on IHL do not contain such 'derogatory' norms. However, the same is not necessarily true of the many special agreements the parties to a conflict conclude during warfare (articles 6/6/6/7 GC I-IV). As is provided in these articles, such special agreements cannot derogate from the material rules of the GCs themselves: 'No special agreement shall adversely affect the situation [of the protected persons]... nor restrict the rights which it confers upon them'. This is a special form of *jus cogens*, restricted to the operation of the GCs (conventional reach of peremptory norms).[105] Moreover, these agreements could also not derogate from peremptory customary rules of IHL (VCLT article 53).

Second, the ICTY has stressed the nexus requirement between the acts or omissions alleged to be criminal and the armed conflict.[106] This is again a jurisdictional issue. The aim of this requirement is to distinguish war crimes from purely domestic crimes and from random or isolated criminal occurrences. In order to uphold the nexus, a 'sufficient link' between the two sets of facts must exist. The armed conflict need not be causal to the commission of the acts, but it must have played a 'substantial part' in the perpetrator's ability to commit the crime. Relevant factors are: the status of the perpetrator (combatant) and of the victim (non-combatant, member of the opposing party); the aim of the act as serving the military campaign of a party to the conflict; the commission of the crime in the context of official duties, and the fact of acting in furtherance or under the guise of the armed conflict. The crimes need not be committed in the area of the armed conflict; but they must be substantively related to this area, which includes the entire territory under the control of the warring parties (geographical and temporal linkage). Such a link was found, for example, when the Crisis Staff of the party committing the crimes was created as a function of the armed conflict.[107] Contrary to CAH (under customary international law) and to genocide, which need not be committed in a specific context, war crimes remain accessory crimes: they are the criminal side of certain breaches of IHL rules. All the breaches of IHL rules which give rise to criminal sanction must be committed in the course of armed conflict. The rules of IHL applying already in peacetime, that is, immediately on ratification of the relevant conventions, do not give rise to war crimes if breached, since

[104] §35.

[105] On the whole issue see R Kolb, ''Jus cogens, intangibilité, intransgressibilité, dérogation positive et négative'' (2005) 109 *Revue générale de droit international public* 305.

[106] See e.g. *Limaj* (TC, 2005), §91; *Stakić* (AC, 2006), §340ff; *Mrksić* (TC, 2007), §423; *Boskoski* (TC, 2008), §293ff; *Dordević* (TC, 2011), §1527.

[107] *Stakić* (AC, 2006), §345.

these breaches are not sufficiently serious (e.g. the duty to disseminate information about applicable IHL). Thus a criminal tribunal must ascertain that there is a link between the criminal conduct and the armed conflict. In most cases, this link is clear and unequivocal. However, there have always been cases falling in a gray area, where some degree of appreciation, or indeed discretion, must be exercised. An example would be a crime committed for purely private ends (stealing, jealousy, etc.) but which was more or less significantly facilitated on account of the chaotic situation created by the armed conflict; and where perhaps the perpetrator knowingly took advantage of this environment.

Third, the ICTY has continued, albeit to a more modest degree, its jurisprudence expanding the number of rules applicable in NIAC, especially the war crimes applicable in NIAC.[108] The particularly bold (and strictly speaking inexact[109]) statement in the *Tadić* case of 1995 may be recalled: 'What is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'.[110] In the *Blagojević* case (TC, 2005), the Trial Chamber considered the crime of forcible transfer in the context of persecutions/CAH. It referred to IHL for a series of issues, e.g. for the definition of lawful evacuations under article 49 GC IV. Then it moved to the rule that families should not be separated. This part of the rule is not repeated in article 17 of AP II, but the Trial Chamber did 'not find any reason why this general principle should not be applicable also to non-international armed conflicts'.[111] This statement is perfectly in line with the famous §119 of the *Tadić* judgment. The ICTY here did not seek positive practice and *opinio juris* buttressing its position; it postulated in a deductive way that something must be as it asserts essentially for reasons of humanitarian protection. The analogy to the law of IAC is strengthened by the recourse to the legal figure of a general principle of law. The duty not to separate families is considered such a principle and thus applied regardless of the type of armed conflict. There are other cases where the ICTY expressed on the applicability of certain crimes in both IAC and NIAC. Thus, in the *Hadzihasanović* case (TC, 2006), the Tribunal held that the following crimes apply to both types of armed conflict:[112] wanton destruction of towns and villages not justified by military necessity,[113] plunder of public or private

[108] This was at its time a significant innovation: see e.g. E Greppi, *I crimini dell'individuo nel diritto internazionale* (Giapichelli 2012) 262.

[109] The statement is not inexact from a moral perspective, but from the vantage point of positive law: the positive law of armed conflicts has since 1949 been erected on the basis that a series of 'inhumane' conducts were prohibited only in IAC and not in NIAC. This is so because the States, being the legislators, refused to extend many prohibitive rules of IAC to NIAC. The drafting of AP I and II is an excellent illustration of this. The foregoing is not meant to say that the time for some progressive development had not come in 1993.

[110] (AC, 1995), §119.

[111] §599.

[112] §38.

[113] §39ff.

property,[114] and destruction or willful damage to institutions dedicated to religion.[115] The tendency of all these passages is to proceed by way of an *ipsa dixit*. The ICTY does not venture upon proving its allegations; such a course would be at once overly burdensome and sometimes perilous. The desired result would not always follow; or significant doubts would remain.

2. *Specific offences under article 3 of the ICTY Statute*

The specific offences under article 3 of the Statute have received some development. There are some offences on which the case-law followed the consolidated lines of the previous periods; hence no discussion is warranted here. It may suffice to refer to the judgments and passages for archival purposes. This is the case for the life and limb offences, i.e., for the offences of murder,[116] torture,[117] and cruel treatment.[118] Other offences deserve a more in-depth treatment.

a. The offence of unlawful labour

The construction of the offence of *unlawful labour* (notably of prisoners of war) to a great extent follows the precedent in the *Naletilić* case.[119] In the *Prlić* case (TC, 2013),[120] the ICTY referred to articles 49, 50, 52 of GC III and 40, 51, 95 of GC IV. It held that article 50 GC IV applies also outside the context of a belligerent occupation, in all cases where there is a control of the adverse forces over enemy civilians. This is the case notably already in the phase of invasion.[121] Article 95 GC IV provides for the work of interned persons who volunteer or otherwise agree to it; however, the labor cannot be of a humiliating or degrading nature.[122] Labour contributing to the common weal of the interned persons can be made compulsory, e.g. the adequate maintenance of the center of detention. For the prisoners of war,[123] there are detailed rules on labour in articles 49 to 57 of GC III. Compulsory work is admissible, except for officers. The work assignments must take into account the age, sex, rank and physical aptitude of the prisoners. Work

[114] §49ff.
[115] §57ff.
[116] *Kordić* (AC, 2004), §37-38; *Kvocka* (AC, 2005), §259ff; *Strugar* (TC, 2005), §234ff; *Halilović* (TC, 2005), §35-37; *Limaj* (TC, 2005), §241; *Hadzihasanović* (TC, 2006), §31; *Orić* (TC, 2006), §344ff; *Krajisnik* (TC, 2006), §841ff; *Martić* (TC, 2007), §57ff; *Boskoski* (TC, 2008), §305; *Haradinaj* (TC, Retrial, 2012), §424ff.
[117] *Kvocka* (AC, 2005), §278ff (recalling that the 'public official requirement' is not a requirement under criminal international law, but only of human rights law); *Limaj* (TC, 2005), §234ff; *Haradinaj* (TC, Retrial, 2012), §415ff.
[118] *Strugar* (TC, 2005), §260ff (interestingly as a result of shellings/artillery); *Limaj* (TC, 2005), §231-232; *Hadzihasanović* (TC, 2006), §32ff; *Orić* (TC, 2006), §349ff; *Boskoski* (TC, 2008), §382; *Haradinaj* (TC, Retrial, 2012), §420ff; *M Stanisić* (TC, 2013), §55ff; *Prlić* (TC, 2013), §145ff.
[119] Kolb (2004) 296-297.
[120] §151ff.
[121] §153.
[122] §155.
[123] §157ff.

linked to the adverse war operations is prohibited (article 50 GC III). Dangerous or unhealthy labour is prohibited, unless the prisoner volunteers to it (article 52 GC III). Humiliating labour is prohibited. The criterion for humiliation is the feelings of the members of armed forces of the detaining party.[124] The following factors must be taken into account for determining when labour becomes forced labour: absence of any pay; situations of vulnerability; direct compulsion; and long term consequences of the labour on the health of the prisoner.[125] One may note in passing an odd formulation in §163, when the Trial Chamber speaks of a prisoner of war not participating in the hostilities – which after all is the case by definition.

b. Spreading terror among the civilian population.[126]

The offence of terror was considered in the *Galić* case (AC, 2006). The Appeals Chamber held that this offence, rooted in article 51(2) AP I and 13(§2) AP II, is part of customary international law and gives rise to individual criminal responsibility.[127] The rules contained in AP I and II on that matter are not new. They codify the principles of protection and distinction of the civilian population, which were qualified as 'intransgressible' by the ICJ in its *Nuclear Weapons* advisory opinion.[128] The relevant provisions were adopted at the 1977 Conference without opposition. They can be found in many other documents and provisions (such as article 22 Hague Regulations, article 33 GC IV, article 6 Turku Declaration, several military manuals, etc.).[129] There is also individual criminal responsibility under customary international law. One may refer to the various statements of States and international organizations; the punishments meted out by courts and military tribunals (including the former Yugoslavia); the 1919 Report of a Commission after World War I, and national legislation of various States (including the former Yugoslavia).[130] The Appeals Chamber has been at pains to clarify the foundations of this offence because of the challenge of the dissenting judge (Judge Schomburg). The elements of crime are described as follows:[131]

(aa) *Actus reus*: acts or threats of violence the primary purpose of which is to spread terror among the civilian population. Attacks are defined as 'acts of violence' according to article 49 of AP I. The attacks must

[124] §161.
[125] §162.
[126] Kolb (2004) 297.
[127] §86.
[128] §87.
[129] §89.
[130] §92ff.
[131] §99ff.

not be direct; they may be indiscriminate attacks or disproportionate attacks, or threats thereof.[132]

(bb) *Mens rea*: the act or threats need not be shown to have actually spread terror among the civilian population (see the wording of article 51(2) AP I).[133] But there must be a specific intent to spread terror among that population.[134] This need not be the sole purpose of the attack; it must however be the primary purpose.[135] The primary purpose can be inferred from the nature, the manner, the timing and the duration of the attack.[136]

The ICTY reverted to this offence in the *D Milosević* case (TC, 2007).[137] It added to the foregoing elements the following considerations of clarifications. First, the offence encompasses only unlawful attacks or threats of attacks against civilians.[138] Second, the crime requires a 'specific intent'. The general intent required is willfully to make the civilian population or individual civilians the object of acts or threats of violence. The specific intent is to spread terror among the civilian population.[139] Third, this offence is an aggravated one in comparison to 'unlawful attack on civilians'; the circumstance of aggravation lies in the specific intent.[140] Fourth, terror is defined as extreme fear. The terror must go beyond the fear that is the normal accompanying effect of the activities of armed forces in armed conflict, especially in an urban environment. There must be a specific intent to instill fear beyond this general level of dismay.[141] The Appeals Chamber in the *D Milosević* case (2009)[142] further clarified the threshold of harm: The actual infliction of death or serious harm to body or health is not required. It is sufficient that the victims suffer grave consequences resulting from the acts or threats of violence, e.g. a serious psychological impact.[143] In the *Prlić* case (TC, 2013),[144] those rules were recalled without further additions. Probably, the crime is thus now fully formulated; major new developments are not to be expected.

[132] §102.
[133] §103, confirmed in *D Milosević* (AC, 2009), §35. This shows that the offence is what be called a *Gefährdungsdelikt* in the German penal science.
[134] §104.
[135] Ibid; confirmed in *D Milosević* (AC, 2009), §37.
[136] §104. Examples are given in the *D Milosević* case (TC, 2007), §881: attacks during cease-fires; indiscriminate attacks; the site of the attack, e.g. a market place.
[137] §873ff.
[138] §877.
[139] §878.
[140] §882.
[141] §883ff.
[142] §24ff.
[143] §33-35.
[144] §194ff.

c. Unlawful attacks on civilians.[145]

This offence was first treated (in the period under review) in the *Kordić* case (AC, 2004).[146] It was there defined as involving attacks launched deliberately against civilians or civilian objects in the course of an armed conflict, not justified by military necessity, which cause deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects.[147] The source of the prohibition lies in customary international law and also in treaties (such as AP I), the latter being applicable only when binding a State.[148] An attack is defined in article 49 AP I as any act of violence in offence or defence; the civilian is defined in article 50 AP I as any person not being combatant. All members of the armed forces, also those without a combat mission (e.g. the legal services), are combatants. Thus, in the present case, members of the 'Territorial Defense' were combatants. Collateral damage inflicted on civilians may be lawful. As to the objects which may be attacked, article 52 of AP I contains relevant rules. If justified by military necessity, the prohibition of attacks on civilians and civilian objects may be inapplicable:[149] with regard to civilian persons this is an odd statement; it may be taken to refer to the exception of collateral damage and/or to direct participation in hostilities; but the expression 'military necessity' is misleading. The offence stems from the fundamental principle of distinction. Can it be considered as having been committed if the attack results only in non-serious civilian casualties or damage, or even in none at all? The answer is that there must be serious injury to body or health.[150] The reasons for this are the following:[151] (1) article 85(3) of AP I, relating to grave breaches, requires such a level of seriousness; (2) under customary international law, there has been no practice of criminalizing breaches of articles 51 and 52 of AP I outside the narrow context of grave breaches fulfilling the seriousness criterion. National legislation varies on this issue. Furthermore, it may be particularly noted that the *Kordić* Chamber emphasized that articles 51 and 52 of AP I reflect customary international law.[152]

In the *Strugar* case (TC, 2005),[153] certain aspects of the crime were further analyzed. First, even if AP II does not contain a rule analogous to article 52 AP I, the prohibition applies also in NIAC.[154] Second, any attack against a civilian object, even if it does not cause damage, must be

[145] Kolb (2004) 290ff.
[146] §40ff.
[147] §40.
[148] §41ff.
[149] §54: 'The Appeals Chamber clarified that the prohibition against attacking civilians and civilian objects would not be a crime when justified by military necessity'.
[150] §57.
[151] §58ff.
[152] §59.
[153] §220ff.
[154] §224.

considered a serious violation of IHL. The point here is rather that absent any damage there are no grave consequences for the victim, so that a jurisdictional requirement under article 3 is lacking.[155] Third, there is no exemption for military necessity[156] (this statement is correct, unlike the one of the Appeals Chamber quoted above). Fourth, a specific result must be proved, namely the death or injury to civilians or extensive damage to civilian objects.[157] Fifth, the definition of civilians here encompasses members of the armed forces having laid down their arms or otherwise *hors de combat*.[158] We have already seen that this interpretation of the term 'civilian' has produced significant disagreement in the context of crimes against humanity. In the *Martić* case (TC, 2007),[159] one important point was added: the unlawful attacks include excessive collateral or incidental victims.[160] Indiscriminate attacks may thus be qualified as nonetheless direct.[161] As to the *mens rea*, intent, direct or indirect (recklessness, *dolus eventualis*), is required.[162] In the *Prlić* case (TC, 2013),[163] the offence was presented along the lines of this consolidated jurisprudence. The Chamber added that persons directly participating in hostilities lose protection under this offence, even if they remain civilians.[164]

d. Destruction of property.[165]

Offences related to the destruction of property feature quite prominently in the period under review. There were even some highly symbolic cases, such as the one relating to the shelling and destruction of the old town of Dubrovnik.[166] There are different types of offences here. They are sometimes considered under the heading of CAH, as in the *Martić*

[155] §225.
[156] §280. See also *Martić* (TC, 2007), §68; *Prlić* (TC, 2013), §189.
[157] §280.
[158] §282.
[159] §66ff.
[160] §69. See also *Prlić* (TC, 2013), §190.
[161] §69.
[162] *Martić* (TC, 2007), §72; *Prlić* (TC, 2013), §192.
[163] §183ff.
[164] §187. On the point of direct participation, see also the ICRC's 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2009), (2008) 90(872) International Review of the Red Cross991ff. In legal writings, the issue has been extensively discussed. See e.g. M Sassoli, A Bouvier and A Quintin, *How Does Law Protect in War?* (3rd edn, vol. I, ICRC 2011) 262ff; N Lubell, *Extraterritorial Use of Force Against Non-State Actors*, (OUP 2010) 140ff; A van Engeland, *Civilian or Combatant?* (OUP 2011) 102ff; W Boothby, 'Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance' (2010) 1 Journal of International Humanitarian Legal Studies 143ff. For a partially different view, see MN Schmitt, 'Deconstructing Direct Participation in Hostilities: the Constitutive Elements' (2010) 42 Journal of International Law and Politics 697ff; and see also the defence of the Guidance of the ICRC by its main author, N Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 Journal of International Law and Politics 831ff.
[165] Kolb (2004), 294-296.
[166] *Strugar* (TC, 2005).

case (TC, 2007).[167] The elements of these CAH-offences were analogous to the ones under article 3 of the Statute.

(aa) *Wanton destruction not justified by military necessity*. In the *Kordić* case (AC, 2004), the main elements of this crime were recalled:[168] (1) destruction of property on a large scale not justified by military necessity; (2) the perpetrator acted with the intent to destroy the property or at least in reckless disregard of the likelihood of its destruction.[169] The offence is part of customary international law.[170] In the *Strugar* case (TC, 2005)[171] some further elements were discussed. First, the concept of large scale was clarified: it requires the destruction of a considerable number of objects; but it does not require that the entirety of a city or village be destroyed.[172] Second, military necessity in this context can be defined with reference to the military objectives in article 52(2) of AP I, always taking the position of the person contemplating the attack.[173]

The offence was again considered in *Hadzihasanović* (TC, 2006).[174] The new aspects were as follows. First, the Chamber stressed that this offence is similar to the one under article 2(d) of the ICTY Statute, placed under the heading of 'grave breaches'; the elements of both offences are identical, but under article 2 the property must be protected under the GCs.[175] Second, the property can be moveable or immoveable.[176] Third, the 'large scale' requirement can be fulfilled also by a single attack or the impairment of a single object if its value is sufficiently great, e.g. a hospital.[177] Fourth, the partial destruction of an object is covered.[178] Fifth, the exception of military necessity, especially for proportionate collateral damage, applies.[179] Sixth, the crime need not necessarily be committed in the course of combat operations, provided it remains closely related to the hostilities (nexus requirement).[180]

The next consideration of the offence came in the *Orić* case (TC, 2006),[181] which insisted on the following further elements. First, the

[167] §89ff (wanton destruction of villages…); 95ff (destruction or wilful damage to institutions dedicated to education or religion); 100ff (plunder of public or private property).
[168] §74-75. See also *Orić* (TC, 2006), §581.
[169] As to this *mens rea*, see also the same definition in *Orić* (TC, 2006), §589 and in *Boskoski* (TC, 2008), §358.
[170] §76. See also *Strugar* (TC, 2005), §292; *Hadzihasanović* (TC, 2006), §39.
[171] §290ff.
[172] §294. See also *Orić* (TC, 2006), §585.
[173] §295.
[174] §39ff.
[175] §41-42.
[176] §42.
[177] §43. On the scale criterion, see also *Orić* (TC, 2006), §583.
[178] §44.
[179] §45.
[180] §46.
[181] §579ff.

offence is applicable in IAC and NIAC.[182] Second, the military necessity exception was more precisely defined. It was linked to the military objective under article 52(2) AP I. An object shall not be attacked if it is unreasonable to believe, in the circumstances, that it is being used to make an effective contribution to military action.[183] Collateral damage may occur, but as a principle military necessity cannot be relied on after the fighting has ceased.[184] An exception exists for the destruction of houses after combat in order to avoid later use of them for military purposes (preventive destruction).[185] Finally, the offence was discussed in the *Prlić* case (TC, 2013)[186] without any new insights, apart perhaps the definition of military necessity according to the formula found in the Lieber Code: it encompasses all action necessary to attain the war aims and compatible with IHL.[187]

(bb) *Plunder of public or private property*. In the *Kordić* case (AC, 2004), this crime was given a general analysis.[188] The prohibition stems from provisions such as articles 28 and 74 Hague Regulations (1907), article 15 GC I or articles 16, 33, GC IV. The crime need not be committed in occupied territory. It is defined as encompassing all forms of unlawful appropriation of property in armed conflict to which individual criminal responsibility attaches under international criminal law.[189] The jurisdiction of the ICTY is however limited to serious violations of IHL (articles 1 and 3 Statute). This implies the breach of a rule protecting important values and a breach involving grave consequences for the victim. The present offence protects important values; the gravity of the consequences for the victim must be appraised on a case-by-case basis.[190] The gravity threshold is reached in the case of appropriation with regard to a large number of people, even if the consequences are not grave for each individual; the overall effect is controlling.[191]

Judicial discussion of this offence was taken up again in the *Hadzihasanović* case (TC, 2006).[192] The elements of the offence were described as follows:[193] (1) public or private property is acquired illegally and deliberately (all forms of unlawful appropriation of property in armed conflict, including pillage); (2) the action is done with knowledge

[182] §582.
[183] §587. To this it must be added: and the attack offers a definite military advantage, see article 52, §2, AP I.
[184] §588.
[185] §588.
[186] §165ff.
[187] §168.
[188] §77ff.
[189] §79.
[190] §82.
[191] §83. See also *Prlić* (TC, 2013), §182.
[192] §49ff.
[193] §49-50.

and intent to acquire property unlawfully, or the consequences of the action are foreseeable. The exceptions are as follows. In IAC, the recognized forms of appropriation such as war booty (enemy property or military equipment captured on the battlefield, but not personal effects of the prisoners) and requisitions are lawful.[194] The rules relating to war booty and requisitions do not apply in NIAC, where no relevant regulations can be found; thus, recourse to national law is necessary.[195] In the context of an actual or looming famine, there is another exception. Thus, for example, food may be eaten on the spot.[196] More generally, the state of necessity exception applies. It supposes a real irreparable harm to life; a particular action is the only means to that danger; the acts at stake are not disproportionate; and the perpetrator who now relies on necessity has not voluntarily created the situation.[197] Finally, the crime need not be carried out in military action, provided it remains closely linked to the hostilities (nexus requirement).[198] The offence was considered again in the *Prlić* case (TC, 2013),[199] but without any new insights.

(cc) *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*. In the *Kordić* case (AC, 2004),[200] it was stressed that the general protection of such objects flows from article 52 AP I; special protection may flow from article 53 of AP I (cultural heritage of peoples). Not all the buildings at stake fulfil the criteria for cultural heritage under article 53; such objects must then be protected according to the requirements of article 52 AP I.[201] This offence was then taken up again in the *Hadzihasanović* case (TC, 2006)[202] with respect to religious institutions. The elements of the crime are as follows:[203] (1) a religious institution is damaged or destroyed; (2) it was not used for military purposes;[204] (3) the acts were carried out with the intent to damage or destroy

[194] §51.
[195] §52.
[196] §53.
[197] §53.
[198] §54.
[199] §179ff.
[200] §85ff.
[201] §92.
[202] §57ff.
[203] §58.
[204] The *Martić* TC (2007), §98 insisted on this exception: general and special protection, i.e. general protection as civilian objects and special protection as cultural heritage objects, is lost in case of military use. The present commentator would add that the loss of protection is acceptable only when attacking the objects offers a definitive military advantage (which must be the higher the more important a cultural heritage object is) and that issues of proportionality in attack remain relevant. This was acknowledged in the context of military necessity by the *Boskoski* TC (2008), §357. In the *Prlić* case (TC, 2013), §178, the element is defined as follows: the object does not constitute a 'military objective'. This is legally more precise than the other definition, according to which is must not be 'used' militarily. An object cannot be attacked only on the account of its military use; there must be also a military advantage. See the careful analysis in I Henderson, *The Contemporary Law of Targeting*, (Martinus Nijhoff 2009), 51ff; and generally W Boothby, *The Law of Targeting*, (OUP 2013).

the property. The *mens rea* therefore supposes a willful action, i.e. an intentional action with the knowledge that the prohibited result would ensue, or in reckless disregard of the likelihood of that result.[205] There is no need to establish that the religious institution is part of the cultural heritage of a people – which gives rise to a distinct offence.[206] The destruction or damage must not have occurred during the hostilities, provided it remains closely linked to the hostilities (nexus requirement).[207]

In the *Prlić* case (TC, 2013),[208] the following elements deserve special mention. First, it is stressed that the special protection under article 53 AP I (cultural heritage) goes further than the general protection as civilian objects under article 52 AP I. The latter provision prohibits only 'attacks' against civilian objects, whereas the former provision encompasses any act linked to the armed conflict that could materially impair the protected objects. Hence, in the context of article 53, it is not necessary to cause damage (however, this is required by article 39(d) of the Statute). Moreover, article 53, unlike the 1954 Hague Convention, does not provide for any military necessity exception. This means that the protection of the cultural object remains applicable so long as that object has not been put to military use.[209]

(dd) *Willful damage to cultural property* (article 3(d), Statute). The offence was discussed in the *Strugar* case (TC, 2005).[210] The main sources of the offence are in article 27 of the Hague Regulations, the 1954 Hague Convention, article 53 AP I and article 16 AP II. The act of hostility must be directed against cultural property and cause actual damage or destruction.[211] The protection accorded is lost when the property is used for military purposes; it is the use, not the location (in the immediate vicinity of a military objective) which determines the loss of protection. However, the proof that the attack was 'directed' at the cultural property may become difficult in case of immediate vicinity to military objectives.[212] From the point of view of *mens rea*, there must be direct intent to damage or destroy the property in question; the question as to whether indirect intent suffices (recklessness) was left open.[213] The crime is thus

[205] §59.
[206] §60.
[207] §62.
[208] §171ff.
[209] §175.
[210] §298ff.
[211] §308.
[212] §310.
[213] §311. In the next stage of the *Strugar* case (AC, 2008), the question arose as to the precise meaning of 'willfully'. Does it encompass indirect intent, i.e. recklessness? The TC had left that question open. However, the AC did not consider it necessary to provide an answer to that question: in the Old Town of Dubrovnik, there were no military objectives at all; therefore, it was impossible not to know that civilian objects would be unlawfully hit; this was deliberate action, i.e. direct intent (§§264ff, 280). In the opinion of the present commentator, indirect intent should suffice.

defined as follows:[214] (1) damage to or destruction of property constituting part of the cultural or spiritual heritage of a people; (2) the property was not used for military purposes at the time of attack; (3) the act was carried out with the intent to damage or destroy the property. The Trial Chamber added that the Old Town of Dubrovnik was inserted in the UNESCO World Heritage list in 1979; all the property within the Old Town was thus within the scope of article 3(d) of the Statute.[215]

3. *'Grave breaches' under article 2 of the Statute*

'Grave breaches' under article 2 of the Statute did not give rise to an extensive case-law in the period under review. Some offences were considered in the *Kordić* case (AC, 2004).[216] The crime was analyzed in its main elements in the *Prlić* case (TC, 2013).[217] Nothing notably new emerges from this jurisprudence. The following elements may be noted.

First, the necessity for an IAC as a condition for the application of the grave breaches régime was confirmed;[218] thereby the dissenting opinions of some former judges of the ICTY were brushed away. However, it was recalled that an IAC can ensue from 'overall control' of local armed groups by a foreign State. For such an overall control, it is not sufficient to equip and finance; it is necessary to concur to the overall planning of the military operations.[219] A belligerent occupation may also flow from a situation of overall control.[220] The armed forces of the foreign State need therefore not be present on the occupied territory, provided that the forces they control are so present.

Second, the older jurisprudence on protected persons, including the allegiance criterion,[221] was fully confirmed by the newer case-law.[222]

[214] §312.
[215] §327.
[216] §36ff (willful killing); §39 (inhuman treatment); §§69ff (unlawful confinement of civilians).
[217] §81ff.
[218] *Prlić* (TC, 2013), §84.
[219] Ibid, §§85-86.
[220] Ibid, §96. Occupation is defined as follows: (1) the occupying power is in a position to substitute its own authority to the one of the occupied power; (2) the enemy forces have surrendered, have been vanquished or have withdrawn; (3) the occupying power has at its disposal a sufficient number of forces in the occupied territory to be able to impose its authority, or it is at least able to send such forces in a reasonable time; (4) a provisional administration has been established on the occupied territory; (5) the occupying power has imparted orders to the civilian population in the occupied territory and is in a position to enforce such orders (§88). Some resistance activity in the occupied territory is compatible with is occupied status, to the extent that the control of the occupying power over the territory is maintained (§94). These criteria are roughly speaking adequate, but item (4) should not be misunderstood to mean that a power can circumvent its duties as an occupying power by avoiding establishing an administration; while item (5) is mainly descriptive, as it is implied in the notion of control over the occupied territory.
[221] Kolb (2000)278ff; Kolb (2004)285ff.
[222] *Prlić* (TC, 2013), §97ff.

The ICTY also confirmed the crucially important point of the non-existence of gaps between GC I-III and GC IV: a person not falling under GC I-III (combatant) is automatically a person falling under GC IV (civilian).[223] A civilian may be someone directly (and unlawfully) participating in hostilities; he or she then remains civilian, but loses some protections. The case-law also confirmed that the nationals of co-belligerent parties are excluded from the 'protected persons' under the grave breaches regime, so long as there is a diplomatic representative to which they can turn for protection.[224] Finally, it was recalled – the point has been controversial in IHL in the past – that for the levy en masse the civilians turning into combatants can benefit for that status only if they had no time to organize themselves into an armed force.[225]

Third, the following offences were discussed, without any marked novelty (most of these offences have similar criteria to those under article 3 of the Statute): willful killing (murder under article 3);[226] inhuman treatment;[227] unlawful confinement of civilians;[228] destruction of property,[229] and unlawful transfer or expulsion of civilians.[230]

Overall, the 'grave breaches' régime has suffered from some decline in the period under review. It is mainly the condition of an IAC, which was absent and which through its evanescence hampered the application of grave breaches in most of the cases decided during this period.

[223] Ibid, §98.
[224] Ibid, §102.
[225] Ibid, §104.
[226] *Kordić* (AC, 2004), §36ff; *Prlić* (TC, 2013), §110-111.
[227] *Kordić* (AC, 2004), §39; *Prlić* (TC, 2013), §112ff. In the latter case, the TC gave some examples of what could amount to inhuman treatment: the conditions of detention; the use of persons as human shields; sexual violence; forced labour on the front line or other dangerous work: §115. The *mens rea* covers both direct intent and recklessness: §120.
[228] *Kordić* (AC, 2004), §69ff; *Prlić* (TC, 2013), §133ff. In the first precedent, it was recalled that a confinement will be unlawful if the detaining party does not comply with the applicable provisions, e.g. article 42 GC IV, *in casu* the absolute necessity or the demand by the concerned person. An initially lawful confinement becomes unlawful if the detaining power does not respect the procedural requirements, such as those under article 43 GC IV, *in casu* an at least biennial remedy against the decision of confinement. The restrictions under article 5 GC IV are also recalled. In the second case, the TC has put greater emphasis on the large power of appreciation of the circumstances for the detaining power (§134). However, as the confinement of civilians is an exceptional measure, it is necessary to examine each file individually and within a reasonable time (§135). Procedural guarantees apply (articles 78, 43 GC IV) (§136). If a civilian requests internment, he or she can be interned, but only under certain conditions (§138). Thus, a detention of civilians is unlawful when: (1) they are detained in breach of articles 42 or 78 GC IV; (2) or in breach of procedural guarantees as provided for in articles 43 and 78 GC IV (§139).
[229] *Prlić* (TC, 2013), §121ff, article 2(d), Statute, referring to objects protected under the GC, with the exception of military necessity and of lawful collateral damage. The offence follows the above-discussed principles in the protection of property.
[230] *Prlić* (TC, 2013), §132. The elements of this crime follow those in the context of CAH, which will be discussed in the next section.

B. Crimes against humanity

1. *General observations*

The ICTY considered CAH in a series of cases;[231] for the ICTR, one may consult some further cases.[232] On the general plane, apart from the important question on the protected persons (civilian population and individual victims as persons *hors de combat*) already discussed, there is one further interesting issue. It concerns the *mens rea* of the crime and the *participation of a plurality of persons in its commission*. According to the jurisprudence, it is necessary that the perpetrator had knowledge of the attack on the civilian population and also knowledge of the fact, or taking the risk, that his or her acts were part of that attack. A specific problem arises if the physical perpetrator is distinct from the accused. The latter may have participated in the crime in some other way, e.g. as a superior. If the superior had the required knowledge, but not the physical perpetrator, is a CAH still committed? The question arose in the *Milutinović* case (TC, 2009).[233] The Chamber responded on the following lines. First, if the accused is too far removed from the commission of the crime (e.g. as simple aider and abettor), and only this accused has the required knowledge, there is no CAH.[234] The criterion is thus that the relationship with the commission of the crime must be sufficiently direct or proximate.[235] Second, there is such a direct and proximate link in the context of committing the crime, planning, ordering and instigating; there is no such sufficient link for aiding and abetting or for superior responsibility under article 7(3) of the Statute, if the state of mind of those persons does not reach the requisite level of intent.[236] More simply put: '. . . as long as someone . . . has knowledge of the context in which the offences occurred, and that person is not merely aiding and abetting or failing to prevent or punish these offences, crimes against humanity will be committed'.[237] The physical perpetrator or the person at whose behest he or she acts need not share the purpose or goal behind the attacks; and it is irrelevant whether they intended the underlying offences to be directed against the targeted population or merely against the victims concerned.[238]

[231] Here is the chronological list of the cases containing a general consideration of the crime: *Kordić* (Appeal, 2004), §93ff; *Blagojević* (TC, 2005), §541ff; *Limaj* (TC, 2005), §180ff; *Stakić* (AC, 2006), §244ff; *Krajisnik* (TC, 2006), §702ff; *Martić* (TC, 2007), §48ff; *Mrksić* (TC, 2007), §429ff; *D Milosević* (TC, 2007), §914ff; *Haradinaj* (TC, 2008), §101ff; *Milutinović* (TC, 2009), §140ff; *Lukić* (TC, 2009), §871ff; *Popović* (TC, 2010), §749ff; *Dordević* (TC, 2011), §1585ff; *Gotovina* (TC, 2011), §1699ff; *Perisić* (TC, 2011), §79ff; *Tolimir* (TC, 2012), §689ff; *M Stanisić* (TC, 2013), §22ff; *Prlić* (TC, 2013), §31ff; *J Stanisić* (TC, 2013), §959ff.

[232] See e.g. *Bagosora* (TC, 2008), §2164ff; *Nahimana* (AC, 2007), §913ff.

[233] §153ff.

[234] §157.

[235] §158.

[236] §158.

[237] §158.

[238] §161.

2. *Specific offences*

There are some specific offences where there are no novelties and where the consolidated lines of the case-law were pursued. This is the case in the following contexts: murder;[239] torture[240] and cruel treatment;[241] outrages upon personal dignity;[242] rape;[243] and imprisonment.[244] Other offences must be analyzed in more detail.

a. Extermination.[245]

Extermination is murder on a large scale (mass murder); in some cases this may imply a vast scheme of collective murder.[246] The case-law has added to this the fact of subjecting a large number of people to conditions of living that would lead to their deaths.[247] The question how to determine that scale in context has arisen in a number of cases. The general rule is that there is no fixed minimum number of victims;[248] there must

[239] *Blagojević* (TC, 2005), §556ff; *Krajisnik* (TC, 2006), §715; *Martić* (TC, 2007), §57ff; *Haradinaj* (TC, 2008), §124; *Popović* (TC, 2010), §787-789; *Dordević* (TC, 2011), §1708; *Gotovina* (TC, 2011), §1724-1725; *Perisić* (TC, 2011), §102-104; *Tolimir* (TC, 2012), §713ff; *M Stanisić* (TC, 2013), §38-39; *J Stanisić* (TC, 2013), §973-974. For the ICTR, see e.g. *Bagosora* (TC, 2008), §2169.

[240] *Brdjanin* (AC, 2007), §241ff (where the US practice, on account of post 11 September anti-terrorist action, is discarded, since one State, however powerful, does not automatically modify customary law, and moreover the relevant Memoranda were later withdrawn); *Martić* (TC, 2007), §73ff; *Haradinaj* (TC, 2008), §127; *M Stanisić* (TC, 2013), §46ff, where it is recalled that there is no requirement under international criminal law of the participation of a State official (§49).

[241] *Martić* (TC, 2007), §78ff; *Haradinaj* (TC, 2008), §126; *Lukić* (TC, 2009), §956-958; *Gotovina* (TC, 2011), §1790-1791 ('cruel treatment' and 'inhumane acts' having the same elements).

[242] *Haradinaj* (TC, 2008), §132, the *actus reus* of the crime being an act or omission which, from an objective point of view, caused severe humiliation or otherwise was a serious attack on human dignity.

[243] *Haradinaj* (TC, 2008), §130 (following the *Kunarać* case definition); *Prlić* (TC, 2013), §69-71. For the ICTR, see e.g. *Bagosora* (TC, 2008), §2199-2200.

[244] *Kordić* (AC, 2004), §114ff: contrary to unlawful confinement as a war crime, imprisonment under CAH does not require the existence of an international armed conflict; imprisonment means 'arbitrary imprisonment', i.e. imprisonment without due process of law. *Martić* (TC, 2007), §86ff: the crime can be committed by acts or omissions; as to *mens rea*, direct and indirect intent (recklessness) qualify. *Prlić* (TC, 2013), §60ff: a detention is arbitrary when it is not based on a legal ground or is in violation of relevant procedural law, e.g. articles 42-43 GC IV. There are motives of lawful imprisonment, e.g. those provided for in articles 68 and 78 of GC IV (offences against occupational forces). A detention that lasts for a disproportionate amount of time is unlawful (§63). The imperative reasons of security under article 42 GC IV connote the idea of a strict or absolute necessity. A large degree of appreciation is left to the detaining power, but in any event collective measures are prohibited; each case must be decided individually (§64).

[245] The offence has been considered in the following cases: *Blagojević* (TC, 2005), §570ff; *Stakić* (AC, 2006), §258ff; *Krajisnik* (TC, 2006), §716ff; *Brdjanin* (AC, 2007), §472; *Martić* (TC, 2007), §61ff; *Lukić* (TC, 2009), §937ff; *Popović* (TC, 2010), §799-801; *Perisić* (TC, 2011), §105ff; *Lukić* (AC, 2012), §528ff; *Tolimir* (TC, 2012), §722ff; *M Stanisić* (TC, 2013), §43-45. For the ICTR, see e.g. *Seromba* (TC, 2006), §352ff; *Nahimana* (AC, 2007), §935ff; *Bagosora* (TC, 2008), §2191. See Kolb (2004)311-312 for the earlier case-law.

[246] It is not necessary that the targeting of the victims takes place on the basis of national, ethnical, racial or religious grounds: *Martić* (TC, 2007), §64. The existence of a vast scheme of collective murder is not a necessary requirement for finding extermination: *Perisić* (TC, 2011), §107.

[247] *Perisić* (TC, 2011), §106. It was even suggested (but not upheld on the facts of the case) that broadcasts instigating killings on a large scale could qualify as extermination: ICTR, *Nahimana* (AC, 2007), §935.

[248] See e.g. *Stakić* (AC, 2006), §260-261. In the ICTR, see e.g. *Seromba* (TC, 2006), §361; *Bagosora* (TC, 2008), §2191.

be a case-by-case assessment.[249] In the *Krajisnik* case (TC, 2006), the Chamber stated that the killings constituting extermination must form part of the same incident, taking into account such factors as the time and place of the killings, the selection of the victims and the manner in which they are targeted.[250] In order to fall into the same category of action and to constitute the basis for finding a mass murder (rather than unrelated incidents of different killings), there is thus a nexus criterion.[251] It must be probably assumed that if a plan or policy of attacks exists (which is not a requirement under CAH), the nexus condition should be considered fulfilled. This also means that a series of incidents or single acts must be considered in their aggregate effect.[252]

As to the number of victims, the *Brdjanin* case (AC, 2007) held killings of 68-300 people in five different locations to fulfil the conditions for extermination.[253] In the *Lukić* case (TC, 2009), it was suggested by the majority (Judge C Van Wyngaert dissenting) that the numerical threshold of victims in extermination must be set higher if an area is densely populated.[254] At the appeal stage (*Lukić*, AC, 2012), the Chamber dealt with this question in detail.[255] It recalled that the *Brdjanin* Chamber had held that 300 individuals targeted were enough to constitute the crime; that in *Stakić* the same result was reached for less than 80 individuals; and in *Krajisnik* for approximately 66 individuals.[256] Where a particular population is targeted, smaller figures may suffice.[257] The Appeals Chamber then accepted the criterion based on the density of the population in a certain area. In considering the circumstances of the case at hand, it said that when almost the entire Muslim population of Koritnik perished in the incident under consideration, it is reasonable to find that the killing of 59 persons amounted to extermination.[258] The reference here was to a single village. The criterion of population density was thereafter endorsed by the Trial Chambers, such as in the *Tolimir* case (TC, 2012).[259] The gist of this jurisprudence is that the offence of extermination becomes a context-related norm, at least with regard to the numerical issue. It has to take account of the specific social context in which the crime takes place, not unlike many questions arising under the crime of genocide, e.g. the 'in part' destruction of a protected group.

[249] See e.g. *Lukić* (TC, 2009), §938.
[250] §716.
[251] Perhaps such a nexus criterion was ignored in the *Perisić* case (TC, 2011): §107.
[252] *Martić* (TC, 2007), §63.
[253] §472.
[254] §938.
[255] §528ff.
[256] §537.
[257] §538.
[258] §543.
[259] §725.

b. Deportation/forcible transfer.

This offence featured prominently in the case-law in the period under review.[260]

(aa) In the *Stakić* case (AC, 2006) the issue of 'deportation' was considered. It was defined as follows: 'forced displacement of persons by expulsion or other forms of coercion from an area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law'.[261] The *mens rea* of the crime does not require an intention to displace across the border on a permanent basis.[262] The displacement must be forced (coercive): it must thus be involuntary, leaving no genuine choice; this includes the threat of force or coercion, or a coercive environment.[263] Lawful displacements include evacuations according to articles 19 GC III, 49 GC IV or 17 AP II. Such lawful evacuations may occur for security reasons or military necessity, or further for humanitarian reasons (natural disasters, epidemics).[264] The transfer must be cross-border.[265] It is not sufficient to cross constantly changing frontlines – there is no customary international law to that effect.[266] In other words, the Chamber's point seems to be that the *de facto* border crossed must be of a consolidated character, e.g. a cease-fire line. Issues linked to deportation were then discussed on the basis of similar arguments in several cases: e.g. *Krajisnik* (TC, 2006),[267] *Dordević* (TC, 2011),[268] *Tolimir* (TC, 2012),[269] and *Ƒ Stakić* (TC, 2013).[270]

In the *Martić* case (TC, 2007) it was added that an evacuation by reason of a humanitarian crisis caused by the accused's own unlawful activity is no excuse.[271] This is an application of the maxim *nemo ex propria turpitudine commodum capare potest*.[272] In the *Krajisnik* appeal

[260] See *Stakić* (AC, 2006), §278ff; *Krajisnik* (TC, 2006), §722ff; *Martić* (TC, 2007), §105ff; *Milutinović* (TC, 2009), §163ff; *Krajisnik* (AC, 2009), §304ff; *Popović* (TC, 2010), §888ff; *Dordević* (TC, 2011), §1603ff; *Gotovina* (TC, 2011), §1737ff; *Tolimir* (TC, 2012), §792ff; *M Stanisić* (TC, 2013), §60ff; *Prlić* (TC, 2013), §47ff; *Ƒ Stanisić* (TC, 2013), §991ff. For the previous jurisprudence, see Kolb (2004)321-322.

[261] §278.

[262] §304ff.

[263] §279ff. See also *Popović* (TC, 2010), §896.

[264] See *Milutinović* (TC, 2009), §166; *Popović* (TC, 2010), §901.

[265] *Stakić*, §288ff.

[266] §301-302.

[267] §722ff.

[268] §1603ff.

[269] §792ff.

[270] §991ff.

[271] §109. Repeated e.g. in the *Popović* case (TC, 2010), §903, in the *M Stanisić* case (TC, 2013), §64 and in the *Prlić* case (TC, 2013), §53.

[272] On the reach of that maxim in international law, see R Kolb, ''La maxime 'nemo ex propria turpitudine commodum capere potest' (nul ne peut profiter de son propre tort) en droit international public'' (2000) 33 RBDI 84ff.

(AC, 2009), it was further added that no minimum number of individuals must have been forcibly transferred.[273] The *Popović* case (TC, 2010) adds further material. First, there must be a nexus between the action of the accused and the crossing of a border; the fact that persons just find themselves across a border is not sufficient; and it must be the act of the accused which determines that destination.[274] Second, stress was laid on the lawful presence of the persons in the area from where they were expelled. Lawful presence means essentially lawful residence, even if the homes in question are provisional.[275] A state of occupation is not necessary for deportation to take place.[276]

Finally, some important considerations were added in the *Prlić* case (TC, 2013). First, the displacement requires that the destination of the victims is sufficiently remote far their homes, so that they are in effect deprived of their right to live in their community.[277] This calls for complicated assessments of fact and it must be seen to what extent the Appeals Chamber will accept it as legally correct. Second, the expulsion beyond a *de facto* border is a displacement from an occupied territory; temporary frontlines are not included.[278] This again does not seem the legally correct criterion. Expulsion out of an occupied territory certainly fulfils the requirements for deportation (see article 49 GC IV), but such a deportation can also occur across other *de facto* boundaries if these are sufficiently consolidated. A stable cease-fire line separating zones of different allegiance must certainly qualify.

(bb) The term 'forcible displacement' is an umbrella term. Its reach was considered in the *Milutinović* case (TC, 2009). Its elements are as follows: (1) the displacement of persons by expulsion or other coercive acts; (2) from an area in which they are lawfully present; (3) without grounds permitted under international law; (4) the intent to displace the victims, permanently or otherwise, within the relevant national border (as in forcible transfer) or across the relevant national border (as in deportation).[279] This definition shows that forcible transfer (other inhuman acts) and deportation (a distinct heading of CAH, article 5(d) of the Statute), under the umbrella term forcible displacement, share the same elements except for the type of border crossed or not crossed. Forcible transfer supposes a displacement within the 'national border'; deportation across the national relevant border.[280] The criteria of involuntariness and unlawful evacuation are common to both offences. The *mens rea* is distinct only on the element of the border: for forcible

[273] §309.
[274] §893.
[275] §899-900.
[276] *Gotovina* (TC, 2011), §1750.
[277] §49.
[278] §55-56.
[279] §164.
[280] *Popović* (TC, 2010), §891-892; *Dordević* (TC, 2011), §1613.

transfer, the intent must be to forcibly displace; for deportation, it must encompass the intent to displace across a relevant border.[281]

c. Unlawful attacks on civilians.[282]

This offence follows closely its counterpart in the context of war crimes. The basis of the offence, in CAH as in war crimes, are articles 51(2) of AP I and 13(2) of AP II. There is no exception for military necessity in the context of attacks on civilian persons. Collateral losses are however accepted, if not disproportionate in the sense of article 51(5)(b) of AP I. Indiscriminate attacks may be qualified as encompassing direct attacks upon civilians. The *mens rea* covers both direct and indirect intent (recklessness).[283] In the *D Milosević* case (TC, 2007), it was stressed that civilians are defined in article 50 AP I (as not being combatants)[284] and that there is an absolute prohibition on the targeting of civilians – thus any attack on civilians is prohibited.[285] The latter formulation is not precise, and the Chamber indeed recalls in due course that a civilian loses protection when taking direct part in hostilities. This means participating in more than the war effort, i.e., committing 'acts of war which, by their nature or purpose, are likely to cause actual harm to the personnel or material of the enemy armed forces'.[286] Further, the notion of attacks against civilians was analyzed in more detail. Apart from direct targeting, it can ensue from the means and methods of combat used, from the compliance with precautionary measures, from the use of indiscriminate weapons, etc.[287] The obligation of the parties to remove, to the maximum extent feasible, civilians from the vicinity of military objectives and not to locate military objectives near densely-populated areas does not relieve the attacking party from the duty to abide by the principles of distinction and proportionality.[288] Moreover, the crime supposes that the unlawful attack has resulted in death or serious injury to body or health within the civilian population[289] (In German legal science this result requirement is expressed through the term *Erfolgsdelikt*). In the

[281] Ibid, §905.
[282] See *Martić* (TC, 2007), §66ff; *D Milosević* (TC, 2007), §939ff; *Perisić* (TC, 2011), §89ff.
[283] On all these points, see the *Martić* case, quoted in the previous footnote. On the *mens rea*, see the developments in *D Milosević* (TC, 2007), §951-952: the criterion is that of willful action, which encompasses intent and recklessness; negligence is excluded. It must be shown that the perpetrator was aware or should have been aware of the civilian status of the civilian status of the persons attacked (standard of the reasonable person who could not have believed that the individual attacked was a combatant). The formulation on this last issue is somewhat loose: *quaere* to what extent it does really not extend into negligence, which was excluded. The same formulation was maintained in the *Perisić* case (TC, 2011), §101.
[284] §946.
[285] §944.
[286] §947.
[287] §948.
[288] §949.
[289] §950.

Perisić case (TC, 2011)[290], the reasoning follows similar lines. Overall, even if it sails under the colours of CAH, the offence remains plunged into the world of IHL.

d. Wanton destruction of property and related offences.

Here again, the offences of 'wanton destruction of villages or devastation not justified by military necessity', 'destruction or willful damage done to institutions dedicated to education or religion', and 'plunder of public or private property' follow their counterparts in the context of war crimes.[291] The issues were discussed for the purposes of CAH in the *Martić* (TC, 2007) case.[292]

e. Persecution.[293]

Issues linked to the offence of persecution are often addressed in the case law of the ICTY; persecution is to some extent the rank-and-file offence in the context of CAH. The crime is moreover typically an 'umbrella crime'.[294] It is defined by the following elements:[295] (1) an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in customary international law or in treaty law; (2) carried out deliberately, with the intention to discriminate on one of the listed grounds, in particular race, religion or politics.[296] Discrimination on the basis of 'ethnicity' has also been accepted in practice (the three grounds listed in the Statute are thus not exhaustive).[297] A single act may suffice.[298] There is a requirement of 'equal gravity' of the prohibited acts with the crimes listed in article 5 of the Statute.[299] Not every denial of a human right constitutes a crime against humanity. The gravity is to be assessed in the context of the cumulative effect of the acts, not in isolation.[300] Thus, globally, only gross or blatant denials of

[290] §89ff.

[291] See above section (A) (d).

[292] §89ff, 95ff, 100ff.

[293] See Kolb (2000) 293-294; Kolb (2004) 317-320. In the period under review, the offence was treated in the following cases at the ICTY: *Kordić* (AC, 2004), §101ff; *Blagojević* (TC, 2005), §578ff; *Kvocka* (AC, 2005), §312ff; *Stakić* (AC, 2006), §322ff; *Krajisnik* (TC, 2006), §733ff; *Martić* (TC, 2007), §112ff; *Milutinović* (TC, 2009), §174ff; *Lukić* (TC, 2009), §992ff; *Popović* (TC, 2010), §983ff; *Dordević* (TC, 2011), §1754ff; *Gotovina* (TC, 2011), §1801ff; *Perisić* (TC, 2011), §117ff; *Tolimir* (TC, 2012), §845ff; *M Stanisić* (TC, 2013), §66ff; *Prlić* (TC, 2013), §72ff; *J Stanisić* (TC, 2013), §1237ff. For the ICTR, see e.g. *Nahimana* (AC, 2007), §970ff; *Bikindi* (TC, 2008), §390ff; *Bagosora* (TC, 2008), §2208-2209.

[294] *M Stanisić* (TC, 2013), §67.

[295] See e.g. *Kordić* (AC, 2004), §101; or *Kvocka* (AC, 2005), §320; or else *Milutinović* (TC, 2009), §175-176; or still *Perisić* (TC, 2011), §118; *Prlić* (TC, 2013), §72 and *J Stanisić* (TC, 2013), §1238. For the ICTR, see e.g. *Bagosora* (TC, 2008), §2208.

[296] The correct interpretation is disjunctive (or), even if the text contains the word 'and': *Martić* (TC, 2007), §114; *Tolimir* (TC, 2012), §846; *Prlić* (TC, 2013), §72.

[297] *Milutinović* (TC, 2009), §176; *M Stanisić* (TC, 2013), §68. See also the ICTR, in *Bagosora* (TC, 2008), §2209, to the same effect.

[298] E.g. *Kordić* (AC, 2004), §102; *Prlić* (TC, 2013), §74.

[299] See e.g. *Popović* (TC, 2010), §966; *J Stanisić* (TC, 2013), §1239.

[300] See e.g. *Kvocka* (AC, 2005), §321; *Milutinović* (TC, 2009), §179; *Lukić* (TC, 2009), §993; *Prlić* (TC, 2013), §75.

fundamental rights qualify.[301] The act need not be a recognized crime under international law.[302]

An act is discriminatory when the victim is targeted because of his or her membership in a group defined by the perpetrator on a political, racial or religious basis.[303] The criterion is thus subjective. An objective quality of the victim is not necessary; it is the perception of the perpetrator which is controlling.[304] The act must discriminate in fact; mere intention to discriminate without actual discrimination does not suffice.[305] Also, there must be a conscious intent to discriminate, not merely knowledge of action in a discriminatory manner.[306] The special intent[307] to discriminate may be inferred from the context. It is sufficient that the special intent seeks to cause the injury; conversely, intent to physically suppress is not necessary. A persecutory intent is not required in addition to a discriminatory intent.[308] Neither is a discriminatory policy necessary.[309] But the discriminatory intent must relate to each specific act or omission underlying the charge of persecution.[310] This intent may be determined by circumstantial evidence, such as the specific nature of the crimes, the targeted persons, the behavior of the accused, etc.[311] The requirement is satisfied as long as either the physical perpetrator or the indirect perpetrator acted with this special intent.[312]

Different offences can constitute the crime of persecution provided the gravity criterion is fulfilled. For example: unlawful attacks on civilians and/or civilian objects (even if no person is actually injured and no object actually hit):[313] terrorizing the civilian population;[314] willful killing, murder, causing serious injury and cruel/inhuman treatment;[315] deportation/forcible transfer;[316] destruction and plunder or pillage of property;[317] destruction of cultural monuments and sacred

[301] *Lukić* (TC, 2009), §993; *Popović* (TC, 2010), §966; *Tolimir* (TC, 2012), §848.
[302] *Popović* (TC, 2010), §966.
[303] *Blagojević* (TC, 2005), §583.
[304] *Martić* (TC, 2007), §118, even if the perception is based on a mistake. See also *Milutinović* (TC, 2009), §177; *Prlić* (TC, 2013), §73.
[305] *Blagojević* (TC, 2005), §583.
[306] *Tolimir* (TC, 2012), §850.
[307] *Stakić*, (AC, 2006), §328; *Lukić* (TC, 2009), §994; *Popović* (TC, 2010), §968.
[308] *Kordić* (AC, 2004), §111.
[309] *Blagojević* (TC, 2005), §582; *M Stanisić* (TC, 2013), §69; *Prlić* (TC, 2013), §76.
[310] *Popović* (TC, 2010), §969.
[311] *Popović* (TC, 2010), §969; *Perisić* (TC, 2011), §122; *M Stanisić* (TC, 2013), §69.
[312] *Dordević* (TC, 2011), §1761.
[313] *Kordić* (AC, 2004), §104-105; *Gotovina* (TC, 2011), §1840-1842.
[314] *Blagojević* (TC, 2005), §588; *Popović* (TC, 2010), §979; *Tolimir* (TC, 2012), §855ff.
[315] *Kordić* (AC, 2004), §107; *Blagojević* (TC, 2005), §586; *Krajisnik* (TC, 2006), §744, 347; *Popović* (TC, 2010), §975; *Dordević* (TC, 2011), §1765; *Gotovina* (TC, 2011), §1808ff; *Tolimir* (TC, 2012), §852-854; *M Stanisić* (TC, 2013), §71-73; *J Stanisić* (TC, 2013), §1240-1241.
[316] *Blagojević* (TC, 2005), §595; *Krajisnik* (TC, 2006), §749; *Popović* (TC, 2010), §989; *Dordević* (TC, 2011), §1763; *Gotovina* (TC, 2011), §1812-1813; *Tolimir* (TC, 2012), §860; *J Stanisić* (TC, 2013), §1242.
[317] *Kordić* (AC, 2004), §108; *Blagojević* (TC, 2005), §593; *Krajisnik* (TC, 2006), §768, 775; *Popović* (TC, 2010), §984; *Gotovina* (TC, 2011), §1804 (imposition of discriminatory restrictions

sites;[318] harassment, humiliation and psychological abuse[319] (e.g. gross overcrowding in detention, no ventilation, begging for water, practice of relieving bodily functions into the clothes, etc.);[320] unlawful detention;[321] forced labour;[322] human shields;[323] sexual assault (including rape, but also other acts of assault short of penetration, such as enforced nudity or mutilations);[324] disappearances;[325] and imposition and maintenance of restrictive and discriminatory measures.[326] The ICTR added particularly hate speeches to this list.[327]

The non-exhaustiveness of the list; the link with human rights provisions; and the open-ended 'gravity'-test based on circumstantial factors, all these factors impress upon this crime a strongly dynamic nature and function. Due to its special intent element, it moreover cumulates with the other CAH offences.

f. Other inhuman acts.[328]

This residual clause, under which several acts not listed in the Statute can be subsumed, has always had pride of place in the jurisprudence of the ICTY. Its elements are frugal, its application delicate: (1) the victim must have suffered serious bodily or mental harm (case-by-case assessment; 'same gravity' criterion as the listed acts prohibited under article 5, an *ejusdem generis* argument); (2) there must be an intent to inflict such

on property), §1818ff, 1825ff (plunder and looting, destruction and burning); *Tolimir* (TC, 2012), §858-859; *M Stanisić* (TC, 2013), §83 (plunder), §86ff (wanton destruction of towns and villages).

[318] *Krajisnik* (TC, 2006), §782; *Milutinović* (TC, 2009), §204ff; *Dordević* (TC, 2011), §1770ff.

[319] *Kvocka* (AC, 2005), §323-325; *Lukić* (TC, 2009), §996.

[320] *Kvocka* (AC, 2005), §323-325.

[321] *Krajisnik* (TC, 2006), §754; *Gotovina* (TC, 2011), §1814ff; *M Stanisić* (TC, 2013), §77.

[322] *Krajisnik* (TC, 2006), §761.

[323] *Krajisnik* (TC, 2006), §763.

[324] *Milutinović* (TC, 2009), §183. The elements of this offence have not been elaborated in customary international law. The Chamber thus turns to domestic law approaches to sexual assault. Sexual assault may be committed in situations where there is no physical contact between the perpetrator and the victim, if the actions of the perpetrator nonetheless serve to humiliate and degrade the victim in a sexual manner (§199). When a person is detained, coercion and lack of consent may be inferred from the circumstances (§200). The elements of the offence are: (1) the physical perpetrator commits an act of a sexual nature on another, including requiring that person to perform such an act; (2) that act infringes the victim's physical integrity or amounts to an outrage to the victim's personal dignity; (3) the victim does not consent to that act; (4) the physical perpetrator intentionally commits the act; (5) the physical perpetrator is aware that the act occurred without the consent of the victim (§201). See also *Dordević* (TC, 2011), §1766-1768.

[325] *Gotovina* (TC, 2011), §1831ff. The Chamber here refers to human right law.

[326] *M Stanisić* (TC, 2013), §91: e.g. denial of freedom of movement or of employment, of equal access to public services, invasion of privacy through arbitrary searches of homes, denial of right to judicial process, etc. The crime is often constituted by the cumulative effect of such acts.

[327] *Nahimana* (AC, 2007), §970ff; *Bikindi* (TC, 2008), §392ff. Hate speech may constitute persecution if it is of equal gravity when targeting a population on the basis of ethnicity or any other recognized discriminatory ground. It may then violate respect for human dignity and the right to security of the person. These are fundamental human rights.

[328] See Kolb (2000) 294-295; Kolb (2004) 320-321. In the period under review, see mainly: *Blagojević* (TC, 2005), §623ff; *Martić* (TC, 2007), §81ff; *D Milosević* (TC, 2007), §933ff; *Lukić* (TC, 2009), §959ff; *Gotovina* (TC, 2011), §1790-1791 (in comparison with cruel treatment); *Perisić* (TC, 2011), §109ff; *M Stanisić* (TC, 2013), §58-59; *Prlić* (TC, 2013), §77ff. For the ICTR, see e.g. *Bagosora* (TC, 2008), §2218.

harm upon the victim (or knowledge of the likely effect of the acts, i.e. recklessness).[329] The *Blagojević* Trial Chamber (2005) emphasized that the principle of legality (*nullum crimen sine lege*) suggests great caution in the construction of this offence.[330] The 'similar seriousness' criterion depends on the circumstances, e.g. the individual features of the victims (such as age, sex, state of health), the mental effects of the incriminated acts on the victims, etc.[331] The effects produced must not be long-lasting.[332] Forcible transfer may be such an 'other inhuman act'.[333] Other examples include mutilations, grave corporal mistreatments, enforced prostitution, enforced disappearances or appalling conditions of detention.[334]

The greatest problem with this heading is the equilibrium to be found between the extension of incrimination, which is its aim, and its containment within the four corners of the principle of legality. There are many case-by-case assessments in this area; they pose delicate issues of judgment. It may for instance be asked to what extent a perpetrator should know and be responsible for some of the 'personal circumstances' of the victims, e.g. their particular sensitiveness. The only solution in that context is to refer to the circumstances the perpetrator knew and acted upon; or at least the circumstances he or she could not ignore, in the sense that they are average qualities of persons of a certain age or sex or state of health; or finally the circumstances which were particularly brought to his or her knowledge. However that may be, the assessments remain difficult. Should enforced nudity be qualified as a CAH? In most cases, the answer will lie in the cumulative effect of a series of inhuman acts – since they rarely occur in isolation in this context.

C. Genocide

1. *General observations*

The crime of genocide has been considered only in a few ICTY cases[335], whereas it is regularly analyzed in the jurisprudence of the ICTR.[336] There have been few novelties on that crime (whose peremptory status has been stressed[337]).

[329] *Kordić* (AC, 2004), §117; *Blagojević* (TC, 2005), §626; *Martić* (TC, 2007), §83; *D Milosević* (TC, 2007), §934-935; *Lukić* (TC, 2009), §961-962; *M Stanisić* (TC, 2013), §58-59; *Prlić* (TC, 2013), §77.

[330] §625. See also *Martić* (TC, 2007), §82; *Lukić* (TC, 2009), §959.

[331] See e.g. *Prlić* (TC, 2013), §78.

[332] *Blagojević* (TC, 2005), §627; *Martić* (TC, 2007), §84.

[333] *Stakić* (AC, 2006), §317.

[334] *Prlić* (TC, 2013), §79.

[335] See: *Stakić* (AC, 2006), §14ff; *Popović* (TC, 2010), §807ff; and *Tolimir* (TC, 2012), §730ff.

[336] See e.g.: *Seromba* (TC, 2006), §314ff; *Nahimana* (AC, 2007), §489ff; *Bagosora* (TC, 2008), §2114ff.

[337] *Blagojević* (TC, 2005), §639 (in the context of the crime of complicity in genocide).

a. Definition

The most significant development relates to the inadmissibility of a negative definition of the protected groups. In the *Stakić* case (AC, 2006), the question was considered to what extent the group of 'non-Serbs' could constitute a protected group under the genocide provision.[338] Could it qualify as a national, ethnical, racial or religious group? Article 4 of the Statute contains the words 'as such'. This shows that the intent must be to destroy a group with a particular identity, not a number of people lacking certain characteristics.[339] Negatively defined groups have no unique distinguishing characteristics that could be destroyed.[340] Subjective stigmatization criteria can be used when determining the targeted group, but they cannot provide the sole criterion. In other words, subjective criteria cannot entirely displace the group-definition but can serve to determine who the perpetrator saw as belonging to such groups.[341] This is also the meaning attached to genocide in the 1948 Convention and its *travaux préparatoires*.[342] In short, a solely negative definition of the protected group was ruled out.

This approach was endorsed in *Popović* (TC, 2010).[343] In the *Tolimir* case (TC, 2012)[344], it was recalled that both objective and subjective criteria may be used in defining of the group, but not solely negative criteria. The ICJ had upheld the same interpretation.[345] A similar but not identical problem surfaced within the ICTR: it was there held by the Appeals Chamber that the 'Hutu political opponents' (supporting the Tutsi group) were not as such a protected group. Thus, the acts directed against them could not be regarded as genocide.[346]

b. Forms of genocide covered by the statute

It may be mentioned that the case-law stressed more than once that only *physical and/or biological genocide* is covered by the Statute, not other forms, such as so-called cultural or social genocide. The word 'destroy', in article 4, is interpreted as impelling such a conclusion.[347] In other words, all measures aiming at simple dissolution of the group rather than geared towards its biological destruction do not qualify. This is now a neatly consolidated jurisprudence. It rightly keeps the threshold of the 'crime of crimes' on a demanding level and avoids watering it down. A protection gap does not ensue, since CAH will fill any interstices left open.

[338] §14ff.
[339] §20.
[340] §23.
[341] §25.
[342] §22.
[343] §809.
[344] §735.
[345] *Genocide* case, 2007, 124, §193.
[346] *Nahimana* (AC, 2007), §496.
[347] *Popović* (TC, 2010), §822; *Tolimir* (TC, 2012), §741.

c. Acta rea

The *acta rea* of genocide (article 4(a)-(e)) are discussed mainly in the *Popović* (TC, 2010)[348] and *Tolimir* (TC, 2012)[349] cases. The same is true for the specific intent to destroy a group (*mens rea*).[350] No new elements emerge. It may however be noted that the *Blagojević* Trial Chamber (2005) held that the word to 'destroy' can be fulfilled by forcible transfer of persons if the intent is thereby to physically or biologically destroy the group as a separate or distinct entity.[351] Such a reading has been suggested also by the ICJ, when it held that forcible transfer (ethnic cleansing) alone is not genocide, but that the conditions of transfer may be such as to imply an intention to destroy the group.[352]

2. *Offences related to genocide*

The offences related to genocide have found some marginal place in the jurisprudence of the ICTY, but they have been more closely scrutinized in the case-law of the ICTR.

a. Complicity

There is, first, complicity in genocide. This offence (flowing from the Genocide Convention of 1948 rather than from the Statute) has been discussed in *Blagojević* (TC, 2005),[353] but has not given rise to any particular development. It is based on the commission of an act of genocide. Absent that act, there can be no complicity.[354] It has also been stressed that this category of participation is broader than aiding and abetting under article 7(1) of the Statute.[355] For complicity, the Prosecution must prove that the accomplice not only knew of the principal's specific intent to destroy the protected group in whole or in part, but also shared that intent personally.[356]

b. Instigation to commit genocide

There is, second, instigation to commit genocide. This was considered by the ICTR in the *Nahimana* case (AC, 2007).[357] There is instigation if activities (such as broadcasting) substantially contributed to the commission of the acts of genocide.[358] This may be the case if certain names of persons to be killed are mentioned and if these persons are subsequently

[348] §810ff.
[349] §736ff.
[350] *Popović* (TC, 2010), §820ff; *Tolimir* (TC, 2012), §744ff.
[351] §665.
[352] *Genocide* case, 2007 122-123, §190.
[353] §633ff.
[354] §638.
[355] *Krajisnik* (TC, 2006), §865.
[356] §865.
[357] §498ff.
[358] §502.

killed.[359] But if too long a time has elapsed between the two events, instigation cannot be accepted. In such a situation, there will be no clear causality.[360]

c. Direct and public incitement to commit genocide

Third, there is direct and public incitement to commit genocide. This offence concerns specifically the jurisdiction of the ICTR (article 2(3)(c) of the Statute). The position as regards this crime was summed up in the *Nahimana* case (AC, 2007).[361] The offence supposes genocidal intent. However, unlike instigation to commit genocide, this is a separate crime and there is no need to show a substantial contribution to the commission of the acts of genocide.[362] The offence here at stake is an inchoate one, punishable even if no act of genocide has resulted.[363] The incitement must be 'direct'; thus, hate speech is not enough; there must be a direct appeal to commit an act referred to in article 2(2) of the Statute, and it must be more than a vague suggestion.[364] When interpreting words uttered, account has to be taken of the author's culture and language.[365] The core point is how its intended audience understood the speech in context, not whether it may appear ambiguous to another audience. The criminal intent or purpose of the speech is not decisive; nor is the political or community affiliation of the author; all these elements are only factors to be taken account in interpretation.[366] The offence is further based on a 'public' utterance, i.e. an utterance by means of mass communications: e.g. speeches to large assemblies; messages disseminated by the media; communications made through a public address system over a broad area, etc.[367] The offence here at stake is a continuing crime, which implies an ongoing criminal activity. The crime is however completed (and thus punishable) at the time the discourse is uttered or published, even though the effects of incitement may extend in time.[368]

A significant tension arises here with the freedom of expression recognized by international and national human right law. The question came to the fore particularly in the *Bikindi* case (TC, 2008).[369] The direct and public incitement in that case took the form of musical performances and speeches. The Chamber emphasized that freedom of expression – a right enshrined in customary international law – is not absolute. There are limitations imposed in the human rights instruments themselves, such as

[359] §507ff.
[360] §513, 519.
[361] §677ff. For a more recent judgment on the same lines, cf. *Nzabonimana* (TC, 2012), §1751ff.
[362] §677-678.
[363] §678.
[364] §692-693.
[365] §698, 700.
[366] §706, 713.
[367] *Nzabonimana* (TC, 2012), §1754.
[368] *Nahimana* (AC, 2007), §716ff, 723.
[369] §378ff.

regarding incitement to discrimination, war propaganda, advocacy of national, racial and religious hatred inciting to discrimination, hostility or violence, etc. There are further limitations with regard to the rights and reputation of others; national security and public order; public health, etc.[370] Hate speech is not criminalized as such under the Statute. In a society, open expression remains essential.[371] But there is a discernible hierarchy of expression, even if sometimes the distinction may be difficult. Freedom of expression thus stops where direct and public incitement to commit genocide begins. In other words, freedom of expression cannot prevail over the prohibition contained in the offence.[372]

All this may readily be conceded, but where freedom stops and incitement begins can be a matter of difficulty. The principle of freedom of expression should at least colour the interpretation of the offence: its elements should be interpreted in a restrictive way (as does the ICTR), lest the criminalization be pushed too far.

d. Conspiracy to commit genocide

Fourth, there is conspiracy to commit genocide. At the ICTY, the offence was considered for the first time in the *Popović* case (TC, 2010).[373] According to article 4(3)(b) of the Statute, conspiracy consists in an agreement between two or more persons to commit the crime of genocide. The participants must share the *mens rea* of genocide.[374] As an inchoate crime, the agreement itself is punishable, regardless of whether genocide is actually committed or not.[375] To establish the existence of such an agreement, circumstantial evidence is permitted; concerted and coordinated action may be evidence of such an agreement; but simple similarity of action is not enough.[376] The term 'conspiracy' comes from the common law and must be interpreted according to common law standards.[377] At common law, the crime is a continuous one: it does not come to an end the moment the agreement is concluded. Moreover, the agreement can be joined by a third person at any moment before the completion of the underlying crime.[378] The ICTR has considered this crime in a much greater number of cases.[379] It has particularly stressed that a tacit agreement may be enough to constitute conspiracy.[380]

[370] §380.
[371] §382.
[372] §396-397.
[373] §867ff.
[374] §868; *Tolimir* (TC, 2012), §787.
[375] §868.
[376] §869.
[377] §872-876.
[378] *Tolimir* (TC, 2012), §785.
[379] In the period under review, see e.g. *Seromba* (TC, 2006), §344ff; *Nahimana* (AC, 2007), §893ff.
[380] *Nahimana* (AC, 2007), §898.

V. Defences

The issue of defences (or circumstances precluding wrongfulness or culpability) has not been much considered by the ICTY since 2004. Only two defences have been mentioned and briefly analyzed.

A. Self-defence

In the *Boskoski* case (AC, 2010),[381] the issue of the equal application of IHL to the 'aggressor' and the 'aggressed' arose. Normally developed under the law of IAC, it was here applied by analogy to a NIAC. If State armed forces act against an armed group in self-defence, in the context of a NIAC, they are still bound to apply IHL. The relevant breaches will be qualified as war crimes. There is indeed a fundamental distinction between *jus ad bellum* and *jus in bello*: the legitimacy of the use of force does not affect the application of the rules of the law of armed conflict. The ICTY has thus emphasized one of the basic principles of IHL. The principle is legally undisputed (at least for IAC). But many (politicians and others) still seem unable to see the difference, thinking that the 'good side' must have all the rights and the 'bad side' almost none. No system of IHL could effectively work with such unreal assumptions: a network of reciprocal application is essential.

B. Tu quoque

In the *M Stanisić* case (TC, 2013),[382] it was recalled that the *tu quoque* argument could not justify international crimes. In other words, similar attacks by the opponent do not give a belligerent the right to proceed to prohibited attacks (an exception can however be found within the sphere of lawful reprisals, but such reprisals are today completely ruled out against protected persons under the GCs[383]). One cannot doubt the soundness of this argument.

VI. Responsibility of the Superior (Article 7(3), Icty Statute, Article 6(3), Ictr Statute)

A. General Aspects

The criminal responsibility of the superior for acts or omissions of his or her subordinates was considered in a series of cases during the period

[381] §25ff.
[382] §24.
[383] See the careful analysis by J Hebenstreit, *Repressalien im humanitären Völkerrecht* (Nomos 2004).

under review.[384] The most authoritative statements on this form of responsibility can be found in the *Hadzihasanović* Trial Chamber case and in the *Orić* Trial Chamber case. Where no specific mention is made, the following summary rests on the first of these cases.

The responsibility of the superior (often a military commander) is an integral part of customary international law for IAC and for NIAC.[385] The purpose of this rule is to promote compliance with the rules of IHL.[386] In ensuring the proper application of IHL, the role of the commander is crucial. Article 7(3) contains a distinct form of criminal liability, based not on responsibility for the acts and omissions of subordinates, but on the failure to prevent and punish.[387] In the *Orić* case (TC, 2006),[388] it was emphasized that the principal crime (i.e. the one the superior fails to prevent or to punish) encompasses aiding and abetting in crimes by subordinates, not only the commission of the crimes themselves. The principal crime can also be committed through omissions. Instigation and aiding and abetting by omission are thus also covered, but only if there is a duty to act, as e.g. in article 13 GC III (for prisoners of war), or if there was an antecedent conduct exposing a person to risk, such as a human shield. The crime can thus consist in neglect in the protection of prisoners of war (by omissions) on the part of the subordinates. In the *Blagojević* Appeal (AC, 2007), the formulation of this aspect of the crime was as follows: article 7(3) of the Statute encompasses all forms of criminal conduct of subordinates regulated in article 7(1), not only 'commission' in the strict sense.[389] And it extends to all crimes under the jurisdiction of the Tribunal (articles 2-5 Statute).[390]

The elements of the crime are as follows:

1. *Superior/subordinate relationship*.[391]

Such a relationship exists where 'effective control' is exercised, i.e., where there is a material ability to prevent and punish the acts or omissions of the subordinate. The formal title of commander is neither required nor sufficient: what counts is the *de facto*, or possibly *de jure*,

[384] See Kolb (2000)309-311; Kolb (2004)326-330. See in the present period: *Halilović* (TC, 2005), §38ff; *Hadzihasanović* (TC, 2006), §65ff; *Orić* (TC, 2006), §289ff; *Blagojević* (AC, 2007), §277ff; *Hadzihasanović* (AC, 2008), §17ff; *Strugar* (AC, 2008), §246ff; *Delić* (TC, 2008), §53ff; *Milutinović* (TC, 2009), §113ff; *Dordević* (TC, 2011), §1877ff; *Perisić* (TC, 2011), §137ff; *M Stanisić* (TC, 2013), §109ff; *Prlić* (TC, 2013), §233ff. For the ICTR, see e.g. *Bagosora* (TC, 2008), §2011-2014; *Ntabakuze* (AC, 2012), §228ff.

[385] *Hadzihasanović* (TC, 2006), §65.

[386] Ibid, §66.

[387] Ibid, §74-75.

[388] At §295ff.

[389] At §280.

[390] *Perisić* (TC, 2011), §138; *Prlić* (TC, 2013), §239.

[391] *Hadzihasanović* (TC, 2006), §76ff. The term 'commander' is for military superiors; but there may be also civilian superiors, e.g. politicians (*Orić*, TC, 2006, §308). See also: *Halilović* (TC, 2005), §56ff; *Orić* (TC, 2006), §307ff.

authority vested with effective control.[392] The simple exercise of influence over subordinates does not suffice. The range of duties of the commander in occupied territory and in unoccupied territory is different: the first situation is territorial and thus the duties of the commander are broader; the second situation is limited to the soldiers under command without being linked to any specific area. There are different indicators of effective control (as a matter of evidence): the official position of the accused; the power to give orders and have them executed; the authority to apply disciplinary measures; the authority to promote or to remove soldiers; participation in negotiations regarding the troops in question. In joint combat operations, commanders do not automatically exercise effective control over all soldiers. A commander may have effective control even if he or she must use force to control the troops, to enforce his or her orders and impose discipline. A commander using 'undisciplined soldiers' may be held criminally responsible for their misdeeds, since he or she knew or read reason to know that there was a serious risk of non-respect of the orders. In the *Halilović* case (TC, 2005), it was added that every commander is covered by this form of responsibility, even if troops are assigned only on a temporary basis.[393] In the *Perisić* case (TC, 2011), it was recalled that the chain of authority may go through intermediaries.[394] In the *Prlić* case (TC, 2013), the point was made that since the superior position could pass through a chain of intermediaries, there is the possibility that a subordinate has more than one superior. The responsibility of these superiors must be considered in aggregate; each remains responsible within the scope of their effective control; and one of the superiors cannot exonerate the others.[395] In the *Orić* case (TC, 2006), it was added that such commanders can emanate from *de facto* self-proclaimed governments, *de facto* armies or paramilitary groups.[396] Moreover, the *Blagojević* Appeals Chamber (2007) considered that the superior need not know the exact identities of the subordinates perpetrating the crimes.[397] This form of responsibility also covers non-military superiors. The elements applicable to such civilian superiors are not stricter than those designed for military commanders.[398]

[392] In the *Hadzihasanović* case (AC, 2008), it was considered that effective control must in any case be proved. The possession of *de jure* authority constitutes *prima facie* a reasonable basis for assuming effective control, but it does not shift the burden of proof to the defence to disprove effective control (§21). In the *Orić* case (AC, 2008), it was added that the term 'prima facie' is from this point of view misleading (§91-92). In the *Strugar* case (AC, 2008), the Chamber held that the authority to issue orders does not automatically establish that a superior has effective control over his or her subordinates; but it is one of the indicators for such effective control (§253).

[393] See §61. See also *Perisić* (TC, 2011), §114.

[394] At §114.

[395] At §239.

[396] See §309.

[397] At §287.

[398] *Milutinović* (TC, 2009), §120. See also *Dordević* (TC, 2011), §1882.

2. *Mental element: the superior knew or had reason to know*.[399]

There is no strict responsibility under article 7(3). It is necessary to establish that the superior actually knew that his or her subordinates had committed a crime or were about to do so, or had information which would at least give on notice of the risk of such offences by indicating the need for additional investigation. Actual knowledge can be established though direct or circumstantial evidence: e.g. the widespread nature or scope of the crimes; the geographical location of the commander; the staff involved; or the existence of a reporting or monitoring system. The other standard is 'had reason to know'. Here, specific information putting the superior on notice of offences committed or about to be committed is necessary.[400] The stricter criterion 'should have known' (neglect to acquire knowledge) has been rejected.[401] However, general information of a nature to put the commander on notice suffices: e.g. the violent or unstable character of some soldiers; the habits of certain subordinates.[402] Prior knowledge of crimes committed could put a commander on notice that another offence is to be committed. These future offences must be 'of the same type' as those already committed in order to remain foreseeable.[403] In the *Orić* case (TC, 2006), it was added that in case of more informal types of authority, the threshold for knowledge can be more demanding.[404] In the *Delić* case (TC, 2008), the point was made that the 'alarming information' (putting on notice of possible crimes) must have been provided or made available to the superior. But actual acquaintance with the information is not required.[405] In the *Milutinović* case (TC, 2009), a question relating to *mens rea* was considered: knowledge must extend to all the elements of the underlying offence. Thus, for example, in the context of persecution as a CAH, it

[399] *Hadzihasanović* (TC, 2006), §91ff. See also: *Halilović* (TC, 2005), §64ff; *Orić* (TC, 2006), §316ff;

[400] In the *Orić* case (TC, 2006), §323 it was stressed that the information can be written or oral (see also the *M Stanisić* case, TC, 2013, §115). In the *Strugar* case (AC, 2008), the test was described as one going to ascertain if the superior had 'alarming information' putting him or her on notice of the risk of offences and indicating the need for further investigation (§298). The same AC held that a 'substantial likelihood' or 'strong risk' of commission of crimes are too exacting standards and are thus legally wrong (§304-308). Thenceforward, the Chambers of the ICTY adopted the 'alarming information'-test: cf. for example *M Stanisić* (TC, 2013), §115. The ICTR Chambers normally used the test of possession of information 'providing notice of risk of such offences': see e.g. the *Bagosora* case (TC, 2008), §2013.

[401] This has been constantly repeated in the case-law, e.g. in *Delić* (TC, 2008), §67; *Prlić* (TC, 2013), §249.

[402] And: willful blindness will not be an excuse: *Halilović* (TC, 2005), §69; *Orić* (TC, 2006), §322.

[403] *Hadzihasanović* (TC, 2006), §102ff. In the *Strugar* case (AC, 2008), the point was made as follows: '[W]hile a superior's knowledge of and failure to punish his subordinates past offences is insufficient, in itself, to conclude that the superior knew that similar future offences would be committed by the same group of subordinates, this may, depending on the circumstances of the case, nevertheless constitute sufficiently alarming information to justify further inquiry under the 'had reason to know' standard' (§301).

[404] At §320.

[405] §66.

must be shown that the superior knew or had reason to know that the relevant subordinate possessed a discriminatory intent.[406]

3. *Duty to take necessary and reasonable measures*.[407]

First, a commander is not obliged to perform the impossible,[408] and need only take measures within the ambit of the material ability to act. Second, the duties are twofold: to prevent, prior to the commission of the crime, and to punish, after the commission of the crime. The failure to prevent cannot be cured by subsequent punishment. To determine the measures a commander must take, an examination of national law is relevant, especially the regulations of the armed forces. Third, general measures must be distinguished from specific ones. The first relate to the dissemination of rules, training, establishment of disciplinary systems, availability of legal advisors, etc. Failure to take such measures increases the likelihood of violations of IHL, but will not necessarily lead to criminal responsibility.[409] Conversely, the taking of general measures will not relieve the commander for failure to take specific measures. It may however influence the assessment of the foreseeability of specific violations. As to the specific measures, they will vary according to the rank and powers of the commander. Necessary and reasonable measures must be determined on a case-by-case basis. Measures of prevention/punishment are also based on the foreseeability of future offences, notably for similar acts and within an identifiable group of subordinates. Fourth, the duty to punish may be carried out by reporting the facts to the competent authorities. This supposes a duty to investigate into the facts. The duty to punish covers past acts, when there is knowledge of them (retroactive duty to punish). However, the duty to investigate arises only for similar acts within in a same group of subordinates. Not all subordinates have to be checked or suspected. Fifth, the duty of the superior is not based on a causal link with the acts of the subordinates. There is no causal link between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that offence. Requiring a causal link would be tantamount to demanding the involvement of the commander in the offence. This would bring the matter within article 7(1) of the Statute.[410]

[406] At §119. The same reasoning was applied to the special intent of genocide: see the ICTR case of *Ntabakuze* (AC, 2012), §245ff.

[407] *Hadzihasanović* (TC, 2006), §121ff. See also: *Halilović* (TC, 2005), §72ff; *Orić* (TC, 2006), §325ff; etc. Necessary measures were described as those appropriate to show a genuine attempt to prevent or punish; reasonable measures are those within the material ability of the accused: *M Stanisić* (TC, 2013), §116.

[408] But it was added in the *M Stanisić* case (TC, 2013), that every means within the material ability must be exhausted, based on the circumstances prevailing at the time the superior acquires the requisite knowledge or has reason to know (§116).

[409] This is a constant tenet in the jurisprudence: see e.g. the *Prlić* case (TC, 2013), §257.

[410] This is now stressed in all the cases: see e.g. *Halilović* (TC, 2005), §75ff; *Orić* (TC, 2006), §338; *Hadzihasanović* (AC, 2008), §38-39. If a superior participates in the crime according to article 7(1), this form of responsibility has precedence over that under article 7(3). However, the position of

A commander leaving a post shortly after a crime is committed (and who will thus not get the reports on it) will not be criminally responsible, since there is no longer effective control. The new commander may also not incur criminal responsibility for subordinates who were not under command at the time of the offences. This may lead to gaps in punishment.[411]

In the *Orić* case (TC, 2006), it was added that the duty to prevent extends to the planning and preparation of underlying crimes by subordinates, not only their commission. The superior must intervene already at this preparatory stage if there is the requisite information. Moreover, the duty to punish extends to non-completed crimes, i.e. planning and preparation; more precisely, the crime must have been completed by some perpetrators, but the punishment must be extended to those who only participated in the planning and preparation stage.[412] Moreover, as was stated in the *Delić* case (TC, 2008), the superior has also the duty to suppress the crimes while being committed, i.e., to put a stop to the unlawful acts under way.[413]

4. *Burden of proof*.[414]

The Prosecution must prove the elements of superior responsibility beyond a reasonable doubt. This flows from the presumption of innocence. There could be opposed presumptions or shifts of the burden of proof; however, none applies in the context of superior responsibility.

This jurisprudence shows that the particular nature of this offence was progressively better understood. The demise of the 'causation' criterion (causal link between the omission of the superior and the crimes of the subordinates) in favour of a pure responsibility for omission to prevent and punish gives to the offence its proper shape. The broad interpretation of the 'has reason to know' criterion (by holding that general information suffices) makes the adoption of the 'should have known' test (simple negligence) superfluous. The requirement of attention must obviously still prevail, in order not to overburden the duty to control and punish, and considerations of reasonableness must govern.[415] Overall, the crime has been considerably developed in detail and depth: it has become a major form of criminal responsibility of its own.

superior is considered an aggravating factor: *Dordević* (TC, 2011), §1891. See to the same effect: *M Stanisić* (TC, 2013), §118.

[411] §194ff.

[412] *Orić* (TC, 2006), §334.

[413] §71. See also *Prlić* (TC, 2013), §259.

[414] *Hadzihasanović* (TC, 2006), §20off.

[415] As the ICTY often emphasizes, a superior cannot do more than the degree of effective control allows: *Orić* (TC, 2006), §329.

B. Specificities in the period under review

In the period under review, four new questions arose in the context of superior responsibility. One further point remains at least doubtful. These five points have already been mentioned, and can be dealt with briefly.

First, there is the issue of 'similar offences'. To what extent can the knowledge of past offences put a superior on notice that another offence is to be committed? The main discussion of this issue took place in the *Hadzihasanović* case (TC, 2006).[416] The conclusion has been that the future offences must be of a similar type, e.g. property offences. Other types of offences, e.g. to life and limb, are not foreseeable. The point is not to require the same offence (e.g. plunder) but the same family of offences. Moreover, the future offences must concern the same group of persons. A superior cannot be expected to foresee offences by other groups of subordinates for the simple reason that some subordinates had committed some offences in the past. These criteria seem reasonable. The point is that while the position of the superior is crucial to a proper implementation of IHL, it is also true that a superior cannot be made responsible for everything happening within the sphere of his or her subordinates. Some limits – as in private law, with the *culpa in eligendo, instruendo et vigilando* concepts – must be drawn.

Second, the case-law has stressed an additional duty of the superior, in addition to the duty to prevent before the fact, and to punish after the fact: it is the duty to suppress during the fact. The point was addressed in the *Delić* case (TC, 2008).[417] This is a reasonable extension. The question will turn on points of fact: when did the superior learn about the crime? Was there the material ability to intervene to stop the offence? This may be the case when the crimes are either continuous (e.g. unlawful detention) or involve a plurality of offences (e.g. mass killings). In the case of random or rather isolated offences, this type of responsibility will hardly ever arise.

Third, there is the extension of the superior's knowledge to the required *mens rea* of the physical perpetrator (e.g. discriminatory intent in the context of persecution). As we saw, the point was addressed in the *Milutinović* case (TC, 2009).[418] The requirement is quite exacting; it will produce serious problems of proof. Moreover, its justification is not very clear. To impute knowledge of the perpetrator's *mens rea* is in order when the question turns on participation in the offences themselves, i.e. in the context of article 7(1). But it is doubtful in the context of article 7(3), which codifies an independent offence. Moreover, the superior responsibility offence is geared towards preventing and suppressing crime and reducing the risk of crimes in the future. In view

[416] §102ff and 159ff.
[417] §71.
[418] §119.

of these aims, it does not seem appropriate to require such a 'sharing of minds' across the different levels of criminal activity. The point should be limited to the *prima facie* knowledge of the superior that crimes have been or are to be committed. An investigation into the presence or absence of mental elements must be left to further inquiry and to specialized personnel. Overall, it does not seem reasonable to hold that since the superior did not know about the mental elements of the physical perpetrator he or she was relieved of his or her duties under article 7(3). The correct approach should be that a superior who comes to know about acts such as those criminalized under persecution/CAH must act. The legal classification of the acts or omissions of the physical perpetrator (is it persecution or some other crime?) is not the point.

Fourth, the presence of more than one superior was an issue in the *Prlić* case (TC, 2013).[419] Clearly, this raises delicate questions of fact. When a plurality of persons interacts in any system, there is always a dilution, if not of the sense of responsibility,[420] at least of the contribution and knowledge of the single unit with regard to the overall result. What each superior knew, and even more had reason to know, will thus become entangled in a complex web of interaction. On the other hand the fact of a plurality of superiors does not relieve each of their own responsibilities. The consequence is only that the legal analysis becomes more complex.

Fifth, there is one point where some doubts remain. In the *Hadzihasanović* case (TC, 2006), it was stated that a new commander may not incur criminal responsibility for failure to punish crimes committed at an earlier time when the subordinates were not under his or her effective control.[421] It would seem logical to limit this holding to the prevention of the crimes: the new commander is at least able to punish former offences and should be required to do so. This seems to be the position to which the *Orić* Trial Chamber (2006) leaned.[422] But the Trial Court in this case stumbled on (and found itself bound by) the decision of the Appeals Chamber in *Hadzihasanović (Jurisdiction)* (2003).[423] The Appeals Chamber took a different stance (Judge Shahabuddeen dissenting). Thus, the legal position is that with regard to the duty to punish, the superior must have had control over the perpetrators of a relevant crime both at the time of its commission and at the time measures to punish were to be taken.

It is suggested that this is mistaken. The duties to prevent and punish are distinct and arise at different moments in time. A superior who finds

[419] §239.

[420] On these issues, see the reflections of M Reisman, 'The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment' (2010) 351 RCADI 368-369.

[421] §198.

[422] §335.

[423] (Appeal, ,2003), §37ff, 51.

out about crimes committed before assuming command and who has the ability to initiate punishment proceedings should not be absolved of that free-standing duty. The sole criterion under article 7(3) should be effective control. This also limits the time-span in which the different duties apply, and makes sense both from the legal and the military point of view. Legally, the aim of superior responsibility is to prevent and punish crime by subordinates. Opening glaring and wholly unnecessary gaps in that legal regime is unwarranted. Militarily, the transfer of command implies that the new commander inherits all pending and unresolved matters. With no gap in military command, there should be none in the legal responsibility flowing from such command.

VII. Conclusion

Only two points need be made by way of conclusion.

First, the jurisprudence of the ICTY and ICTR has developed in the period under review mainly along the consolidated lines drawn by the past case-law. The times of great legal creativity have gone. The tribunals now essentially administer the previously shaped international criminal law. This is not to be taken as a criticism. Heroic times are transient, accompanied by later phases of digestion and systematization. The historic role of the ICTY in the rebirth and shaping of modern international criminal law will in any case remain on the records.

Second, the greatest non-technical concern of the present commentator is the continuing nationalistic approaches to the work of international criminal justice by the countries of the former Yugoslavia (and elsewhere). Too many persons in all parts of the world continue to consider that the culprits (by definition guilty!) of the enemy can never be sufficiently severely punished – while holding at the same time that the prosecutions against their own 'heroes' are tainted by bias. To some extent this is understandable and could not be expected to be otherwise in consideration of the existing nation-State-driven ideologies and prisms. The same pattern can be observed in the context of other criminal tribunals, such as the ICC. Right my country; wrong the other; all fault theirs; all crime with the other, always with the other, only with the other. This raises interesting questions of collective and individual psychology. It also shows the timeless actuality of the luminous passage in Luke, 6, 41-42: 'Why do you look at the speck of sawdust in your brother's eye and pay no attention to the plank in your own eye? How can you say to your brother, 'Brother, let me take the speck out of your eye', when you yourself fail to see the plank in your own eye? You hypocrite, first take out the plank out of your eye, and then you will see clearly to remove the speck from your brother's eye'.[424] The state of affairs

[424] See also Matthew, 7, 3-5.

described above is one sign of the fact that international criminal justice still has a stony and uphill way ahead. To adjudicate upon the darkest sides of humanity is precisely the mission of the criminal tribunals. But that mission cannot itself change the ways of humanity. This remains, if anything, a social and political task. And significant improvement here is still far from being in sight.