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Kolb, Robert

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THE JURISPRUDENCE OF THE YUGOSLAV AND RWANDAN CRIMINAL TRIBUNALS ON THEIR JURISDICTION AND ON INTERNATIONAL CRIMES (2000–2004)

By ROBERT KOLB*

I. INTRODUCTION

In 2000 the author published an article in this *Year Book*¹ reviewing the substantive case-law of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda in the period from 1995 to 1999. It is now proposed to update that review by considering developments in the period from the beginning of 2000 to October 2004. The focus remains the same: the discussion is limited to matters of substantive law to the exclusion of procedural points. This article deals with the crimes within the jurisdiction of the Tribunals, some issues of participation in the commission of crimes, defences, and some other questions of general interest. For reasons of space, only trial and appeal judgments will be considered; interlocutory decisions may be mentioned in passing where appropriate; moreover, legal writings will be quoted only exceptionally. In order not to repeat what has already been said, reference will be made to the earlier review. The present piece seeks to emphasize developments and novelties but also the departures or indeed fluctuations in the jurisprudence. The aim is to highlight these differences without discussing again the background, which is to be found in the 2000 article.

In the period under review, at least 33 judgments containing some substantive developments on the construction of crimes or defences have been rendered. The ICTY has produced the greater share of these: 19 of these judgments have been handed down by it,² whereas 14 have been decided by the ICTR.³ Many of these judgments of trial chambers or

* Professor of International Law at the Universities of Neuchâtel, Berne, and Geneva (University Centre of International Humanitarian Law).

¹ See R. Kolb, 'The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes', *British Year Book of International Law (BYIL)*, vol. 71, 2000, pp. 259–315.

² The judgments are the following: (1) *Kupreskic* (14 January 2000); (2) *Blaskic* (3 March 2000); (3) *Aleksovski* (Appeal) (24 March 2000); (4) *Delalic* (Appeal) (20 February 2001); (5) *Kunarac* (22 February 2001); (6) *Kordic* (26 February 2001); (7) *Jelusic* (Appeal) (5 July 2001); (8) *Krstic* (2 August 2001); (9) *Kvočka* (2 November 2001); (10) *Krnjelac* (15 March 2002); (11) *Kunarac* (Appeal) (12 June 2002); (12) *Vasiljevic* (29 November 2002); (13) *Naletilic* (31 March 2003); (14) *Stahic* (31 July 2003); (15) *Krnjelac* (17 September 2003); (16) *Galic* (5 December 2003); (17) *Krstic* (Appeal) (19 April 2004); (18) *Blaskic* (Appeal) (29 July 2004); (19) *Brdjanin* (1 September 2004).

³ The judgments are the following: (1) *Musema* (27 January 2000); (2) *Kayishema* (Appeal) (1 June 2001); (3) *Akayesu* (Appeal) (1 June 2001); (4) *Elizaphan/Ntakirutimana* (21 February 2003);

appeal chambers are decided along traditional lines, containing novelties only on scattered and circumscribed points, which however are of some importance. As a whole this body of jurisprudence is less impressive than that of the formative years, between 1995 and 1999. At that time, the chaotic status of international criminal law had to be remedied by an outstanding body of creative reasoning and innovative legal engineering. At that time, the ICTY contributed to great developments within the law, such as the extension of war crimes for international armed conflicts to non-international armed conflicts, or to the whole theory of internationalization of an internal armed conflict through foreign intervention and action on behalf of a foreign power.⁴ In the present period, these developments were mainly consolidated and extended. However, one regrets the tendency, present more or less to date, to restate lengthily the law already expounded by the previous judgments and to engage generally in long discussions quite unnecessary to the decision at hand. Greater concision in the areas already settled would have been advisable and would have lent more force to the fresh developments, which otherwise tend to be overshadowed.⁵

Another criticism, sometimes voiced by commentators, is that of some contradiction within the case-law from one chamber to another. But that is quite natural if one thinks of the unsettled status of the many questions of international criminal law and the diverging approaches held in that context. It is sufficient that main lines emerge and that any contradictions are gradually addressed and resolved.

The existence and the case-law of the *ad hoc* tribunals has, during the period from 1999 up to today, been called into question also from the point of view of events situated on the policy level. It is known that international criminal tribunals have only been created when the circumstances allowed, *i.e.* they were based on victor's justice. That justice has not always been partial or otherwise defective for those being judged (whatever the position of those it omitted to judge); it is sufficient to recall here the precedents of Nuremberg. In a decentralized international system, the point was, as one commentator puts it,⁶ to have some criminal justice instead of having none at all. However, if inequality becomes too blatant and one has the impression that some few situations are singled out for prosecution whereas many others are not—this course being based on the will of some or even one Power—a sense of dissatisfaction remains. Recent events could prompt such an impression. Certainly, the so-called

(5) *Semanza* (15 May 2003); (6) *Niyitegeka* (16 May 2003); (7) *Rutaganda* (Appeal) (26 May 2003); (8) *Kajelijeli* (1 December 2003); (9) *Nahimana* (3 December 2003); (10) *Kamuhanda* (22 January 2004); (11) *Ntagerwa* (25 February 2004); (12) *Gacumbitsi* (17 June 2004); (13) *Niyitegeka* (Appeal) (9 July 2004); (14) *Ndindabahizi* (15 July 2004).

⁴ See the general overview over that practice by a judge of the tribunal: T. Meron, 'International Law in the Age of Human Rights', *RCADI*, vol. 301, 2003, pp. 24ff.

⁵ Thus concision was one of the main *leges artis* of the Roman juriconsults.

⁶ E. David, 'La responsabilité pénale: quelles poursuites pour quels crimes?', in: K. Bannelier e.a. (eds.), *L'intervention en Irak et le droit international*, Paris, 2004, p. 298.

internationalized tribunals for Sierra Leone, Cambodia, or East Timor constitute some progress; but they are still *ad hoc* tribunals created from case to case. In 2002, the Statute of the ICC came into force. This court is permanent and is in theory vested with equal and universal jurisdiction. However, its conventional framework allows States not to subject themselves and their territory to its jurisdiction, leaving therefore important areas of inequality. The essential point is that in the period now under review, roughly from 1999 to 2004, we witnessed unprecedented attacks against the ICC, especially by the United States. At the same time, there has been an unprecedented degree of unilateral uses of force, very probably (Kosovo) or manifestly (Iraq) not permitted by international law; we were also confronted with other cases of contempt for the law (*e.g.* the atrocities committed in the Abu Greib camp in Iraq in 2004). These events not only shake the already weak world order; they also shake the moral foundations of criminal prosecution by international tribunals, to the extent it may be increasingly felt⁷ that prosecution is not a matter of justice but of all too selective political choice.⁸ Such a development would be fatal; it is one important task at present to try to limit its reach.

At this juncture it is convenient to turn to the case-law in the period under review. It is necessary to stress that the review will be selective.

II. THE CONDITIONS FOR THE JURISDICTION OF THE TRIBUNALS

On the question of jurisdiction, the period under review brought few developments. The whole matter is to some degree of a preliminary character and has been dealt with in depth in the first years of the tribunals' existence. However, some aspects may be noted.

*1. The requirement that the rules of international humanitarian law applied be part of customary law*⁹

Until the year 2000, the Yugoslav and Rwanda Tribunals had the tendency to follow literally the *Report of the Secretary-General of the United Nations pursuant to paragraph 2 of Security Council Resolution 808* (1993),¹⁰ being a sort of *travaux préparatoires* for the establishment of the two judicial bodies. The Report explained that in order not to contravene the principle *nullum crimen sine lege*, the crimes over which the Yugoslav Tribunal should exercise jurisdiction had to be part of the body of customary rules

⁷ It is to be noted: rightly or not.

⁸ The policy of the US, voiced by Ambassador Prosper, of favoring the creation of *ad hoc* tribunals through the Security Council instead of the ICC goes in that direction. It will be noted that because of the veto right, no *ad hoc* tribunal could ever be established against the wishes of the US (or any other permanent member).

⁹ See *BYIL* (2000), pp. 26off.

¹⁰ UN Doc., S/25704.

of international law. This conception has some merit; but it is unduly narrow. There may be policy considerations for not holding somebody criminally responsible if the acts committed were not customarily, and thus *erga omnes*, subject to criminal repression.¹¹ However, the *nullum crimen* requirement is satisfied as soon as the criminal prohibition applied at the time of commission of the offence(s) and at the place where such offence(s) were committed. To that extent, a treaty applicable on the State on whose territory the acts were committed is sufficient to trigger criminal responsibility, if it was in force at the relevant time and if it was properly inserted within the municipal legal order.¹² Thus, the ratification by Yugoslavia of the two Additional Protocols of 1977 to the Geneva Conventions of 1949, and the Agreement concluded among the warring parties of the Bosnian War under the auspices of the ICRC (by which a series of obligations under the law of armed conflicts were accepted)¹³ were sufficient to found a criminal liability as far as the *nullum crimen* requirement is concerned.

In the previous period, there were some timid moves towards such a broader conception. Thus, the Rwanda Tribunal held in *Kayishema* (1999)¹⁴ that Protocol II of 1977 had been ratified by Rwanda and that it was not necessary to inquire into its customary status.

In the period presently under review this broadened jurisdictional approach has been adopted on a much more general basis. Thus, in *Blaskic* (2000), it is explained that any special agreement binding on the warring parties could qualify for conferring criminal jurisdiction, since even if it was not expressive of customary international law, there was no risk of infringing the *nullum crimen* principle.¹⁵ Moreover, the trial chambers and appeal chamber constantly repeat, under Article 3 of the Statute relating to war crimes, that in order to apply the mentioned provision 'the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met...'¹⁶ With respect to Additional Protocol II of 1977, the Rwanda Tribunal took the same approach. In *Musema* (2000), it explained that the Protocol II was applicable *qua* treaty law to Rwanda in the relevant period; and that was held to be sufficient to bestow it with jurisdiction. It then added, *obiter*, that at least Article 4 of Protocol II (which was the main basis for the prosecution) embodies indisputably customary prohibitions paralleling the conventional ones.¹⁷ In the result,

¹¹ Such a policy reason might be that a purely conventional basis does not assure that the same acts be prosecutable generally if all the parties to a conflict have not ratified the same conventions or undertaken the same special agreements. It must be noted that such an inequality was not forthcoming in the case of Yugoslavia, since the accepted conventional obligations applied throughout the relevant territory.

¹² By the same token, even purely internal legislation would suffice if it clearly faces *ratione materiae* the situations covered.

¹³ Agreement of 22 May 1992.

¹⁴ At §156.

¹⁵ *Blaskic* (2000), §172. The Tribunal brings thus into the reach of its consideration the two Additional Protocols of 1977.

¹⁶ See, e.g., *Kunarac* (2001), §403; *Kordic* (2001), §167; *Kvočka* (2001), §123; *Brdjanin* (2004), §126. This statement could already be found in *Tadic* (judgment of the Appeals Chamber, 7 May 1997), §610.

¹⁷ *Musema* (2000), §240. See also *Semanza* (2003), §§351ff.

this double-tier finding strengthened its conclusions based mainly on treaty law.

As can be seen, an element implicit (or even explicit) in the previous case-law comes out with greater strength in the period now under review: the Tribunals do not hesitate to found themselves on such special agreements instead of insisting on customary law. This allows them to shorten the legal analysis and to avoid to some extent the often awkward strictures in the establishment of customary law; conversely, it narrows the jurisprudential scope of the findings, since these are not founded on generally applicable law but on some particular law. However, the Tribunals most often do not completely exclude customary law from their reasoning; they simply reduce the volume with which they proffer it. In fact they often affirm both prongs, saying that a norm applies *qua* treaty law and then adding that it is also founded on customary law (or at least to some extent on customary law). This last affirmation is in such cases a somewhat shorter statement, since it becomes an *obiter dictum*.

The correct perspective is therefore that a one-sided approach (focussed exclusively on customary law) increasingly gives way to a two-tier approach (navigating between customary and conventional law) which allows the tribunals to simplify, in a series of cases, the findings on the customary nature of the norm at issue by confining their analysis to an *obiter dictum*. By that 'integrated' approach, the mutual exclusivity and aggressive duality between the sources is lessened. Rather a sort of pluralism is affirmed. At the same time, the excessive limitations of the Secretary General Report of 1993 are finally avoided.

2. *The requirement that the violation of the rule must entail, under customary international law, individual responsibility*¹⁸

If it is true that conventional law suffices to found the criminal responsibility of any accused, then it must also suffice, as a source, to establish *individual* criminal liability. The point is, however, that such instruments rarely affirm individual criminal responsibility under international law but leave the matter to the domestic law of the States parties. A notable exception is the grave breaches régime of the Geneva Conventions and Additional Protocol I, and a series of analogous provisions in instruments adopted since then.¹⁹ But even the grave breaches régime covers only a small minority of the possible violations of the conventional provisions, so that the question largely remains subject to a case-by-case analysis.

As has been explained in the previous article, the problem of customary individual responsibility arises especially for a series of breaches incorporated into the Statutes not by express description but only by way

¹⁸ *BYIL* (2000), pp. 264ff.

¹⁹ See, e.g., Article 15 of the Second Additional Protocol to the Hague Convention on Cultural Property in Period of Armed Conflict (1999). See V. Maimetti, 'De nouvelles perspectives pour la protection des biens culturels en cas de conflit armé: l'entrée en vigueur du Deuxième Protocole relatif à la Convention de La Haye de 1954', *International Review of the Red Cross*, vol. 86, 2004, pp. 358ff.

of *renvoi*. Such is particularly the case of Article 3 of the ICTY-Statute which limits itself with criminalizing 'violations of the laws and customs of war', going on to list some few examples of such acts. In this context, the problem of individual criminal responsibility arises for each count which is not expressly listed;²⁰ it is necessary to inquire if such individual criminal responsibility attaches under customary international law to the prohibition at stake, or if that prohibition has so far given rise only to mechanisms of State responsibility.²¹

Even where no clear precedents existed, the tribunals were quick to find that individual criminal responsibility attaches to an act, under the essential condition that the act be a grave and manifest violation of fundamental social and moral values (and thus ordinarily prosecuted under municipal law). The problem arises especially in the context of non-international armed conflicts, where the record of criminal prosecutions prior to 1993 was almost non-existent.²² No direct support for individual criminal responsibility existed in this field. Thus, the Tribunals had recourse to the openly deductive reasoning of the International Military Tribunal (IMT) at Nuremberg, in the celebrated statement that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'²³ On such a view, individual criminal responsibility is inherent in grave violations of fundamental prohibitions, since only then can their essential protective content be enforced. The logic is clearly deductive rather than inductive, and thus based on general principles of law rather than on custom as traditionally understood. It is this 'inherent' logic, which forms the backbone of the 'Tribunals' reasoning in this context.

In the period under review, the question was analyzed in detail with respect to common Article 3 to the Geneva Conventions of 1949. As it is known, that article applies to non-international armed conflicts—even if it would be more correct to state that to some extent it applies in any situation whatever, ranging from perfect peacetime to simple internal tensions and disturbances and finally to fully fledged international armed conflict. In the case of peacetime or simple tensions, it applies to the

²⁰ For the acts expressly listed, there is at least a presumption that they give rise to customary individual responsibility: otherwise they would not have been listed. That presumption is difficult to overcome, and in fact it has never been rebutted in either of the two *ad hoc* Tribunals.

²¹ There are two main types of sanctions for the violation of a norm of international law: (1) *State responsibility* for acts in breach of an international legal norm, e.g., the violation of a provision of a treaty on exploitation of a common continental shelf. In the mentioned example, the State responsibility is exclusive, there is no individual responsibility under international law for the breach. (2) *Individual responsibility* for breach of a norm for which international law provides for such a responsibility, e.g., the commission of acts of genocide. Such responsibility will ordinarily be additional to the State responsibility. In some cases there may be international criminal responsibility without State responsibility, e.g., if some crimes against humanity or genocide are committed by private individuals, not engaging the State.

²² See the somewhat over-elaborate (albeit important and useful) explanations in *Tadic* (1995), §§128ff.

²³ See *AJIL*, vol. 41, 1947, p. 220.

extent that its provisions are identical to the applicable (and non-derogable) human rights provisions, notwithstanding that it could be said that these provisions take precedence as *lex specialis*.²⁴ In the case of international armed conflict, it is eclipsed by the more detailed provisions of the Conventions; but it is not impossible to hold that it still applies 'in parallel'.²⁵ In the *Delalic (Celebici)* Appeal (2001),²⁶ the question of individual criminal responsibility under common Article 3 gave rise to prolonged reasoning, in which the 'inherent' view featured quite prominently. The ICTY founded itself on a series of reasons justifying the criminalization of conduct prohibited by common Article 3. First, it recalled the IMT axiom on 'men and abstract entities'. Second, it made reference to State practice, especially on the textual level: national legislation, Security Council resolutions, military manuals, judicial practice, *e.g.* in Nigeria. Third, it recalled the Yugoslav Criminal Code and the Agreement of 22 May 1992. Fourth, it raised a non-discrimination argument of a much broader nature: if there was no individual criminal responsibility, the same horrendous conduct committed in a non-international armed conflict could not be punished, whereas it could be prosecuted if part of an international armed conflict. As many modern conflicts tend to merge both elements, international and internal, there is no justification for such a discrimination, which disturbs the sense of justice. (It may be added that this reasoning had already inspired the Security Council when establishing the Tribunal.) Fifth, the ICTY found that there was some intent of the 'legislator' to criminalize violations of common Article 3, even if no enforcement mechanism was provided for those ends. Reference was made to the ICRC Commentary. This argument is to some extent optimistic; it re-construes more than it construes; but this does not mean that it is necessarily inadequate. Sixth, the *nullum crimen* argument was held to fail: 'It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilized people, and thus are, in the language of Article 15(2) of the International Covenant on Civil and Political Rights, criminal according to the general principles of law recognized by civilized nations.'²⁷

The findings of the ICTY are summarized in some detail here since they show a typical line of argument: the most variegated reasons are interwoven by successive additions and without any clear hierarchy or close scrutiny. It is as though the effect of their addition gives them incremental weight. Some elements are clearly deductive (the *Nuremberg*

²⁴ But it could equally be said that it reinforces those provisions or that it applies in parallel. The ICJ has also held that norms of international humanitarian law are a sort of *lex specialis* to human rights norms, both applying in conjunction (i.e. IHL fixing what is to be understood under 'arbitrary deprivation of life' in the sense of human rights norms). This type of *lex specialis* is not the ordinary one, derogating from another source; it is a particular *lex specialis*, supplementing another source. See the *Nuclear Weapons* Opinion (General Assembly), [1996] ICJ Rep p. 240, §25.

²⁵ As does customary law on the use of force with respect to the Charter law: see the *Nicaragua* case [1986] ICJ Rep 92ff.

²⁶ At §§153ff.

²⁷ *Delalic* (Appeal, 2001), §173.

dictum, non-discrimination, the common conscience of mankind), whereas others purport to be inductive (State practice, the intention of the drafters). The impression is that the first have greater weight, at the end of the day, than the second, or that the first would suffice in themselves even if the second were absent.²⁸ That may also be the reason why the practice of States is analyzed at a relatively cursory level, hardly sufficient to meet the stringent criteria for establishing customary law.²⁹ However, it has to be borne in mind that the argument based on the municipal law of the former Yugoslavia (and eventually that based on the Agreement of 1992) disposed of the matter: there was evident criminalization in the law applicable to the accused, and that was sufficient to uphold the decision. As with the requirement that the substantive rule applied pertains to customary law, so also the equivalent rule that it gives rise to individual criminal responsibility can be based alternatively on the two (and possibly three) prongs of: (1) general customary international law, or (2) particular international law, especially applicable conventions, and also (3) internal law. As the basic reason for the existence of the requirement is the *nullum crimen* principle, there is strictly speaking no necessity for a source of international law to be available: municipal law suffices, if it clearly establishes criminal responsibility for the incriminated acts, committed in the context of an armed conflict. The requirement of an international source (as distinct from purely municipal sources) may be held necessary in order to establish and to limit the jurisdiction of an *international* tribunal; but this is only a matter of convenience and not of legal compulsion.

All in all, the requirement at stake is not heavily limitative on the reach of criminal responsibility under the jurisdiction of the Tribunals. Only rules not dealing with very grave matters could be held not to give rise to individual criminal responsibility. But such matters are already ruled out under the separate requirement that the violation must be serious, *i.e.* 'that it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim'.³⁰ To a large extent, this last rule primarily performs the function of fixing a proper threshold for the individual criminal responsibility requirement here at stake. The rule of thumb thus appears to be the following: if a violation is held 'serious' as defined under the seriousness requirement, it will automatically also be held to give rise to individual criminal responsibility.

²⁸ Could an accused be left unpunished for appalling acts only because he has the chance of having committed them before there have been international criminal prosecutions of that type of acts? Is there a privilege of being the first? That does not seem to be the logic of the Tribunal. It is more inclined to what has been called here the 'inherent' view.

²⁹ But it is true that customary international law in the field of human rights law and of international humanitarian law is based more heavily on the element of *opinio juris* than on that of practice: see, *e.g.*, C. Tomuschat, 'International Law: Ensuring the Survival of Mankind in the Eve of a New Century', *RCADI*, vol. 281, 1999, p. 334; R. Abi-Saab, 'Les conflits internes aujourd'hui', *Essays in Honour of J. Siotis*, Bruxelles, 1995, pp. 323-5; R. Kolb, 'Selected Problems in the Theory of Customary International Law', *NILR*, vol. 50, 2003, pp. 124-5.

³⁰ See *Tadic* (1997), §610.

3. *The requirement that the violations of humanitarian law took during a certain period of time*³¹

Only one slight addition is warranted with respect to the temporal jurisdiction of the Tribunals. Article 1 of the ICTR Statute limits the jurisdiction of the Tribunal to acts (and omissions) committed between 1 January 1994 and 31 December 1994. However, as the case-law has shown, this time-span is not as rigid as it might at first sight appear. Thus, in the *Nahimana* case (2003), the ICTR was confronted with the situation of a 'conspiracy to commit genocide'³² founded on an agreement concluded among the accused before the relevant time-span. That agreement was put into execution in 1994 and led to the commission of various genocidal practices performed by the accused. The Tribunal held that both acts, the conspiracy agreement and the genocidal acts, fell within its jurisdiction, notwithstanding the fact that the agreement was strictly speaking situated outside the relevant temporal time-span. The Tribunal held that the conspiracy to commit genocide is an inchoate offence of a continuing character, culminating in the commission of the prohibited acts; thus, it extends by way of legal construction up to the time of execution of the contemplated acts (*i.e.*, in this case, into the year 1994).³³ There are thus some offences of a 'continuous character', straddling time-borders. In other words, there are some temporal 'constructive presences', just as there are spatial constructive presences created by legal craftsmanship.³⁴ What has been said of conspiracy must presumably apply equally to the 'direct and public incitement to commit genocide' prohibited by the Statutes.³⁵ It also represents an inchoate offence: *ubi eadem ratio, idem jus*.

4. *The existence of an armed conflict*³⁶

In the period under review, the question of the existence of an armed conflict was refined only with respect of the spatial element. The rule on that point is simple: it is sufficient that there be an armed conflict in

³¹ *BYIL* (2000), pp. 267–8. No aspects touching on the spatial jurisdiction or the seriousness of the crimes will be developed here, since there does not seem to be any significant development of the law in that areas. The question of jurisdiction *ratione loci* must not be confused with the geographical reach of an armed conflict, which is held to exist throughout the territory of a party to the armed conflict, even in areas where actual fighting does not take place. This aspect is related only to the concept of armed conflict and not to that of spatial jurisdiction. The spatial jurisdiction is limited according to Article 1 of the ICTY Statute to the 'territory of the former Yugoslavia' (the regulation being more intricate for the Rwanda Tribunal). To this general requirement, the *further* requirement of the existence of an armed conflict is added, and that further requirement has its proper and own spatial dimension (existence of armed conflict *ratione loci*). To some extent both may overlap, but they remain conceptually different.

³² See Article 2 §3, letter b of the ICTR Statute.

³³ *Nahimana* (2003), §1044.

³⁴ As for international law, *e.g.*, in the law of the sea, in the context of some acts whose effects are felt in the contiguous zone, see V. Lowe, 'The Development of the Concept of the Contiguous Zone', *BYIL*, vol. 52, 1981, pp. 109ff.

³⁵ See Article 2 §3, letter c of the ICTR Statute; Article 4 §3, letter c of the ICTY Statute.

³⁶ *BYIL* (2000), pp. 269–71.

(some parts of) a State in order that the law of armed conflict apply to all of its territory, notwithstanding the absence of any local hostilities in any particular part of it.³⁷ The rule is thus that of the 'unity of the territory' of the State, just as the same rule exists in other areas of international law, for example in matters of sovereignty, treaty application, international responsibility, etc. Evidently, if there is no fighting in a certain part, there will be little chance to apply rules relating to hostilities. But a whole series of other rules may apply, such as those relating to imprisoned persons, to destruction of property, to deportations, etc. The existence of an armed conflict somewhere in the territory is simply a precondition for the relevant norms of international humanitarian law to be applicable.

Since the question of the exact meaning of the spatial existence was called in question, the ICTY insisted on the principle of 'geographic unity', strongly reaffirming it. In the *Kunarac* Appeal (2002) it was explained that: 'There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring States or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved.'³⁸ Thus, a violation of the laws and customs of war may occur at a time and place where no fighting is actually occurring. Of course it would be necessary to establish the existence of a nexus between the armed conflict and the relevant acts; if the acts are unrelated to the armed conflict, they will not give rise to prosecution under the guise of that conflict.³⁹ But that is an additional question which does not impeach upon the clear principle of unity of territory. For if there is no armed conflict in the territory, no war crime can be committed at all, whereas if there is no nexus in a particular case, this simply means that the particular act at stake cannot be considered a war crime. The former question is general and preliminary; the latter only particular and consequential.

With respect to the temporal aspect mentioned in *Kunarac* many uncertainties remain. There are certainly norms of international humanitarian law which continue to apply beyond the 'general conclusion of peace', the classical example being that relating to prisoners of war or other captives still held, up to the moment they are released.⁴⁰ Moreover, what a general conclusion of peace (or a peaceful settlement) exactly means will be clearer in cases where the question hardly gives rise to difficulties rather than in hard cases where it is likely to appear. Suppose that the fighting goes on at lower intensity by way of resistance or other similar actions: where will the line be drawn? The examples of Afghanistan or

³⁷ See *Delalic* (1998), §185.

³⁸ *Kunarac* (Appeal, 2002), §57.

³⁹ On the nexus requirement, see below at Section 5.

⁴⁰ See, e.g., *Blaskic* (2000), §64.

Iraq (2004) spring to mind. When did the hostilities end, if they ended at all? The answer can be sought only in the principle of effectiveness, which permeates the matter: formal agreements are not relevant if the facts contradict them.⁴¹ An independent inquiry into the real situation must show if there is still the level of violence qualifying as an armed conflict, or if there is still an overbearing foreign presence justifying the holding that an occupation continues.

5. *The existence of a nexus between the offences and the armed conflict*⁴²

The nexus requirement differs in the two Statutes in the sense that it does not apply to the same crimes. Moreover, in the two Statutes its intrinsic meaning and substance are the same only with regard to the main crime to which it applies, *i.e.* war crimes.

For the ICTY, the requirement that there must be a nexus between the offence and the armed conflict applies to all the offences under its jurisdiction with the exception of genocide. It thus even applies to one offence which does not require such a nexus under general international law, *i.e.* crimes against humanity. The nexus requirement is usual for war crimes, for such crimes can be committed only as part of an armed conflict; but it is extraordinary in relation to crimes against humanity, this aspect constituting a voluntary limitation of the jurisdiction of the ICTY by the drafters of the Statute.

As for the ICTR Statute, it requires such a nexus only for the violations of common Article 3 and of Additional Protocol II of 1977, as criminalized by Article 4 of its Statute. One is here confronted with the situation which prevails also under customary international law: *i.e.* a nexus only for war crimes, not for crimes against humanity. As we shall see, in the period under review the nexus requirement was particularized to a degree for war crimes and down-played to a degree for crimes against humanity.

The meaning of the 'nexus' is not the same for war crimes and for crimes against humanity. In the context of war crimes, it has been interpreted as requiring a true relation between the acts and the armed conflict: the first must be 'closely related' to the armed conflict. The test is thus substantive and must be applied in each particular instance. Conversely, in the context of crimes against humanity, the ICTY has finally interpreted the 'nexus' to mean no more than the objective existence of an armed conflict in the territory concerned: hence, the nexus requirement disappears as a substantive condition, or merges into the existence of an armed conflict. Thus, if there is an armed conflict in a territory, any act qualifying as a crime against humanity or genocide committed in that territory will automatically fall under the jurisdiction of the Tribunal, without any

⁴¹ This is the basic principle upon which the modern law of armed conflict is being erected: see Article 2 of the Geneva Conventions of 1949.

⁴² *BYIL* (2000), pp. 271–3.

scrutiny as to its substantive relation with that conflict: 'The requirement that there exists an armed conflict does not necessitate any substantive relationship between the acts of the accused and the armed conflict whereby the accused should have intended to participate in the armed conflict... [A] nexus between the acts of the accused and the armed conflict is not required. The armed conflict requirement is satisfied by proof that there was an armed conflict at the relevant time and place.'⁴³ The existence of an armed conflict is sufficient, it being a general prerequisite for exercising jurisdiction at all. As an objective prerequisite (*Objektive Strafbarkeitsbedingung, condition objective de punissabilité*) it is independent of the *mens rea* of the accused: the accused need not have known about the existence or qualification of the armed conflict. The rule in this field is: objective existence not conditional relation.

The reason for this restrictive interpretation, doing away with the nexus, is to narrow the departure from customary international law, which knows of no nexus requirement in the context of crimes against humanity. By construing the point as a purely preliminary jurisdictional enquiry into the existence of an armed conflict, the departure from general international law is minimized; and that was the intended result.

Finally, with regard to genocide, the ICTY Statute (as the ICTR Statute) does not require the existence of an armed conflict at all;⁴⁴ thus the question of a nexus does not arise.

The area in which the nexus requirement still applies is that relating to war crimes, whether in an international armed conflict or in an internal armed conflict (common Article 3, Protocol II of 1977). As to the substance, the nexus requirement is not always easy to apply. In abstract terms it means that there must be some 'close relation' between the acts incriminated and the hostilities.⁴⁵ However, the exact standard has to be worked out in practice; some intricate situations have given rise to a rich jurisprudential material. The case-law has invoked different formulae, ranging from 'closely related' (which is the most commonly used) to 'direct connection',⁴⁶ 'geographical and temporal link',⁴⁷ 'acts committed in conjunction with the armed conflict',⁴⁸ 'action under the guise of an armed conflict',⁴⁹ or still to 'sufficient link'.⁵⁰ Traditionally the nexus requirement was held to be satisfied in the following situations: (i) acts or omissions forming part of the armed conflict or of the hostilities, e.g., the shelling of civilian buildings; (ii) acts or omissions performed in order

⁴³ *Kunarac* (2001), §413. This has become constant jurisprudence: see, e.g., *Kordic* (2001), §§32-3; *Brdjanin* (2004), §133 (speaking of a geographical and temporal link with the armed conflict, but that does not seem to imply more than the objective existence of it in the territory; therefore, these words would better be dropped). *Contra: Blaskic* (2000), §§66-9.

⁴⁴ See, e.g., *Krstic* (2001), §§480-1. ⁴⁵ *Tadic* (1997), §573.

⁴⁶ *Kayishema* (1999), §188. ⁴⁷ *Kupreskic* (2000), §546.

⁴⁸ *Musema* (2000), §260, in addition to the 'closely related test'; is the 'conjunction-test' a supplementary one, or is it considered to express the same idea as the 'closely related'-test? See also *Semanza* (2003), §369.

⁴⁹ *Rutaganda* (Appeal) (2003), §569.

⁵⁰ *Kordic* (2001), §32.

to further or support the war effort or policy of one party to the conflict, even if there is no formal endorsement, *e.g.*, acts of ethnic cleansing done in furtherance of the general war policy of one party.⁵¹ Both types of acts involve direct participation in the conflict, either in a formal or in an informal way.

Some new light was shed on that question in two new cases, in *Kunarac* (Appeal, 2002) and in *Rutaganda* (Appeal, 2003). These two cases developed a 'substantial influence' test which complements and adds to the former 'furtherance' test. Thus, it was held that the armed conflict must have played a substantial part in the perpetrator's ability to commit the crime, the decision to commit it, the manner in which it was committed, or the purpose of the commission.⁵² Conversely, the armed conflict need not have been causal for the commission of the crime.⁵³ In applying the 'substantial influence' test, several factors are proposed, in addition to those already mentioned: *e.g.*, the fact that the perpetrator is a combatant, that the victim belongs to the opposing party, that the act serves the ultimate purpose of a military campaign, that the act is committed as part or in the context of the perpetrator's official duties, etc.⁵⁴ None of these factors is in itself decisive; but they all tend to create a sort of presumption, which must be overcome by contrary evidence. Substantial influence means direct influence, not simply collateral advantages created by the state of conflict. Thus, if a perpetrator finds that the armed conflict created favorable conditions for the commission of his common crime, *e.g.*, by lessening police control in the relevant area, he will not be committing a war crime (*Rutaganda*).⁵⁵ The nexus requirement is not satisfied if one takes just the *opportunity* to commit an act during the time of an armed conflict; the armed conflict, though not causal to the commission of the act, must have been the *intrinsic reason* to have done so.

The older furtherance test covered arguably only cases where there was some subjective link to the armed conflict, *i.e.* the intention to further the war aims of one party, or the support of the war policy of one party. This intention could be interpreted quite extensively; but some form of participation was manifestly required. Does the substantive influence requirement modify that situation? It could be argued that an objectively preponderant influence of the armed conflict in the perpetrator's ability to commit the crime (a criterion mentioned in *Kunarac*) might suffice, instead of requiring a subjective furtherance intention. The *caveat* in *Rutaganda* has obviously to be taken into account: the mere facilitation of a common crime by the general situation of war is not sufficient. But suppose that the armed conflict provides some individuals with the

⁵¹ See *BYIL* (2000), pp. 272–3. See the partial divergence in *Blaskic* (2000), §70, not requiring acts in the interest of one party to the conflict.

⁵² *Kunarac* (Appeal) (2002), §58. *Rutaganda* (Appeal, 2003), §569.

⁵³ *Kunarac* (Appeal) (2002), §58. *Rutaganda* (Appeal, 2003), §569.

⁵⁴ *Kunarac* (Appeal) (2002), §59. *Rutaganda* (Appeal, 2003), §569.

⁵⁵ *Rutaganda* (Appeal, 2003), §570.

special arms they need to commit a crime; suppose that the decision to commit the crime is shaped because of some injustice suffered under the strains of the conflict; suppose that the way the crime is committed involves the use of military personnel which is manipulated and unknowingly furthers or even creates the conditions for the commission of the crime. All these situations could be brought within the four corners of the substantial influence theory.

It must, however, be asked if such an objective influence of the armed conflict is really sufficient. Is the real point not, rather, to ask whether the crime was merely committed on occasion of an armed conflict (in essence remaining a common crime), or if it was committed for the purpose of furthering or sustaining the armed conflict (being then clearly a war crime)? And if that is the true point, surely the furtherance test expressed it better? In effect, nothing would be gained, through large formulae, to bring into the realm of international prosecution common crimes committed 'under some guise' of the armed conflict. Moreover, if we were to add the substantial influence requirement to the old furtherance test, the position would end up being too restrictive: for if a perpetrator acts in order to sustain the war effort of one side, it would be excessive to require in addition some particularly important influence from, or on, the armed conflict. The acts committed, in such a case, should be held automatically to relate to the armed conflict under the nexus requirement. Consequently, the substantial influence criterion is perhaps a less necessary and happy novelty than it seems at first sight. The old furtherance criterion, correctly applied, was, it is submitted, satisfactory.

Finally, it can be noted that the ICTR, which had handled the nexus requirement in a particularly exacting way in the previous period of review,⁵⁶ somewhat relaxed it in this period. The crux was that the trial chambers had heretofore neatly separated genocide from the armed conflict. They had held that the indicted civilians holding posts of authority had committed their crimes only in the context of the campaign of hatred against the Tutsi (and moderate Hutu); according to this view, they had not acted in the context of the armed conflict taking place at the same time, nor in support of the war effort of one party to that armed conflict. In *Rutaganda* (Appeal) (2003), the Appeals Chamber reversed that jurisprudence, by invoking the new criteria developed in *Kunarac*. It held that the government, in order to fulfil one of its policy aims, sponsored the paramilitary groups carrying out the attacks on the Tutsis; and that the acts of genocide thus perpetrated were linked to the armed conflict as they were a part of the overall governmental campaign.⁵⁷ The point mainly turns on a question of fact, *i.e.* the relatedness of the ethnic cleansing policy with the armed conflict; and it is certainly reasonable to

⁵⁶ *BYIL* (2000), p. 273. The ICTR had thus at that time declined to pass any conviction on Article 4 of its Statute, dealing with violations of Common Article 3 to the Geneva Conventions (1949) and of Additional Protocol II of 1977.

⁵⁷ *Rutaganda* (Appeal, 2003), §§571ff.

admit that there was at least a partial overlap between the two. It will be noted that it was not necessary to employ the substantial influence test, since the furtherance test would have led to the same result.

III. ARTICLE 2 OF THE ICTY STATUTE: GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 1949⁵⁸

There has been little movement within this category of crimes, but at least two general points must be noted.

I. The requirement of an international armed conflict

The *Tadic* Appeals Chamber (1999)⁵⁹ had held that the conflict in Bosnia-Herzegovina was an international armed conflict⁶⁰ because of the overall control of Serbian and Croat States on the local militias of the Bosno-Serbs and of the Bosno-Croats. This jurisprudence has been followed in the period presently under review, and any challenge to it has been rejected: one may quote *Blaskic* (2000),⁶¹ *Delalic* (Appeal) (2001),⁶² *Kordic* (2001),⁶³ and *Brdjanin* (2004).⁶⁴ The only challenge to the criterion of overall control from within the Tribunal seems to have come from Judge Shahabuddeen, who wrote in a Declaration appended to the *Blaskic* case (2000) that the overall control criterion was but a nominal substitute for the effective control-criterion developed by the ICJ in the *Nicaragua* case (1986). He added that he failed to see how the overall control criterion could improve the legal position with respect to the effective control criterion, since at the end of the day, it was effectiveness which was in both cases decisive. As to the degree of effectiveness required, he explained that the *Nicaragua* test is sufficiently flexible to cover different situations and can be applied in a contextually satisfactory way. There is much to be said for that opinion: in effect, the overall control test is but the effective control test modified according to the peculiarities of the different context in which the question appears in *Nicaragua* and in the ICTY—State responsibility on the one side, determination of objective existence of an armed conflict on the other.⁶⁵

An interesting question arose in the context of 'overall control' with respect to belligerent occupation. In the *Blaskic* case (2000), the ICTY Chamber had held that the extensive destruction of Muslim property by Bosno-Croat troops could violate Article 53 of Geneva Convention IV, which applies only to occupied territories, since Croatia could legally be considered an occupying power. This unexpected result was reached by applying the overall control test to the issue of occupation: if Croatia controlled the local Bosno-Croat militias, then it could be held that it

⁵⁸ *BYIL* (2000), pp. 273ff.

⁵⁹ At §§122ff.

⁶⁰ Or, more precisely: an internationalized armed conflict.

⁶¹ At §§73ff.

⁶² At §§14ff.

⁶³ At §§36ff.

⁶⁴ At §§121ff.

⁶⁵ See the explanations in *BYIL* (2000), pp. 277–8.

exercised belligerent occupation by virtue of that control.⁶⁶ The Chamber thus posited a wholly new standard in international law, namely the concept of belligerent occupation *longa manu* or 'constructive belligerent occupation', not by effective authority over the territory but by overall control over those who effectively control the territory. There is here a sort of dilution of the chain of effective control: indirect control is equated to direct control.

This reasoning was neatly rejected in the *Naletilic* case (2003). The first point made by the *Naletilic* Chamber is that if one followed the *Blaskic* approach this would lead to a multiplication of the notion of occupation: there would be one concept of occupation under the Hague Regulations of 1907 Article 42, which requires effective authority of the invading army; and a different concept under Geneva Convention IV, in particular Article 6, which would not require such effective authority but could be satisfied by constructive occupation.⁶⁷ This led the Chamber to its essential conclusion, that the overall control criterion is not applicable to the determination of the existence of an occupation.⁶⁸ Occupation necessitates a direct and effective degree of control, since it imposes on the occupying power a series of onerous duties.⁶⁹ Moreover, Geneva Convention IV is a supplement to the Hague Regulation; in the absence of an autonomous definition of occupation it must be held to refer back to the Hague Regulations and to endorse its definition of occupied territory.⁷⁰ Thus it is the old criterion of effective and direct control which applies;⁷¹ in the words of Article 42 of the Regulations of 1907, to be occupied, the territory must be 'actually placed under the authority of the hostile army'. The occupation may not extend to the whole territory: it may apply only to the geographically limited areas where it is effectively displayed. The Chamber added:

There is no requirement that an entire territory be occupied, provided that the isolated areas in which the authority of the occupied power is still functioning 'are effectively cut off from the rest of the occupied territory'.⁷²

This last finding is of interest if one thinks of the situations in Afghanistan and to some extent also in Iraq, notwithstanding the interventions of the Security Council under Chapter VII of the Charter.

⁶⁶ *Blaskic* (2000), §149.

⁶⁷ This reasoning is not necessarily compelling. It is based on the text of the two mentioned provisions, and in particular on the fact that the text of the Hague Regulations seems to exclude any type of indirect control. However, the text is not sacrosanct in the sense that it could not be read in a more contextual way. Thus, for example, the ICTY has held that the protected persons under Article 4 of Geneva Convention IV do not need to meet the nationality-criterion mentioned therein; it stated that allegiance is enough in the context of internationalized armed conflicts like that taking place on the territory of Bosnia (see below, in the text). This holding was a piece of teleological and dynamic interpretation, which could be followed—if it was wished—also in the context of occupation. In order to avoid the multiplication of occupations concepts, it would then have been necessary to affirm that the occupation by indirect control has become customary law in the context of internationalized armed conflicts like that of Bosnia, and that in consequence the Hague Regulations of 1907 have to be read in such a modified way. The question if such in effect is the state of customary law, or if such a holding would have been wise, is another point.

⁶⁸ *Naletilic* (2003), §214.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, §215.

⁷¹ *Ibid.*, §218.

⁷² *Ibid.*

As to the general point raised by the *Blaskic* and *Naletilic* Chambers, the concept of 'constructive occupation' would have had a potentially enormous series of consequences, the effect of which was not sufficiently considered.⁷³ It might easily have overstepped the reasonable bounds of responsibility, since most rights and duties in the area are legally predicated upon the idea that there is effective control. If there is no such direct control, the construction of imputability is quickly overburdened; overall control in such situations creates too wide a circle for responsibility; possibly, only effective control of the intermediary entity, as envisaged in the *Nicaragua* case, would suffice to make constructive occupation acceptable, if at all.⁷⁴ It seems therefore that the more conservative approach in *Naletilic* was warranted. This is the more so, since the acts incriminated, even if they cannot be indicted as grave breaches, will be still prosecutable as war crimes. Consequently, there does not seem to be any real affront to justice in choosing the more cautious approach.

2. *The status of the victims as protected persons*⁷⁵

As with the overall control test, the ICTY continued to follow its previous approach on the definition of the protected persons: it applied the allegiance criterion in disregard of the formal nationality requirement set out in Article 4 of Geneva Convention IV.⁷⁶

A new aspect arose only on one point. In *Blaskic* (2000), defence counsel raised the matter of co-belligerency. The argument was that Article 4(2) of Geneva Convention IV excludes from the circle of protected persons all the nationals of co-belligerent States having normal diplomatic relations with each other. The purpose of that exclusion is obvious: the Geneva Convention is not based on a general human rights logic but aims specifically at protecting those civilians that are considered to be 'enemy civilians', *i.e.* civilians in their dealings with the hostile power. Only these civilians were in jeopardy of having their rights infringed because of the obvious conflict of interest. In the case of co-belligerent

⁷³ This is the case even if one limits the reach of constructive occupation to internationalized armed conflicts only. It must not be forgotten that the overall control criterion (relaxing the effective control criterion of *Nicaragua*) was adopted to be able to qualify an armed conflict as being international in nature. That is a purely objective qualification, which does not entail that any party bears international responsibility for the acts of another entity with which it has some degree of relations. But the law of occupation is not concerned with the objective qualification of a situation for the purposes of criminal law: it means imputability of acts to one party notwithstanding these acts being committed by another entity. One understands that the *ratio* and the reach of the first situation are not at all the *ratio* and reach of the second, and that therefore one must be slow to slide from the first to the second. If, moreover, the concept is not limited to internationalized armed conflicts, but imported into other situations of 'occupation' (as to the many types of occupation and the fringing borders of the concept: A. Roberts, 'What Is A Military Occupation?', *BYIL*, vol. 55, 1984, pp. 249ff), the problems are all the more conspicuous.

⁷⁴ Thus, if any type of constructive occupation is ever envisioned, it must be founded on the criterion of effective control of an entity, since then there is—according to *Nicaragua* standards—the possibility to attribute the acts of that entity to a foreign power as being its own.

⁷⁵ See the background information in *BYIL* (2000), pp. 278–80.

⁷⁶ See *Blaskic* (2000), §§124ff; *Kordic* (2001), §§147ff; *Blaskic* (Appeal, 2004), §§167ff.

States, it was anticipated that the nationals of allied parties would not need any conventional protection.⁷⁷ According to the defence, the Bosno-Croats and the Bosno-Muslims were in fact co-belligerents in the fight against the Serb 'aggression'. The ICTY rejected the argument, finding that after a first period of alliance against the Serb forces, the Bosno-Croats and the Bosno-Muslims started intensely fighting each other; thus, they could not be co-belligerents in the sense of Article 4(2) of the Convention.⁷⁸ Only such a reading is consistent with the object and purpose of Article 4: what counts is the effective situation on the spot. The same principle inspired the findings on nationality/allegiance on the one hand, and on co-belligerence on the other: the principle of effectiveness as elicited from the object and purpose of the provision. One difference may, however, be noted: in the first case, the principle was applied against the text, and thus more constructively (nationality/allegiance); in the second case, it was applied in conformity with the text by relating it to the facts (co-belligerency). The finding reached on co-belligerence is unimpeachable.

Apart from the classical murder and mistreatment offences, the Tribunal mainly dealt with such offences as unlawful confinement of civilians,⁷⁹ taking of hostages,⁸⁰ destruction of property,⁸¹ and unlawful transfer of civilians.⁸² There is no space to discuss all the offences in detail, but some points may be made.

As to 'unlawful confinement of civilians', the *Kordic* case⁸³ recalls first of all that internment is permitted only in cases of absolute necessity with regard to the internal or external security of the State (Article 42 Geneva Convention IV). The determination of what security requires is left to the State, but the conditions must be interpreted with utmost strictness. The mere fact that the person is a national of the enemy, or of military age, should not be considered sufficient. Moreover, every case should be considered individually; no collective measures of confinement could be lawful.⁸⁴ Finally, a series of procedural rights must be granted: see Article 43 Geneva Convention IV. The ICTY here builds on its previous case-law. Its practice amounts to ask that the restrictive conditions of Geneva Convention IV be taken seriously. That is more than a restatement of what is to be found in the Convention. To some extent it is creative interpretation, since the practice of States had stressed the discretionary element to the detriment of the strict proportionality criteria laid down in the Convention.⁸⁵ It may be recalled that the United Kingdom interned a number of Argentine citizens during the Falkland war, without meeting, in all probability, the exacting security requirements of the Geneva Convention.

⁷⁷ The condition of a regular diplomatic representation was apparently added for such cases as that of Italy during the Second World War, where co-belligerency did not correspond at any time with diplomatic relations, a fact which puts in danger the protection even of co-belligerent nationals.

⁷⁸ *Blaskic* (2000), §§137ff; *Blaskic* (Appeal, 2004), §§183ff. ⁷⁹ *Kordic* (2001), §§273ff.

⁸⁰ *Ibid.*, §§304ff. ⁸¹ *Kordic* (2001), §§321ff; *Naletilic* (2003), §§574ff; *Brdjanin* (2004), §§583ff.

⁸² *Naletilic* (2003), §§512ff. ⁸³ At §§273ff. ⁸⁴ *Ibid.*, §285.

⁸⁵ See R. Kolb, *Ius in bello, Précis de droit des conflits armés*, Basle/Brussels, 2003, pp. 189-90.

The 'taking of hostages' is a crime committed when there is a threat to subject civilians, who are unlawfully deprived of liberty or unlawfully detained, to inhuman treatment or death as a means of achieving the fulfillment of a condition. The act must be perpetrated in order to obtain a concession or to gain an advantage.⁸⁶ *A contrario*, a person lawfully detained cannot apparently be considered a hostage. But any mistreatment could qualify under such headings as 'willfully causing great suffering...'

'Excessive destruction of property not justified by military necessity' relates essentially to special protections under the Geneva Conventions, and to Article 53 of Geneva Convention IV which covers only occupied territory. The unjustified destruction must be extensive, unlawful, and wanton. A single act can exceptionally constitute an extensive destruction: *e.g.*, the destruction of a hospital.⁸⁷ The law in this area is summarized as follows as to the different situations covered: '(i) Where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or (ii) Where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and (iii) The destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.'⁸⁸

The offence of 'unlawful transfer of civilians' was considered for the first time in *Naletilic* (2003). Transfers from occupied or invaded territory are prohibited, except in situations of imperative military reasons or for transfers motivated by an individual's own genuine choice to leave. Any physical or moral coercion, including indirect pressure, is forbidden. Real freedom to choose must be ascertained on a case-by-case basis. Thus the following definition of the offence has been given: (1) an act or omission, not motivated by the security of the population or imperative military reasons, leading to the transfer of a person from occupied territory or within occupied territory; (2) the intent of the perpetrator to transfer a person.⁸⁹

It will be recalled that an important criterion in order to judge on the genuineness of the military necessity exception is the will to allow the people to return to their homes as soon as possible, and the practical measures taken to that effect. If the transfer is organized to be definitive, there can be no excuse of military necessity, since this is always provisional. As to the forms of indirect coercion for voluntary transfers, it is a matter of evidence in individual cases. If a policy of some form of cleansing is

⁸⁶ *Kordic* (2001), §§304–13. ⁸⁷ *Kordic* (2001), §340.

⁸⁸ *Kordic* (2001), §341. See also *Naletilic* (2003), §§574–6; *Brđjanin* (2004), §§583–9. The last judgment here mentioned adds that as to *mens rea* intent or recklessness is required (§589).

⁸⁹ *Naletilic* (2003), §521.

proved to exist, it may lead the interpreter more easily to infer a form of organized pressure.

IV. ARTICLE 3 OF THE ICTY STATUTE: VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR⁹⁰

There have been few novelties in this category, except for the definition of individual offences. Five aspects may be noted.

First, the ICTY has constantly repeated the *residual* character of Article 3 of the Statute:⁹¹ it covers all serious violations of the law of armed conflicts, whatever their source and origin (Geneva law, Hague law, treaty law, customary law, special agreements, etc.). Thus, notwithstanding the very shorthanded formulation of Article 3, there are no gaps left by that article as to the war crimes prosecutable: the *renvoi* to any source external to the Statute establishing a war crime is in fact complete. On this point, the *Tadic* jurisprudence has been followed and affirmed.

Second, it was stressed that Article 3 of the Statute applies to international as well as to non-international armed conflicts.⁹² On this point too, there is a continuation of the *Tadic* jurisprudence, but the point must be again stressed, since it means that the concept of war crimes was imported into non-international armed conflicts. That is an achievement which is almost entirely to the credit of the ICTY and which has been seminal. Article 8 of the ICC Statute, which lists under the general heading of 'war crimes' offences committed both in international and internal armed conflicts is a direct offspring of that jurisprudence. The same can be said of a series of recent instruments, which criminalize offences committed both in international and internal armed conflict, thus doing away with one of the best-entrenched *summae divisiones* of the law of armed conflicts following the Second World War. One example has already been given: the Additional Protocol on Cultural Property of 1999 (additional to the Hague Convention of 1954).

Third, the ICTY had the opportunity to stress on appeal that Article 3 of the Statute does not suppose a discriminatory intent on the part of the perpetrator.⁹³ Discrimination is not a necessary element of war crimes; ordinary intent or recklessness suffices. One may wonder why such a point, obvious as it is, was raised by counsel on appeal.

Fourth, the ICTY affirmed more clearly than in the previous period under review that Article 3 of the Statute covers also conventional rules binding the parties to the conflict and not only customary rules.⁹⁴ That point was already considered under the aspect of jurisdiction. But it

⁹⁰ *BYIL* (2000), pp. 280ff. On the law relating to war crimes, see, since the year 2000 chiefly: G. Simpson (ed.), *War Crimes Law*. Aldershot *et al*, 2 vols.

⁹¹ See, e.g., *Blaskic* (2000), §168; *Kumarac* (2001), §401; *Brdjanin* (2004), §§126ff.

⁹² See *Blaskic* (2000), §161; *Kordic* (2001), §163. ⁹³ *Aleksovski* (Appeal, 2000), §§13ff.

⁹⁴ See *Blaskic* (2000), §172; *Kumarac* (2001), §401; *Kordic* (2001), §167.

raised additional and interesting problems as a matter of substance. It appears from the judgments that what the chambers had in mind were the great conventional texts, mainly the two Additional Protocols of 1977. To a large extent such texts are 'custom-related' in the sense that the violations of their main rules correspond to, or are generally held to be also, violations of customary international law.⁹⁵ The gap between the conventional war crimes and the customary war crimes is thus minimal (if any) under that heading. However, the judgments clearly say that any agreement binding the parties to a conflict may qualify under Article 3 of the Statute. In the case of former Yugoslavia, the special agreements among the parties were well known. The main one was the Agreement of 22 May 1992, affirming the acceptance of a series of conventional obligations arising out of the Geneva Conventions and the Additional Protocols. The relation to customary international law is in these cases maintained, as there is reference to the substantive obligations of international humanitarian law.

However, the holdings of the ICTY seem to pave the way also for any other special agreement, which does not refer to such customary-conventional war crimes. What if an agreement were to be concluded containing idiosyncratic obligations assumed by both parties to the conflict? One may think, for example, of specific agreements as to humanitarian aid going well beyond what the applicable law of armed conflict asks for. If the breach of such purely *inter partes* obligations could give rise to criminal prosecution as a war crime, this means that the parties could freely create war crime provisions applicable only to their bilateral relations. There would thus be potentially an emerging category of bilateral war crimes (*gewillkürte Kriegsverbrechen*). In certain situations where the warring parties conclude a considerable number of special agreements, this would considerably increase the number of the prosecutable war crimes. As can be seen, the link to customary law is here abandoned. Such a course is perfectly acceptable when considered from the perspective of the *nullum crimen* principle.⁹⁶ However, in such cases, the intention of the parties to criminalize the breaches of the special agreements should give rise to particularly stringent scrutiny. Moreover, one can ask if it is the proper task of an international tribunal to function as an organ of prosecution for the idiosyncratically assumed obligations of the parties, or if there are at least limits to such a function.

Fifth, the ICTY returned more than once to *common Article 3* of the Geneva Conventions, whose importance it stressed in a particularly prominent way. In *Delalic* (Appeal, 2001)⁹⁷ it said that common Article 3 is a fundamental provision which applies both to international and

⁹⁵ One must also recall that the Tribunals have jurisdiction only over serious violations of international humanitarian law, *i.e.* only over the major substantive provisions of those instruments.

⁹⁶ It is this principle which is invoked by the ICTY to justify the inclusion of treaty law: if there is agreement among the parties, there will be no violation of the *nullum crimen* requirement. See *Blaskic* (2000), §172.

⁹⁷ At §§140ff.

non-international armed conflicts. It is a principle of universal application, since its principles were so basic that they must govern behavior in all circumstances. Common Article 3 constituted the minimum yardstick of obligations common to international and non-international armed conflicts. In effect, it set forth a minimum core of mandatory rules, reflecting the fundamental humanitarian principles underlying international humanitarian law as a whole. If they applied in non-international armed conflict, they must apply *a fortiori* in international armed conflicts. Thus, the ICTY affirms the applicability of common Article 3 also to international armed conflicts: as a handy and well-known common code, the prosecution may in effect be tempted to invoke it also in this larger context. Such an explicit recognition that common Article 3 is formally applicable also in international armed conflicts is a new step in the jurisprudence.

It may be recalled that in *Delalic* (Appeal, 2001), the ICTY engaged in a lengthy discussion as to whether common Article 3 gives rise to individual criminal responsibility under customary international law. The focus on international armed conflict is here dropped. This reasoning has already been commented on.⁹⁸

Turning to specific offences, the ICTY made statements on a whole series of these: only four will be discussed here. The first relates to attacks on civilian population; because of its paramount importance, it will be considered first. Then, something has to be said on offences relating to the destruction of property, on unlawful labor of prisoners, and on terror against the civilian population.

(a) *Attacks on the civilian population*

In three cases⁹⁹ the ICTY dealt with the question of direct or indirect attacks on the civilian population. The rule which requires attacks to be directed only against military objectives and not against civilian persons or objects is at the very root of the law of armed conflicts. Together with the principle of humanity, it is one of the great constitutional principles upon which that branch of the law stands or falls.¹⁰⁰ The principle was discussed mainly in the *Galic* case (2003); the *Kupreskic* case (2000) deals more specifically with the situation of reprisals against civilians and will be thus discussed in the chapter devoted to the defences.¹⁰¹

In the *Galic* case (2003), the ICTY affirmed that the principle of protection of civilians against attack has evolved into a principle of customary international law applicable to all armed conflicts, international and non-international.¹⁰² It is a fundamental principle common to all types of armed conflict. Moreover, it constitutes a *jus cogens* norm.¹⁰³ In the

⁹⁸ On this point see above, Chapter II, no. 2.

⁹⁹ *Kupreskic* (2000), §§521ff; *Kordic* (2001), §§321ff; *Galic* (2003), §§13ff.

¹⁰⁰ In effect, the opposite of the principle of limitation is the practice of total war. See R. Kolb, *ius in bello, Précis de droit des conflits armés*, Basle/Brussels, 2003, pp. 65ff, 114ff.

¹⁰¹ Chapter IX.

¹⁰² *Galic* (2003), §19.

¹⁰³ *Ibid.*, §98.

Kupreskic case (2000) alike, it was affirmed that the protection of civilians against attack 'is the bedrock of modern international humanitarian law'.¹⁰⁴ The violation of this rule gives rise to manifest individual criminal responsibility: it suffices to point to the system of grave breaches, which includes the deliberate targeting of civilian populations.¹⁰⁵ The ICTY, in *Galic* (2003), then expands on the content of the obligation. The *actus reus* is constituted by attacks which cause death or serious bodily injury within the civilian population; the *mens rea* supposes that there is intention in the knowledge (or when it was impossible not to know) that civilians or civilian property were being targeted.¹⁰⁶ There is no exception for military necessity, contrary to what seems to have been held in the *Blaskic* case: the rule prohibiting attacks on civilians is fundamental and must always be followed.¹⁰⁷ However, the status as a civilian may be lost. In *Kupreskic* (2000)¹⁰⁸ it is explained that this may happen especially if (i) civilians abuse their position, *e.g.*, by taking up arms,¹⁰⁹ or if (ii) there is some collateral damage on civilians when military objectives are attacked, provided the principles of reasonable care, of proportionality, and of the prohibition of the use of indiscriminate means are respected.¹¹⁰ The abuse of civilian position is further explained in *Galic* (2003). According to that judgment, the status of civilian is lost if a person participates directly in hostilities, for the time of such participation. To take a 'direct' part in hostilities means to commit acts of war which by their nature and purpose are likely to cause actual harm to the personal or materials of the enemy armed forces.¹¹¹ In cases of doubt, a person shall be considered to be a civilian: a person shall not be made the object of attack when it is reasonable to believe, in the circumstances of the person contemplating the attack, that the person targeted is not a combatant.¹¹² The same rule applies to civilian objects: they must not be made the object of attack if it is unreasonable to believe, in the circumstances and information available to the person contemplating the attack, that the object at stake makes an effective contribution to military action.¹¹³ The *mens rea* with respect to such attacks includes recklessness but excludes negligence; it must be shown that the perpetrator was aware of the civilian status of the person(s) attacked, either because of the circumstances, or because no reasonable person could have believed that the person attacked was a combatant.¹¹⁴

Finally, the Chamber in *Galic* (2003) moves to the whole question of indiscriminate attacks and proportionality. Indiscriminate attacks against civilians are prohibited by customary international law and may be

¹⁰⁴ *Kupreskic* (2000), §521.

¹⁰⁵ *Galic* (2003), §28.

¹⁰⁶ *Ibid.*, §§42-3.

¹⁰⁷ *Ibid.*, §44; see also *Blaskic* (Appeal, 2004), §109.

¹⁰⁸ At §§521-4.

¹⁰⁹ See, *e.g.*, Article 19 Geneva Convention IV (1949). Such civilians can be considered 'unlawful combatants', to which possibly neither Convention III nor Convention IV applies, but which remain under the protection of common Article 3 of the Geneva Conventions and of the substantive customary content of Article 75 of Additional Protocol I of 1977, as well as under the protection of applicable human rights law.

¹¹⁰ See Articles 52 and 57 of Additional Protocol I (1977).

¹¹¹ *Galic* (2003), §48.

¹¹² *Ibid.*, §50.

¹¹³ *Ibid.*, §51.

¹¹⁴ *Ibid.*, §55.

treated as amounting to a direct attack on civilians.¹¹⁵ Some attacks may moreover violate the principle of proportionality by causing excessive collateral civilian damage. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the perpetrator, making reasonable use of the information available, could have expected excessive civilian casualties to result from the attack.¹¹⁶ As to *mens rea*, it must be shown that the attack was launched willfully and in knowledge of the circumstances giving rise to the expectation of excessive civilian casualties.¹¹⁷ The fact that the opposite party has not abided to the obligation to remove civilians from the vicinity of military objectives to the maximum extent feasible does not relieve the attacking party of its duty to abide by the principle of distinction and proportionality when launching its attack.¹¹⁸ In *Kupreskic* (2000) there is some further explanation as to the interpretation of these general principles of distinction, of indiscriminate and of proportionality. In interpreting such general and sometimes loose principles, it is said, the 'elementary considerations of humanity', flowing from the Martens Clause, should be taken as a basis of decision. In these cases, the scope and purport of the rule must be defined with reference to 'elementary considerations . . .', the Martens Clause, and the principles and dictates of humanity and public conscience in general.¹¹⁹ That means that under Articles 57 and 58 of Additional Protocol I of 1977 (*qua* customary international law) the discretionary power to attack must be construed as narrowly as possible.¹²⁰ It has also to be borne in mind that cumulative attacks may qualify as being excessive by their aggregate effect, rather than by their isolated effect.¹²¹

These passages amount to a quite thorough *exposé* of the law relating to attacks on military/civilian objectives. One may notice many aspects. The most striking one is that the legal analysis lends force to the rules of Protocol I (1977), which is considered to be customary law for all relevant purposes. In the spectrum between military considerations (military efficacy) and humanitarian considerations (protection of potential victims), which are the main antagonizing forces underlying any positive regulation of the law of armed conflict, it can be seen that the ICTY leaned heavily towards the humanitarian pole to the detriment of the military pole. The general principle of interpretation advanced in *Kupreskic* tends to establish a sort of soft legal presumption against the legality of an attack causing civilian damages; each such attack must be justified according to particularly stringent considerations. This course is hailed under the finding of the same chamber that there is a 'progressive humanization of international legal obligation' in this area, and a move away from any type of reciprocity or limitation in the area of protection of civilians.¹²² This course may be welcomed, as well as it can also give rise to concerns

¹¹⁵ *Galic* (2003), §57.

¹¹⁶ *Ibid.*, §58.

¹¹⁷ *Ibid.*, §59.

¹¹⁸ *Ibid.*, §61.

¹¹⁹ *Kupreskic* (2000), §525.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, §526.

¹²² *Ibid.*, §518.

of practicability, according to the role and ideology which each spectator holds. One may just notice how remote these holdings are from the claims of some powerful States (notably the United Kingdom and even more so the United States) which are habituated to the conduct of hostilities. In their practice, they have, for example, refused to presume the civilian status of objects which are ordinarily civilian objects, invoking problems of proof;¹²³ they used incendiary¹²⁴ and chemical¹²⁵ weapons; or, more anciently, they bombed towns by nuclear weapons, claiming military advantages.¹²⁶ As a general proposition, the law as expounded by the ICTY is sound; but it remains to be seen how severely such principles can be applied in practice outside the context of the former Yugoslavia.

Second, the considerable reach of the foregoing passages is strengthened by the tendency to eliminate from the law all types of reciprocity in the area of protection of civilians. That is true of the main type of reciprocity, *i.e.* the plea of reprisals, which is effectively ruled out by *Kupreskic* (2000).¹²⁷ But it is true also in a much more general sense. Thus, for example, the Tribunal took pains to disentangle as much as possible the two sets of obligations relating on the one hand to the duty of the attacked to keep civilians as much as possible physically remote from military objectives, and on the other hand the duty of the attacker to limit its attack on military objectives. The ICTY clearly indicated that some infringement of the first does not justify any softening of the latter. Consequently, there is a constant move in the jurisprudence to construe the principle of distinction as giving rise to a whole set of absolute and *per se*-obligations, from which any element of reciprocity, but even of interrelation, is expelled. This may be compared with the general move in human rights matters *lato sensu* towards non-bilaterality, non-reciprocity, and absoluteness of obligation.¹²⁸ A further strengthening occurs by declaring all these aspects applicable indifferently in international and internal armed conflict: the obligation, with its non-reciprocity genetic code thus becomes a sort of overarching general principle, knowing of no exception.

¹²³ See, *e.g.*, the statement by the US Military Command in the first Gulf War: *US Department of Defense Report to Congress on the Conduct of the Persian Gulf War—Appendix on the Role of the Law of the War*, 10 April 1992, in: *International Legal Materials*, vol. 31, 1992, p. 627.

¹²⁴ The US and the UK have ordinarily defended the use of such weapons. See E. David, *Principes de droit des conflits armés*, Bruxelles, 2nd ed., 1999, pp. 336ff.

¹²⁵ As to both types of weapons, incendiary and chemical (*e.g.* Agent Orange), see the conduct of hostilities of the US in Vietnam: M. Bothe, *Das völkerrechtliche Verbot des Einsatzes chemischer und bakteriologischer Waffen*, Köln/Berlin, 1973, pp. 303ff, 328ff.

¹²⁶ As to Hiroshima and Nagasaki, see the already very skeptical view of J. M. Spaight, *Air Power and War Rights*, 3rd ed., London/New York/Toronto, 1947, pp. 273ff., 276: 'To the present writer it seems that to approve atom bombing would be to confess that all the denunciation of indiscriminate bombardment at The Hague and elsewhere was nothing but hypocrisy and insincerity. International law cannot trim its sails so quickly to the winds of expediency as that. It should hold to the view that, while target-area bombing comes close to the border-line of permissibility, atom bombing definitely oversteps it.'

¹²⁷ At §§510ff.

¹²⁸ See, *ex pluribus*, B. Simma, 'From Bilateralism to Community Interest in International Law', *RCADI*, vol. 250, 1994-VI, pp. 364ff.

Third, it must be stressed that the test applied for criminalizing the violation of the relevant provisions is based upon a reasonable care standard, and not upon a strict liability. The ICTY constantly refers to the circumstances as they prevailed at the time of the attack and the information available at that moment to the attacker. There is no *ex post facto* judgement; the judgement is related back to the time of commission of the acts, *i.e.* to the concrete position of the perpetrator and to his actual knowledge at that time (*ex tunc* judgement). However, the appreciation is not wholly subjective. There is a negligence saving-clause: if the information could have been available by using reasonable care, or if the judgement could and should have been made more accurately by any reasonable person in the circumstances, the perpetrator will be found responsible. These standards cannot be described in a very detailed way in the abstract; but they are known to each criminal law system. It might be said, in our context, that a slight negligence in the heat of combat is excusable and will not be imputed to detriment; but a gross negligence will be so imputed. The test seems to be, in the words of a former Swiss criminal judge: if the reaction by reading the file is 'he would better have acted in that way', the negligence is excusable; if, conversely, the reaction is 'how could he have behaved like this!', then the negligence is imputable. These standards correspond to the ordinary practice of the post-World War II jurisprudence. Thus, in the *Hostages Trial* (1948), it was held that the acts of General Rendulic—who ordered a scorched earth policy (destruction of property) when in retreat before the Russian army in Finmark—could be excused by a plea of military necessity. The Tribunal held that these acts were committed in the belief (in fact exaggerated) that the Soviet army was almost arriving, but that no grave negligence interfered with the judgement of the accused.¹²⁹ It will be noted that the plea was admitted in relation to the attack on property and not in relation to the attack on civilian persons.

(b) Destruction of property

In the *Kordic* case (2001) three property-related offences were considered. First, some space was devoted to 'wanton destruction of property'. It supposes the following elements: (1) the destruction of property on a large scale; (2) a destruction not justified by military necessity; (3) an intent to destroy the property or a reckless disregard of the likelihood of its destruction. The offence is not limited to property inside occupied territory.¹³⁰

Second, some space was devoted to 'plunder'. The findings of the *Delalic* case (1998) were confirmed, the Chamber reminding us that the crime covers all forms of unlawful appropriation of property in the

¹²⁹ See *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. VIII, London, 1948, pp. 67–9.

¹³⁰ *Kordic* (2001), §347. See also *Naletilic* (2003), §§578–80. As to wanton destruction of towns, villages, etc.: *Brdjanin* (2004), §§591ff.

context of an armed conflict.¹³¹ In the *Naletilic* case (2003), the offence of 'plunder' gave rise to further legal discussion. Plunder (*i.e.* pillage) covers willful and unlawful appropriation of property, both private and public. The appropriation does not need to be extensive or to involve a large economic value: it covers large-scale seizures and systematic economic exploitation of occupied territory, but also acts of appropriation committed by individual soldiers for their private gain. As far as the jurisdiction of the ICTY is concerned, plunder must involve grave consequences for the victims, *i.e.* amount to a serious violation of the law. Sufficient monetary value is but one aspect of such seriousness, which has to be ascertained in context. Thus, in case of repeated acts, the analysis has to concentrate on the aggregate gravity. Plunder is not limited to occupied territory. Lawful contributions, such as requisitions, are excepted from the reach of the offence.¹³²

Third, the offence of 'destruction or willful damage to institutions dedicated to religion or education' prompted some comments. Its basis is to be found in Article 27 of the Hague Regulations of 1907 and Article 53 of Additional Protocol I (1977), as well as in the Protection of Cultural Property Convention of 1954. The offence is a *lex specialis* to the general protection of civilian objects; religious and educational institutions are in effect civilian objects *par excellence*. As for civilian objects in general, the special protection of these institutions is lost if they are used for military purposes.¹³³ The *mens rea* is intent or recklessness.¹³⁴

In the context of destruction or appropriation of property, much depends upon the point of military necessity, to which the law defers. The definition of that concept is of the utmost difficulty, since it is shaped by the many and various situations of warfare and has thus to remain eminently flexible. The case-law following World War II was rightly quite restrictive of that notion, lest the whole law of armed conflict be undermined; but it has also not refused to apply military necessity where the claim appeared to be made *bona fide* and reasonably.¹³⁵ The problem seems to be to trace the outer fringes of the plea when still made within the general fabric of the law, on the one hand; and to exclude those cases where it is manifestly made as a contempt and evasion of the law, on the other. Thus, much must indeed turn on reasonableness and the general spirit of

¹³¹ *Kordic* (2001), §352.

¹³² *Naletilic* (2003), §§611ff. Thus, the Chamber gives the following definition of the offence, §617: 'Plunder as a crime under Article 3(e) of the Statute has been committed when: i) the general requirements of Article 3 of the Statute, including the seriousness of the violation, are fulfilled; ii) private or public property was appropriated unlawfully and willfully.'

¹³³ *Kordic* (2001) §§354ff. See also *Naletilic* (2003), §§603-5; *Brdjanin* (2004), §§594ff.

¹³⁴ *Brdjanin* (2004), §599.

¹³⁵ See *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. XV, London, 1949, pp. 175-6. As to the concept of military necessity and the constraints put on it, see, *e.g.*, *Commentary on the Additional Protocols of 8 June 1977*, (ed. ICRC), Geneva, 1987, pp. 392ff. In a generic way, military necessity can be defined as 'action nécessaire pour atteindre les objectifs conformes aux buts de la guerre' (cf. J. Salmon [ed], *Dictionnaire de droit international public*, Bruxelles, 2001, p. 733).

conformity or contempt to the law underlying the incidents in question, and even the campaign in which they occurred.

(c) *Unlawful labor of detained persons*

An interesting discussion took place on that matter in the *Naletilic* case (2003). As it proved impossible to distinguish between civilians detained and prisoners of war proper, the Chamber decided to apply the régime of Geneva Convention III because it was more favorable to the accused (it allowed more restrictive measures of detention). Article 49 of that Convention permits compulsory labor of prisoners of war, but under stringent conditions: (1) the work must be in the interest of the prisoner; (2) it must not be connected with war operations; (3) it must not be unhealthy or dangerous; (4) there must be suitable working conditions, e.g., as to accommodation and food. Consequently, the following are permissible, e.g., work in the camp administration, in agriculture, in commerce, in arts and crafts, in domestic services; in some industries, not directly connected with the war effort, in public works, in transport, etc., provided always that there is no military character and purpose. An incidental benefit of the services to the military authorities when the work normally serves to maintain civilian life does not render it illegal. On the other hand, the following are typically impermissible, e.g., forced work in metallurgical, machinery, and chemical industries; humiliating work. To the extent the work is of non-military character, the prohibition can be cured only by free consent, leaving a real choice. The *mens rea* required is intent that the victim would be performing prohibited work. Thus, the offence is defined as follows: '[A]n intentional act or omission by which a prisoner of war is forced to perform labor prohibited under Articles 49, 50, 51 or 52 of Geneva Convention III.'¹³⁶

These explanations are of some interest, since this is the first time the ICTY considered the offence of forced labor. It thereby largely followed the régime of the Geneva Convention III. It is interesting to note that the Convention leaves open to doubt some important questions, notably the reach of consent of the prisoner. In effect, Article 52 of the Convention, which mentions consent, does so only with respect to unhealthy and dangerous labor. Can the reach of consent be extended to other categories than unhealthy or dangerous work? Can work of a military character be accepted if the consent is free? Different lines of argument could be followed. It is possible to argue that the construction of consent has to be strict because of the obvious danger of abuses. In the light of Article 7 of the Convention, which forbids voluntary renunciation of rights,¹³⁷ the result would be that any consent to work other than unhealthy or dangerous would be illegal and criminal. It could be added that the prohibition of such military work is due also to the State of origin of the

¹³⁶ *Naletilic* (2003), §§245ff, quotation taken from §261.

¹³⁷ This Article reads as follows: 'Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.'

prisoner: its interests are also directly affected. Thus, a double consent should be required, if any: that of the prisoner and that of the home State. The prisoner could not dispose of the rights of his State of origin alone. But it is possible to take also a more liberal view, holding that the criminality of the acts turns on the compulsive element rather than on the very nature of the work. The mention of consent would then be taken by analogy from Article 52 into other provisions (e.g. Article 50(b)), since that analogy is favorable to the accused. It could moreover be argued that the criminality of the act was not apparent to the accused, since the whole point involves a subtle question of interpretation of the Convention; and that such doubts have to be resolved to the advantage of the accused. It does not seem that the problem was addressed in the *travaux préparatoires* in 1949. Thus it would be useful to give some authoritative interpretation on this point in order to clarify the law. To state a preference involves really a legislative choice, balancing experiences leading to mistrust on the one hand, and respect for individual self-determination on the other (if it is held to be possible in such a context).

(d) *Terror against the civilian population*

This crime, a further novelty in the jurisprudence, was considered in the *Galic* case (2003).¹³⁸ The precise offence charged by the prosecution was 'killing and wounding civilians in time of armed conflict with the intention to inflict terror': Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II (1977). The obligation underlying the offence forms part of customary international law and gives rise, under it, and under conventional law, to individual criminal responsibility.¹³⁹ The elements of the crime are the following: (1) acts of violence against the civilian population or individual civilians not taking direct part in hostilities, causing death or serious injury to body or health; (2) the action must be willful; (3) its primary purpose must be that of spreading terror among the civilian population. The actual infliction of terror is not an element of the crime.¹⁴⁰ The *mens rea* is based on specific intent (*dolus directus*) to spread terror, *dolus eventualis* or recklessness not being enough. The perpetrator must specifically have intended to spread terror. Terror must be held to mean 'extreme fear'.¹⁴¹ One will notice how the strict *mens rea* requirement limits the ambit of the offence.

V. ARTICLE 4 OF THE ICTR STATUTE: VIOLATIONS OF
COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS (1949)
AND OF ADDITIONAL PROTOCOL II (1977)¹⁴²

Article 4 of the ICTR Statute reflects the war crimes held to be applicable in a non-international armed conflict, as the law stood in 1994. At that time, it was still a novelty to apply the very concept of war crimes in an

¹³⁸ At §§62ff.

¹³⁹ *Ibid.*, §§94ff.

¹⁴⁰ *Ibid.*, §134.

¹⁴¹ *Ibid.*, §§136-7.

¹⁴² *BYIL* (2000), pp. 282-5.

internal armed conflict; indeed, it is really through both *ad hoc* Tribunals that this extension of the concept entered the body of international law.¹⁴³

The essential novel aspects in this area of the law concern the requirement *ratione personae*, and more specifically the class of the persons who can be considered legally perpetrators of relevant violations of Common Article 3 and of Protocol II (1977). In the previous period under review, the question had been treated somewhat summarily. The position was that perpetrators had to be members of the armed forces (interpreted extensively) or civilians mandated or holding *de facto* positions of authority in the context of the war effort. There was thus a double-tier test: (i) membership in the armed forces; (ii) *de facto* authority in the taking of war-related measures. The common basis of this test was that the persons must hold *de iure* or *de facto* positions of public authority. Hence, the test has been called a 'public agent test'. This test has been somewhat relaxed in the *Akayesu* case on appeal (2001). The Appeals Chamber started by stating that there is no provision in the Statute limiting the criminal responsibility under common Article 3 and Protocol II to a specified class of persons.¹⁴⁴ Consequently, the point was to be settled according to the object and purpose of common Article 3, the Geneva Conventions, and the Protocols. The main object of these texts is to provide a minimum core of humane treatment under all circumstances to potential victims of the conflict. To be effective, such a minimum order implied necessarily effective punishment on persons who violate it.¹⁴⁵ This effectiveness-reasoning disposes of the question of personal scope of application: no special and *a priori* relationship to one party to the conflict or to a public authority is necessary for triggering criminal responsibility under Article 4 of the Statute.¹⁴⁶

The position taken in *Akayesu* has not brought complete clarification; neither has it been clarified in the jurisprudence to follow. In *Semanza* (2003), the Chamber held quite unclearly that the perpetrators must appertain to the armed forces or be other persons under a special agency test, *i.e.* 'individuals who were legitimately¹⁴⁷ mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfill the war efforts.'¹⁴⁸ It added that a specific link between the perpetrator and one of the parties to the conflict is not required, and that the minimum protections of common Article 3 and Article 4 of Protocol II can be claimed against anyone.¹⁴⁹ There seems here to have been a quite haphazard and

¹⁴³ Cf. R. Arnold, 'The Development of the Notion of War Crimes in Non-international Conflicts through the Jurisprudence of the UN *ad hoc* Tribunals', *Humanitäres Völkerrecht*, vol. 15, issue 3, 2002, pp. 134ff.

¹⁴⁴ *Akayesu* (Appeal, 2001), §436.

¹⁴⁵ *Ibid.*, §§442-3.

¹⁴⁶ *Ibid.*, §444.

¹⁴⁷ The sense of this word, which is a newcomer, is nebulous. It seems generally accepted that the legality and propriety of the appointment under internal law is not material for the public agency test under Article 4 ICTR Statute. The only essential point is whether the person held *de facto* powers (eventually added to *de jure* powers) in relation to the war effort.

¹⁴⁸ *Semanza* (2003), §360.

¹⁴⁹ *Ibid.*, §361.

unreflective merger of previous jurisprudence with the *Akayesu* appeal findings. The relation of the link requirement with the statement that protections can be claimed against anyone is far from clear. Either there is a specific link requirement or there is none; but both cannot coexist as to the same facts. The correct interpretation of *Semanza* is probably that if individuals fulfil the link requirement they are 'classical' perpetrators of the crimes at stake; however, legally, such a link is no longer required, for the protections can be claimed against anyone. The first criterion has thus become descriptive, whereas the second is alone legally controlling. One might thus probably say that the ICTR gave Article 4 an *erga omnes* reach as to the individuals obliged.

There still remains the question as to the precise relation of these findings to the general requirement that the acts at stake must have a nexus to the armed conflict in order to fall under the jurisdiction of the Tribunal. Does the nexus not reintroduce by the backdoor the public agency test seemingly expelled by the front door? On closer reflection, it appears that both aspects are not on the same plane. The nexus only signifies that there must be a close relation between the acts or omissions and the armed conflict. But such a close relation can be triggered by the acts of any person, if only the acts are done in the context of the war effort and war aims of one party, and not for purely private ends. That is mainly a question of motivation and of intent; it is not a question of personal status or of official function. Thus, the nexus criterion is much larger than the public official test and allows without contradiction the broader reading chosen in the *Akayesu* appeal.

The foregoing analysis, if correct, displays a quite remarkable step in the jurisprudence. In the post-World War II cases, it was accepted that civilians holding some form of *de facto* authority could commit war crimes.¹⁵⁰ That already was a progressive step in the law. Now, a further big leap is made: any person whatsoever may seemingly be held accountable for war crimes. Consequently, war crimes become provisions with unlimited *Drittwirkung*; they are transformed into the type of ordinary criminal law provisions binding any person whatsoever in the territory without any specific personal precondition. What that in effect means is that the Geneva Conventions and Protocols do not simply apply to the parties which ratified or acceded to them but to all the persons on their territory, including those who have no link with any public capacity. In this context too one can see the step from a limited approach to humanitarian law, based on formal requirements, to a sort of maximal approach,¹⁵¹ predicated upon the all-present logic of non-reciprocity,

¹⁵⁰ See *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. XV, London, 1949, pp. 58ff.

¹⁵¹ This *maximum* reach-approach stems from the *topos* of IHL as *minimum* protection, which thus must be of universal and unexceptionable reach. There is a direct equation here: minimum core of protection = maximum reach of entitlement and obligation.

inalienability, intangibility, intransgressibility,¹⁵² *jus cogens*, etc. From the point of view of legal technique, international humanitarian law and its related criminal law are becoming increasingly soft, whereas from the point of view of effective legal humanitarian protection they are becoming increasingly strong. A State-centered approach stressing the formal status of persons holding public authority gives way (in the *ad hoc* Tribunals at least) to a victim-centered approach stressing the criminality of the act in itself.

Is the step taken welcome from a principled perspective? From the point of view of an approach centered on victim-protection and effectiveness of the law (which was that of the Tribunal) the construction is unimpeachable: why should not all persons be *equally*¹⁵³ held accountable if they commit acts *in relation to the war* and if these acts are as such punishable as war crimes, the general conditions for prosecution being met (customary or treaty basis of the crime, individual criminal responsibility, etc.)? Why should the status of the person be more important than the substantive act? Why should it be a formal basis for discrimination? By acting in the war context, the person in a certain sense elects to enter the arena of the war; he cannot then complain that the rules of warfare are applied to him.¹⁵⁴ The only question mark could be if the circle of persons accountable in an international tribunal is not excessively enlarged in this case, and if persons not in any direct connection with State authority should not be left to the prosecution of internal tribunals. But this is a contextual question and it has to be solved on a case-by-case basis. There does not seem to be a principled distinction, because the gravity of the acts may not differ; thus, the very reason of criminal repression by an international tribunal may also not differ. On the other hand, State officials or civilians invested with public authority, through their acts, are accountable for the abuse of power inherent in their acts. However, from a victim's perspective the sanction cannot concern the issue of *détournement de pouvoir*; it must turn on the quality of the act in itself, and that is not a matter of formal status.

Conversely, if the general conditions for a war crime are absent (*e.g.* the absence of a relevant nexus), the crime must be considered to be a common crime and be left to internal law—exception made for special provisions.

VI. ARTICLE 4 ICTY STATUTE/ARTICLE 2 ICTR STATUTE: GENOCIDE¹⁵⁵

In the category of genocide, there have been marked evolution in the jurisprudence during the period under review. The novelties touch mainly

¹⁵² See the *Nuclear Weapons* Opinion (General Assembly) [1996] ICJ Rep 257, §79.

¹⁵³ Without distinction as to public capacity or not.

¹⁵⁴ That is no more than the application of the principle of effectiveness thought to its logical end.

¹⁵⁵ *BYIL* (2000), pp. 285ff. On this crime, see especially the following texts, published after 2000: M. Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum crimen sine lege and the Subject Matter Jurisdiction of the International Criminal Court*, Antwerpen [etc.], 2002, pp. 401ff. G. C. Bruno,

on two aspects: first, there has been a break of continuity; secondly, there has been a further development along the lines previously set. The most conspicuous evolution was the softening, and indeed the blurring, of the definition on the protected groups. As a result, the law becomes uncertain on this point of considerable importance. The jurisprudence here departs from rather than following its previous course. There were also important specifications on the question of genocide in a geographically limited area under the general heading of the intention to destroy a group only 'in part'. However, the jurisprudence on this second aspect follows the main lines laid down, so that new developments can be located within the framework of existing concepts. It may be noted in passing that the jurisprudence constantly reaffirmed the *jus cogens* character of the prohibition of genocide;¹⁵⁶ it is in effect one of the classical examples of *jus cogens* as understood since the codification of the law of treaties.¹⁵⁷ At this juncture, a point by point analysis in the elements of genocide is warranted.

1. Actus reus

In the *Krstic* case (2001)¹⁵⁸ the ICTY stressed that the *acta reus* of genocide all suppose the pursuit of the aim of *physical destruction* of a protected group. Thus, so-called 'cultural genocide'¹⁵⁹ by measures such as exclusion from national life, denial of political rights, segregation, etc., as coined, e.g., in the context of apartheid in South Africa, cannot be qualified as genocide in the legal sense. The *travaux préparatoires* of the Genocide Convention of 1948 show that the drafters deliberately ruled out such cultural genocide, because it was held to be too vague. It is true, the Chamber added, that recent developments tend to impress some enlargement on the concept: the UN General Assembly qualified ethnic cleansing as genocide, and so did the German Federal Constitutional Court in a decision of the year 2000. However, according to the principle *nullum crimen*, customary international law must be interpreted as covering, as to yet, only acts of physical destruction. Thus, for example, an attack on the cultural or sociological distinctive features of a group in order to annihilate its separate identity with respect to the rest of the community ('forced assimilation policies') does not fall under the definition of genocide.

¹⁵⁶ 'Le crime de génocide dans la jurisprudence des tribunaux pénaux internationaux pour l'ex-Yougoslavie et pour le Rwanda', in: E. Fronza/S. Manacorda (eds.), *La justice pénale internationale dans les décisions des tribunaux ad hoc*, Paris/Milan, 2003, pp. 94ff. W. A. Schabas, 'The Crime of Genocide', in: *The New International Criminal Law*, ed. by Kalliopi Koufa, Athens, 2003, pp. 467ff. W. A. Schabas, 'The Jelacic Case and the Mens Rea of the crime of genocide', *Leiden Journal of International Law*, vol. 14, 2001, pp. 125ff. W. A. Schabas, *Genocide in International Law: The Crimes of Crimes*, Cambridge, 2000.

¹⁵⁶ See, e.g., *Krstic* (2001), §541. That the prohibition is also customary seems quite obvious: *Musema* (2000), §151.

¹⁵⁷ Thus the International Law Commission gave the prohibition of genocide as an example when it drafted Article 53 of the Vienna Convention on the Law of Treaties (1969): *YBILC*, 1966-II, p. 248.

¹⁵⁸ At §§574ff.

¹⁵⁹ The concept is not new: see already A. Planzer, *Le crime de génocide*, Doctoral Thesis, University of Fribourg (Switzerland), 1956, p. 7.

But in some circumstances such a policy may be part of the evidence of specific intent to proceed also to physical destruction by displaying a pattern of contempt and attack on the targeted group.

These holdings of the Chamber are clear and were followed by all the subsequent trial chambers.¹⁶⁰ They have much to recommend themselves, if the tendency is to be resisted to boil down this most serious of all international crimes to an always larger class of acts of lesser gravity, or even to politicize it at the expense of a proper legal definition. It is submitted that the crime should thus remain a narrowly defined one. Moreover, the fact that 'cultural genocide' will not qualify as genocide does not mean that no international crime has been committed. The category of crimes against humanity contains a specific offence related to persecution (done with discriminatory intent) and many forms of cultural genocide may well qualify under that subsidiary heading. If it is felt that other forms of group persecution are to be criminally prosecuted, and that the subsidiary heading of crimes against humanity is not sufficient to that end,¹⁶¹ it is for the legislator to set the path and to properly define these purportedly new crimes. The case-law may engage in such a course only to the extent that there is a necessity and that the point at issue is largely accepted in the international arena.

The point still remains what exactly amounts to 'physical destruction'. That term is only apparently clear; as all legal terms, it may be interpreted more or less narrowly. Thus, for example, the Genocide Convention itself allows indirect means of destruction:¹⁶² the jurisprudence gave as an instance the 'systematic expulsion from homes' (accompanied by the requisite specific intent). However, it is easily understood that systematic expulsion from homes, on the level of *actus reus*, is a physical destruction much less obvious than the killing of members of the group. If one still further broadens the chain of relevant acts, may one for example say that deportation is an act of (indirect) physical destruction? As will be seen in due course, the case-law has responded by the negative. But from the point of view of the *actus reus* (and not of the *mens rea*), what distinguishes systematic expulsion from homes from deportation? Or is the correct view that implicitly the 'systematic expulsion from homes' was also abandoned as an *actus reus* when deportation was denied that status? Is the true meaning that expulsion from homes is performed in the expectation that the persons so expelled will in due course perish because of lack of shelter, food, etc.? But if that is true, all turns on the facts of particular cases and thus deportation cannot be ruled out as a means of indirect destruction if it happens to have the same effects as expulsion

¹⁶⁰ See, e.g., *Stakic* (2003), §518.

¹⁶¹ Apart from questions of prestige attached to the graver qualification of genocide in comparison with the lighter one of crimes against humanity—a reasoning which in any event is not convincing since it places itself only on an abstract plane. A crime against humanity may concretely be as grave as an act of genocide; by the figures of persons involved, it may even be graver.

¹⁶² See letters c–e of Articles 4/2 ICTY/ICTR Statutes.

from homes in a specific case. It may not be necessary to expand further on this point; it already appears that many aspects still await clarification.

As to the different forms of *actus reus*, some additions in the case-law may be noticed:

- (a) *Killing members of the group*. The restrictive reading given in *Akayesu* (1998)¹⁶³ with regard to the two terms 'assassinat' and 'killing', giving preference to the French wording which is narrower¹⁶⁴ and thus more favorable to the accused, has been fully endorsed by the subsequent case-law: see e.g. the *Musema* case (2000).¹⁶⁵
- (b) *Causing serious bodily or mental harm to members of the group*. The case-law added some further examples of prohibited acts under that heading, by endorsing all the explanations given in previous judgments. In *Stakic* (2003) the following acts were added: sexual violence (rape and other sexual assaults), interrogations combined with beatings, and threats of death.¹⁶⁶ It is to be borne in mind that since the specific intent must be to physically destroy the group, such acts must be performed with that aim; otherwise, they will not amount to genocidal acts.
- (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*. From these acts of indirect physical destruction the case-law distinguished measures which are not aimed at real physical destruction. Thus, in *Stakic* (2003), it was affirmed that deportation is not sufficient: deportation does not aim at physical destruction but 'merely' at the dissolution of the group.¹⁶⁷ But is that generally true? In *Krstic* (Appeal, 2004), the finding of *Stakic* was somewhat watered down, but without reversing it. The Appeals Chamber found that the physical transfer could be an additional means to ensure physical destruction of a group; it could cause the result of eliminating the residual possibility for a group to reconstitute itself in the targeted area. If that is established, it buttresses a finding of genocidal intent erected on other grounds; however, it remains true that forcible transfer does not constitute in and of itself a genocidal act.¹⁶⁸
- (d) *Imposing measures intended to prevent birth within the group*. No further developments can be mentioned under that heading.
- (e) *Forcibly transferring children of the group to another group*. In *Musema* (2000), it was confirmed that this heading covers not only any direct act or forcible transfer, but also any infliction or threat of trauma, which would lead to the forcible transfer.¹⁶⁹ It will be noted that this heading also does not suppose direct physical destruction of the targeted persons.

¹⁶³ *Akayesu* (1998), §§500–1. See *BYIL* (2000), p. 286.

¹⁶⁴ It covers only intentional killing, whereas killing in English may cover also unintentional killing.

¹⁶⁵ At §155. ¹⁶⁶ *Stakic* (2003), §516. ¹⁶⁷ *Ibid.*, §§518–19.

¹⁶⁸ *Krstic* (Appeal, 2004), §§24ff, 33. ¹⁶⁹ *Musema* (2000), §159.

2. *Mens rea: specific intent*¹⁷⁰

The crime of genocide is essentially qualified by the *mens rea* of attempting to destroy, in whole or in part, a group as defined in the relevant instruments. It is this specific intent which distinguishes the crime of genocide from other crimes, like crimes against humanity. In the latter, it is sufficient to attack, and even to physically destroy, a civilian population; the attack qualifies as an international crime by its massiveness; but no intent must be shown that the attacked persons constituted a special group, nor that there was an intent to wipe them out as such a group. In this sense, but only in this sense, it can be said that the crime of genocide is more heavily leaning towards the subjective (*mens rea*) criterion than towards the objective (*actus reus*) criterion. Or, in the words of the chamber in the *Stakic* case (2003), the crime is primarily based on this intent ('surplus of intent'): it is thus not necessary to prove a factual destruction of the group by going into numerical terms; it is the genocidal intent or *dolus specialis* that predominately constitutes the crime.¹⁷¹ In German penal science, such crimes are called '*kupierte Erfolgsdelikte*' or '*Delikte mit überschüssender Innentendenz*':¹⁷² the result is that the crime is constituted as soon as the criminal behavior infringes the protected position of the victims, but before the result aimed at is really produced (in full or even in part).

The special intent must be to destroy the group 'as such', *i.e.* as a separate and distinct entity.¹⁷³ Does that imply that the individuals must be targeted solely because they were members of the group destined to destruction? The question arose in the *Niyitegeka* case (2004) at the ICTR. The response was that the criterion of destruction 'as such', correctly interpreted, means that the prohibited acts have been committed *because* of membership of the individuals in the protected group, but not solely because of such membership. Thus, if one reason (which will ordinarily be controlling) for the acts performed was the membership of the individuals to the group to be destroyed, and there is the requisite *mens rea*, the fact that other reasons existed in parallel does not disqualify these acts as being crimes of genocide.¹⁷⁴ That leads to a further point clarified in the case-law: the special intent to destroy must be distinguished from motive. There may be many immediate motives for engaging in genocidal acts: the pursuit of economic benefits, the rise to power, the search for political advantage. Such motives are irrelevant to the *mens rea* requirement.¹⁷⁵ What counts is only the intent to destroy and not the personal reasons for having formed such an intent. That, indeed, is a general principle of criminal law: the *mens rea* is abstract, in the sense that the only relevant thing is to ascertain its existence, and not the reasons for its

¹⁷⁰ For the basic information see *BYIL* (2000), pp. 287–8.

¹⁷¹ *Stakic* (2003), §522.

¹⁷² See, e.g., P. Noll, *Schweizerisches Strafrecht, Allgemeiner Teil*, 2nd ed., Zurich, 1986, p. 93.

¹⁷³ *Brdjanin* (2004), §698.

¹⁷⁴ *Niyitegeka* (2004), §53.

¹⁷⁵ *Jelicic* (Appeal, 2001), §49; *Brdjanin* (2004), §696.

existence. Moreover, the existence of a plan or policy is not required, but it may be an element of evidence in establishing the existence of a specific intent:¹⁷⁶ if there exists such a policy and it can be shown sufficiently clearly to exist, then the specific intent would be established for all those adhering to it; conversely, if there is no such policy, the specific intent can still be inferred from the circumstances of the particular case.

The specific intent must be strictly established for the acts committed. In particular, only willful and direct causation is sufficient. Thus, only acts done with the direct goal of destroying, and which ordinarily lead directly to such destruction, qualify; conversely, acts whose effect is only more or less foreseeably or probably to bring about such destruction do not qualify. This point relating to the length of the chain of causation is controversial in legal writings. According to *Krstic* (2001), the narrower interpretation must for the time being be held to reflect customary international law.¹⁷⁷

What that exactly implies is less clear on reflection than first appears. To the extent indirect means of destruction are recognized by the law, some stretch within the chain of causation is accepted. The problem most probably boils down to the exclusion of acts which are too remote in their link with the direct or indirect destruction of a group. The foregoing implies that an accused would have the benefit of the doubt while still having the requisite intent to destroy, simply because the acts he committed were not sufficiently able to produce the result intended. The law would consider this course an improper attempt, not to be punished (*untauglicher Versuch*). It need not be stressed that there will be some delicate delimitations between acts still sufficiently close to the result and acts reputed to be too remote. If it is true that the crime of genocide is constituted mainly by the subjective element, then the interpretation of remoteness must be quite exacting.

The most important developments in the period under review relate to partial genocide committed in geographically limited areas ('in part'). To how a narrowly defined area can the crime of genocide be reduced? Can genocide be committed by targeting the selected group only in a province, in a town, in a municipality, in a street? In the *Stakic* case (2003)¹⁷⁸ there is a summons to be cautious in accepting such limited area genocides lest the definition of the crime be distorted.

The *Krstic* case is the leading case on this question. It had to deal with the Bosnian Serb take-over of the protected area of Srebrenica in 1995, and the ensuing slaughter of Muslim men of the whole area. In *Krstic* (2001) it was held that such limited area genocide implies seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it.¹⁷⁹ The number of victims is not material. Consequently, a campaign resulting in killings of a finite number of

¹⁷⁶ *Jelusic* (Appeal, 2001), §48.

¹⁷⁷ *Krstic* (2001), §571.

¹⁷⁸ At §523.

¹⁷⁹ *Krstic* (2001), §590. See also *Stakic* (2003), §524; *Brdjanin* (2004), §700.

members of a protected group in different places spread over a broad geographical area might not qualify as genocide if it is not targeting the very existence of the group as such; conversely, the killing of all members of the part of a group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide.¹⁸⁰ The physical destruction may even target only a part of the geographically limited fraction of the group, to the extent the perpetrators regard the intended destruction as sufficient to annihilate the group as a distinct entity in the area at issue.¹⁸¹ In the case submitted to it, the Chamber decided that genocide had been committed: the combination of killings of men with the forcible transfer¹⁸² of the rest of the Muslim population resulted in the destruction of the Bosno-Muslim population at Srebrenica.¹⁸³ The essential criterion shaped by the Chamber is thus that of the 'distinctness' of the group to be destroyed in a limited area: the attack must be on a limited but visible entity rather than on a series of individuals too loosely connected.

In *Krstic* (Appeal, 2004)¹⁸⁴ the discussion was centered on the substantive requirement that a 'substantial part of the group' must be targeted or destroyed. The part targeted must have a significant impact on the group as a whole. This aspect had already given rise to jurisprudential statements in the previous period of review. The present Appeals Chamber clarified the various factors to be taken into account in applying the substantial part criterion. The starting point is the (quantitative) numerical size of the targeted group, evaluated in relative terms, *i.e.* in relation to the overall size of the entire group in the State concerned. Second, there is the qualitative importance of the targeted group in terms of its symbolic or emblematic significance to the community. Third, much depends on the perpetrator's area of effective control: if he controls only a small part of the territory, he will be able to implement his genocidal designs only in that part. How were these criteria applied in the present case? The Appeals Chamber found that Srebrenica was of immense strategic importance for the viability of a Bosnian Muslim State. As a United Nations safe area it had a high symbolic importance. And the Serb forces indicted in this case controlled only the Srebrenica area and could thus act only there. These factors outweighed the numerically small proportion of persons killed with respect to the whole Muslim population in Bosnia. The conviction for genocide was thus upheld.

With regard to the foregoing one may say that the ICTY in the *Krstic* case laid down its doctrine on partial (geographically limited) genocide. One will notice the flexible interpretation of the crime and the relative readiness and sympathy for admitting such partial genocides. The 'substantial part' requirement was reduced to a series of factors where

¹⁸⁰ *Krstic* (2001), §590.

¹⁸¹ *Ibid.*

¹⁸² As it can be seen, forcible transfer here reinforces the finding of genocidal intent arrived at independently.

¹⁸³ *Ibid.*, §§595–8.

¹⁸⁴ At §§8–15. See also *Brdjanin* (2004), §§701–2.

numerical size plays only a minor role. In fact, in *Krstic*, symbolic and control-related arguments played the determining role. Moreover, the symbolic character of the group can be the result not only of intrinsic characteristics (*élites*, historical figures, etc.), but also of somewhat fortuitous events, such as the fact of being proclaimed a safe area by the United Nations. If an area is not proclaimed to be such, would that change the result arrived at? Finally, the area of control of the perpetrator is as such completely accidental; and yet it is considered material. It can moreover help to establish the special intent if the members of the targeted group are pitilessly persecuted in the area of control.

In summarizing, the two controlling prongs are the following: (1) the targeted individuals must form part of a (locally) distinct entity; (2) the part of the group targeted must be either substantial on the numbers, or somehow symbolic, or quite systematically attacked in the area of effective control of the perpetrating forces. These criteria leave a wide field for interpretation; the threshold for partial genocide has been lowered by the *Krstic* case probably in view of the appalling facts at stake.

3. *Groups protected*

On the issue of groups protected, there has been probably the most important evolution in relation to the crime of genocide during the period under review. In this context, the standards were not simply lowered, but they were dissolved in the mists. It will be recalled that the Genocide Convention and the Statutes of the *ad hoc* Tribunals mention four protected groups: national, ethnical, racial, and religious. The jurisprudence had already established that this list is not exhaustive, but that other groups presenting the same type of stability and coherence could also qualify.¹⁸⁵ That objective approach has been progressively subjectivized. As a result, the law was rendered more uncertain and more open-ended, without, it is submitted, much correlative benefit.

For the ICTY, the dominating doctrine of the protected group in the period under review has been formulated in *Krstic* (2001). According to the Trial Chamber, there is substantial overlap between the definition of groups in the context of genocide and the concept of 'national, ethnic and religious minorities'. The main aim of the Genocide Convention was to protect such minority groups rather than to refer to different prototypes of human groups.¹⁸⁶ Thus, it would be idle to define the group in any static and purely objective way; that in effect would be contrary to the object and purpose of the Genocide Convention. What is essential is a *subjective criterion*: the group characteristics appear notably through the *stigmatization* of the group.¹⁸⁷ As far as the ICTY is concerned, this new doctrine was consolidated in *Brdjanin* (2004), by giving a slight steer

¹⁸⁵ *Akayesu* (1998), §§511ff.

¹⁸⁶ *Krstic* (2001), §556. As can be seen, this is the starting-point for the depreciation of the group criterion.

¹⁸⁷ *Ibid.*, §557.

towards a more mixed subjective-objective approach. In this case, it is in effect added that the determination of the group quality rests on *objective and subjective criteria* and must be made on a case-by-case basis.¹⁸⁸ The objective criterion appears to be the appurtenance to a minority group, especially national, ethnic, or religious; whereas the subjective criterion is the stigmatization test, *i.e.* the subjective notion of appurtenance to a targeted group as it appears in the eye of the perpetrator and/or of the victim. The ICTR had already broken that ground in *Musema* (2000): it was there underlined that the group-concept has to be assessed in the light of the particular political, social, and cultural context of each collectivity; for the rest, the stigmatization criterion is controlling. As an objective limitation, the *Musema* Chamber kept the exclusion of groups not being relatively stable and permanent.¹⁸⁹ Only in one case has an ICTR Chamber seemed to have relied on a purely subjective (stigmatization) criterion;¹⁹⁰ but the judgment available is not yet an official version and cannot be taken as a deliberate and considered departure from previous case-law.

If one attempts to summarize, the result of the foregoing is the following group definition: protected groups are defined on the combined basis of an objective-relative criterion and a superimposed and powerful subjective criterion. The objective criterion rests on the idea of a permanent and stable group, *i.e.* the fact that an individual is by some form of destiny tied to that group. However, the precise definition of that criterion is relative to a certain society and its culture and practices. Moreover, membership of such groups is largely a matter for subjective determination: what counts is the perception of the perpetrators and victims at a given moment, *i.e.* the aspect of stigmatization. Such is the complex state of the test as it is presently applied by the jurisprudence.

In the *Stakic* case (2003) a particular problem prompted some slight reflections on the group-definition. It was held there that a purely negative approach in defining the protected group (*e.g.* 'all non-Serbs') is not adequate if more than one group is targeted. In such a situation it is not sufficient to identify the group as individuals not being part of the group to which the perpetrators consider themselves to belong;¹⁹¹ the definition must be positive, identifying each persecuted group as such. 'Outsiders'

¹⁸⁸ *Brdjanin* (2004), §§682–4, 684. Thus: 'In accordance with the jurisprudence of the Tribunal, the relevant protected group may be identified by means of the subjective criterion of the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnic, racial or religious characteristics. [...] The correct determination of the relevant protected group has to be made on a case-by-case basis, consulting both objective and subjective criteria. This is so because subjective criteria alone may not be sufficient to determine the group targeted for destruction and protected by the Genocide Convention, for the reason that the acts identified in subparagraphs (a) to (e) of Article 4(2) must in fact be directed against 'members of the group' (§§683–4).

¹⁸⁹ *Musema* (2000), §§161–2. See also *Semanza* (2003), §317: '[The determination of a protected group] ought to be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by subjective perceptions of the perpetrators. The Chamber finds that the determination of a protected group is to be made on a case-by-case basis, consulting both objective and subjective criteria'; *Kamuhanda* (2004), §630.

¹⁹⁰ *Gacumbitsi* (2004), §254.

¹⁹¹ *Stakic* (2003), §512; *Brdjanin* (2004), §685.

are by definition not a group. That is particularly true if some members of the perpetrators' own community are also targeted because they are held to be too friendly to the cause of the persecuted group. Think of the example of the moderate Hutu in Rwanda.

What can be elicited from the new group definition, based on a mix of objective and subjective criteria? First, it may be noted that the subjectivization of the test to some extent merges the questions of the group definition and that of partial genocide (in a limited geographic area). In effect, as the *Krstic* case shows, it is now possible either to define the Srebrenica Muslims as a stigmatized and thus protected group 'as such', against which genocide proper is committed; or to define the group in a larger way by reference to the objective criterion of an ethnical group within Bosnia, and then to speak of a genocide 'in part' of the territory. The more the subjective aspect of the group definition will prevail, the more the two questions will tend to merge into one another.

As to the complex new group test, it is doubtful if it represents much progress. It looks subtler and more articulated, but it is submitted that it does not carry the matter any further. That the national, ethnical, racial, religious, or other groups *ejusdem generis* should be defined according to a particular cultural and social context may readily be conceded. Nationality, and all the more ethnicity, race, and religion, are objective facts;¹⁹² what counts is how the victims lived and were perceived in a given society. Therefore, the law has to orient itself around these facts of life if it wants to be effective. For the rest, the open-endedness of the groups listed leaves sufficient place for needed additions and even for the stigmatization criterion: if a group constitutes itself through the experience of persecution suffered in common, such a group can be brought within the old so-called 'objective' definition. Take for example the Cambodian 'genocide': if it is shown that all the intellectuals and highly educated persons in a society were persecuted in order to create the new 'agrarian' man, this stigmatization in conjunction with the relative stability of the group (the participation is not voluntary but to a large extent a matter of destiny) allows us to qualify these acts as genocide. The subjective criterion should not do more than to keep such possibilities open.

The main line of argument must, however, rest on the groups mentioned in the Genocide Convention. They are the backbone of the crime. If the subjective criterion is put at the center of the reasoning, one thereby conceals the real content of the crime and tends surreptitiously to accredit the idea that 'any type' of group may qualify. In truth, further groups qualify only by way of a special, *ejusdem generis*, analogy to the mentioned ones. The groups as defined in the Convention are thus the correct point of departure, and not an open-ended stigmatization test as a seemingly primary and independent basis. It is for this reason of improper inversion of the relevant elements that the subjective trend in the jurisprudence seems to be superfluous, and eventually even spurious.

¹⁹² One knows how differently they are perceived in different African societies.

4. *Direct and public incitement to commit genocide*

In the *Nahimana* case (2003)¹⁹³ before the ICTR, the point at issue was the role of the media in the Rwandan genocide. It is generally known that some of the mass media had a crucial influence on the genocide by lending themselves to hate speeches and propaganda. Thus, the accused in the case at hand used the written and radio media for his appeals to destroy the Tutsi, to some extent as Streicher had done in Germany against the Jews. The legal aspect on which the ICTR devoted some reflection was the relation of incitement to commit genocide with freedom of expression as a fundamental human right. The Chamber reviewed the circumstances under which the freedom may and must be limited. It essentially relied on Article 20(2) of the International Covenant on Civil and Political Rights, which requires States parties to prohibit 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Freedom of expression may also be limited to protect the rights of others. The Chamber engaged on this point in a thorough analysis of the case-law of the main judicial and quasi-judicial human rights bodies, namely the Human Rights Committee of the United Nations and the European Court of Human Rights.

The Chamber finally stated the relevant criteria that emerge from the jurisprudence on the permissibility of limitations to the freedom of expression: (1) the *intent or purpose* of the expression (is it a *bona fide* research, or is the purpose to stir violence, to voice revengeful sentiments, etc.); (2) the *context* (may the words used have a particular effect in a sensitive area, situation, etc.). All these passages are a contribution to the balancing test of one of the most delicate human rights matters. At the same time it can be seen how difficult their application remains in many cases. However, when there is direct incitement to commit a crime (such as to kill persons) there can be in the end, it is submitted, no doubt.

VII. ARTICLE 5 ICTY STATUTE/ARTICLE 3 ICTR STATUTE: CRIMES AGAINST HUMANITY¹⁹⁴

1. *The prohibited acts*

As stated in the *Akayesu* case (1998), the acts contemplated under the heading of crimes against humanity are inhumane in nature and character, causing great suffering or serious injury to the body or the mental or

¹⁹³ At §§978ff.

¹⁹⁴ *BYIL* (2000), pp. 291ff. On this crime, see especially the following texts, published mainly after 2000: M. Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum crimen sine lege and the Subject Matter Jurisdiction of the International Criminal Court*, Antwerpen [etc.], 2002, pp. 455ff. A. Cassese, 'Crimes against Humanity: Comments on Some Problematic Aspects', in: *The International Legal System in Quest of Equity and Universality. Liber Amicorum Georges Abi-Saab*, ed. by Laurence Boisson de Chazournes and Vera Gowlland-Debbas, The Hague, 2001, pp. 429ff. A. Cassese, 'Crimes against Humanity', in: *The Rome Statute of the International Criminal Court*, ed. by Antonio

physical health. In order to give some content to this general idea, the Statute lists a series of acts that are held to illustrate the prohibited *acta reae*. This list is not exhaustive. In the Statute of the ICC, some additional crimes are listed; they were taken from the jurisprudence of the *ad hoc* tribunals.

In the period under review, the tribunals discussed mainly the following offences: persecution, rape, torture, and mistreatments, outrages upon personal dignity, enslavement, imprisonment, extermination, deportation/forcible transfer, and 'other inhumane acts'. This is not the place to devote an in-depth analysis to each of these counts. Some indications on the main lines of the jurisprudence will suffice. First, there will be an update, where necessary, to the headings already discussed in the last period of review, then, some additional comment on the offences newly discussed. Conversely, not much needs to be said on the general conditions of crimes against humanity, such as the definition of the civilian population or the notion of widespread or systematic attack.

(a) *Extermination*¹⁹⁵

In the *Krstic* case (2001), extermination was defined as mass murder along the following lines: 'A particular population must be targeted and its members killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population'.¹⁹⁶ Extermination can be closely related to genocide. But it distinguishes itself from that crime first by the fact that the targeted population does not necessarily have any common national, ethnical, racial, or religious characteristics. Second, the intent to destroy the group as such is not necessary. Moreover, third, extermination covers situations where some members of the group are killed whereas others are spared.¹⁹⁷ Of these three differences highlighted by the case-law, the second one is the strongest; the other two aspects have been somewhat weakened by the subjective bend in the genocide jurisprudence.

As to the numerical aspect of the crime ('mass murder'), it has been said that the figures involved can be more limited if the group targeted is made up only of a relatively small number of people. In general, the destruction 'of a numerically significant part of the population concerned' is required,¹⁹⁸ even if the ICC Statute speaks only of 'a part' of the population. However, contrary to the previous jurisprudence, the possibility of committing extermination by a single or a very limited number

Cassese, Paola Gaeta, John R.W.D. Jones, Oxford, 2002, pp. 353ff. Y. Dinstein, 'Crimes against Humanity after Tadic', *Leiden Journal of International Law*, vol. 13, 2000, pp. 373ff. G. Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', *Harvard International Law Journal*, vol. 43, 2002, pp. 237ff.

¹⁹⁵ See: *Krstic* (2001), §§490ff; *Vasiljevic* (2002), §§216ff; *Stakic* (2003), §§633ff; *Brdjanin* (2004), §§388ff; *Musema* (2000), §219; *Semanza* (2003), §§340-1; *Kajelijeli* (2003), §§890ff; *Nahimana* (2003), §1061; *Kamuhanda* (2004), §§693-4; *Gacumbitsi* (2004), §§307ff; *Ndindabahizi* (2004), §§475ff, 479-80.

¹⁹⁶ *Krstic* (2001), §503.

¹⁹⁷ *Krstic* (2001), §§490ff; *Stakic* (2003), §639.

¹⁹⁸ *Krstic* (2001), §§501-2.

of killings has been ruled out.¹⁹⁹ If such isolated killings occur, they are legally to be put under the heading of 'murder' and not of extermination. On the other hand, it is the aggregate of the acts that will be relevant:²⁰⁰ if there are a series of limited killings, they may add up to a chain which brings the acts under the purview of extermination. Moreover, participation in the crime may be remote or indirect,²⁰¹ if only there is the requisite *mens rea* and there is a contribution to the final result. It has been added that omissions are also covered. In *Musema* (2000)²⁰² it was said that the omissions thus considered must 'cause' the death. That is to fall back to the old mistake of thinking that omissions can cause a result in the same sense as positive acts can. The true test is whether the action by the accused could have in all probability eliminated the criminal result and if the accused could be held responsible, in the circumstances, for not having done so. This is not causation proper, but a hypothesis: *conditio cum qua verisimiliter non*.

The group to be exterminated is not defined by positive criteria as in the case of genocide. Consequently, it can be qualified in the negative, as all persons not belonging, or not loyal, to the perpetrators' group.²⁰³

Earlier uncertainties as to the proper *mens rea* have continued to manifest themselves. The case-law of the Tribunals is far from being harmonious on this point. Discriminatory intent is not required.²⁰⁴ In *Vasiljevic* (2003)²⁰⁵ it is stated that the perpetrator must have known of the vast plan of collective murder and have been willing (*i.e.* have intended) to take part. The *Stakic* (2003)²⁰⁶ case is more precise as to the required will element: *mens rea* of the crime supposes intention (*i.e.* *dolus directus* or *dolus eventualis*) to kill or to create conditions of life that lead to death of a large number of individuals; recklessness or gross negligence are not enough. In *Brdjanin* (2004)²⁰⁷ recklessness is admitted, but it seems to be equated to *dolus eventualis*; if this is true, there is no substantive difference with *Stakic*, except for conceptual misunderstandings. As to the ICTR, *Semanza* (2003)²⁰⁸ requires intent, while *Kajelijeli* (2003)²⁰⁹ allows also gross negligence. To say the least, there is here some disorder, which needs to be quickly overcome. The correct standard seems to be that of *Stakic*, if one adds recklessness understood as something akin to *dolus eventualis* (so gross a negligence that it can only be equated to intent, or at least acceptance of the inevitable outcome). On all the other points, the case-law has followed the lines laid down in the previous period of review.

(b) Torture and related mistreatment offences²¹⁰

As to torture, the most conspicuous development took place in that context in the *Kunarac* case (2001). We are first reminded that torture is

¹⁹⁹ *Vasiljevic* (2002), §227; *Kajelijeli* (2003), §893; *Kamuhanda* (2004), §§693-4.

²⁰⁰ *Brdjanin* (2004), §391.

²⁰¹ *Ibid.*, §390.

²⁰² At §219.

²⁰³ *Stakic* (2003), §639.

²⁰⁴ *Krstic* (2001), §500; *Vasiljevic* (2003), §228.

²⁰⁵ At §228.

²⁰⁶ At §§641-2.

²⁰⁷ At §395.

²⁰⁸ At §341.

²⁰⁹ At §895.

²¹⁰ As to torture, see *Kunarac* (2001), §§465ff; *Kvočka* (2001), §§131ff; *Kronjelac* (2002), §§177ff; *Kunarac* (Appeal, 2002), §§142ff; *Brdjanin* (2004), §§480ff; *Semanza* (2003), §342.

absolutely prohibited in international law, both in times of peace and of war; and that the norm constitutes an example of *jus cogens*.²¹¹ Then the Chamber moves on to the essential point: the condition that some person acting in public capacity must have participated to the perpetration of the crime—in order to be considered as torture under international law—is eliminated. It is known that human rights instruments defining torture make reference to such a public official: see, *e.g.*, the Torture Convention of 1984, in Article 1. According to the Chamber, on this point a direct analogy between human rights law and international humanitarian law is not warranted. The two bodies of law operate in different contexts and with different aims. Human rights law is concerned essentially with the role of the State in its dealings with private individuals; hence a natural stress on the acts of public officials as being part of its very subject-matter.²¹² On the other hand, international humanitarian law and the related criminal law have a much broader scope. They are not strictly limited to actions of public officials but touch upon individual conduct much more generally, *e.g.*, to actions done by civilians. That can be clearly seen in some provisions of international humanitarian law, which contemplate the commission of acts by individuals without official status. The Chamber quotes to that effect Article 4 of Additional Protocol II (1977) and Article 12 of Geneva Convention I (1949). The consequence drawn from the preceding statements is that ‘the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.’²¹³

What that practically means is that the concept of torture under customary international law splits up into two prongs: one for human rights purposes and another for international humanitarian law and criminal law purposes. For criminal law, the offence is constituted by the following objective elements: (1) infliction, by an act or omission, of severe pain or suffering, whether physical or mental; (2) the act or omission is intentional; (3) the act or omission must be aimed at reaching a certain goal.²¹⁴ The illegitimate purposes (goals) which are certainly recognized in customary international law are the following: (i) obtaining information or a confession; (ii) punishing, intimidating, or coercing a victim or a third person; (iii) discriminating, on any ground, against the victim or a third person. The prohibited purpose must only be part of the motivation behind the conduct and need not be the sole or even the predominant purpose.²¹⁵ To the present commentator this purpose-scheme appears

²¹¹ *Kunarac* (2001), §466. That reminder may not be useless if one thinks of the efforts of some lawyers in the United States (like A. Dershowitz) to allow some forms of legally accepted torture.

²¹² The Chamber however recalls that even human rights bodies have given some horizontal effects to the prohibition of torture, which amounts to casting away the public official requirement: see the *HLR v France* case of the ECHR: ECHR, *Reports*, 1997-III, pp. 745ff.

²¹³ *Kunarac* (2001), §496; see generally §§465ff.

²¹⁴ *Ibid.*, §§483ff.

²¹⁵ *Ibid.*, §§485-6.

so broad that any purposeful action²¹⁶ will lend itself to be subsumed under it.

The step taken by the ICTY in *Kunarac* may be welcomed as to substance. It is still to be applied with some care, since, by casting away an element which was held to be important, there is some slight tension²¹⁷ with the *nullum crimen* principle. There is in effect no substantive reason to hold that the concept of torture is unique in international law. Legal concepts are relative to a certain juridical context and legislative aim.²¹⁸ Thus, nobody ever claimed that the concept of 'property' or of 'occupation' are unique across the legal order and its many branches. There are weighty reasons to distinguish torture in the State-centered human rights context from torture in the individual-centered criminal law context. Thus, the conceptual refinement in *Kunarac* is appropriate. It can be added that all the subsequent trials at the ICTY and at the ICTR have endorsed the notion of torture as expounded in *Kunarac*.²¹⁹

Human rights law is still held relevant to the definition of the crime of torture, namely in order to identify the threshold of pain required.²²⁰ The jurisprudence here refers to the case-law of the human rights bodies, especially to the case-law of the ECHR. Thus, the threshold of 'severe pain or suffering' is ascertained by objective factors (severity of the harm) but also by subjective ones (effect on the particular victim, victim's age, sex, state of health, etc.). Human rights case law has considered the following acts to be torture: beatings, sexual violence, threats of torture, deprivation of food/water, mock executions, electric shocks to genitals, thumb press, extended hanging by hands or legs, *submarino* (immersion in a mixture of blood, sperm, excrement, and urine), mutilations, etc.²²¹ Permanent damage is not required. Mental suffering includes, for example, being forced to be present during the torture of relatives or friends.²²² If mistreatment lasts for a certain time, a decision as to whether torture has occurred requires consideration of all the elements: thus solitary confinement may amount to torture if there is a certain duration and strictness.²²³ The jurisprudence has confirmed that rape meets the

²¹⁶ There are some rare cases where acts which objectively qualify as torture are not torture because they were committed without intent. A classical example is the case of an Austrian individual who was arrested and forgotten in a detention cell for twenty days, without water and food, in the permanent anguish of dying by privation. See *EuGRZ*, 1981, p. 571.

²¹⁷ The tension is only slight, since the acts of torture at stake are already prohibited by any criminal code. But then a point of jurisdiction of the ICTY may arise.

²¹⁸ See K. Engisch, *Einführung in das juristische Denken*, 3rd ed., Stuttgart, 1964, pp. 1ff (many new editions since).

²¹⁹ See *Kvočka* (2001) §139; *Kronjelic* (2002), §187; *Kunarac* (Appeal, 2002), §§142ff; *Brdjanin* (2004), §§488-9; *Semanza* (2003), §342.

²²⁰ *Kvočka* (2001), §§143ff; *Kronjelic* (2002), §181. *Brdjanin* (2004), §484.

²²¹ For a compendium of examples, cf. L. Doswald-Beck/R. Kolb, *Judicial Process and Human Rights*, Kehl/Strasbourg/Arlington, 2004, pp. 285ff.

²²² Why not simply of third persons? Is the sense of the restriction that there is no mental suffering when obliged to watch the worst abuses on a fellow man? If that is the idea, it is submitted that it is wrong.

²²³ *Kronjelic* (2002), §182.

severity test.²²⁴ As to the *mens rea* for rape, the sexual motive is not relevant; there must be intent, and the act must at least be committed also for one of the prohibited purposes.²²⁵

One understands the tendency of the *ad hoc* tribunals to refer to the human rights bodies practice for defining the material content of torture. However, it must be recalled that the contextual weighing up of a series of objective and subjective criteria by the human rights bodies fits the State-related context in which these bodies operate. A State may be held responsible for having violated individual rights on the basis of highly individualized judgements, derived from extremely open-ended norms such as the fundamental rights and freedoms. In this area, a norm whose content is simply 'the freedom of the press is guaranteed' may be perfectly sufficient, since the law and the practice will spell out its precise content. If that content is enlarged, that goes to the detriment of the State and not to the freedom of the individual; and if it is narrowed, the right will be considered not to have extended so far from its inception. The same is not true of criminal law, which rests on the principle of strict construction: *nullum crimen*, foreseeability of the law, no conviction on the basis of analogies, etc., for the benefit of the accused. In this context, the highly context-dependent cluster of objective and subjective criteria adopted by the human rights bodies should be somewhat elaborated in order to give way to a more principled set of thresholds.²²⁶ A purely case-by-case weighing-up may not meet the more exacting standards of the criminal law. It is not suggested that the standards in this matter can be completely objectified; but some constructive effort in that direction would be welcome.

A serious divergence has arisen in the jurisprudence as to the list of prohibited purposes. There seems to be some degree of recognition that the list is not exhaustive,²²⁷ at least for the purposes of international humanitarian law. And there is certainly agreement on the point that the prohibited purpose must not be the sole one having motivated the perpetrator; it can be one motivating purpose among others.²²⁸ However, in *Krnjelac* (2002), it was held that only the prohibited purposes listed in the Torture Convention are as yet part of customary international law. Thus, the 'humiliation' of the victim is not yet a recognized prohibited purpose and no conviction can be based on it. An enlargement of the

²²⁴ *Kunarac* (Appeal, 2002), §151. *Brdjanin* (2004), §485.

²²⁵ *Kunarac* (Appeal, 2002), §153.

²²⁶ It is a general problem of criminal law to smooth out completely subjective standards such as those relating to pain, to shocks, to sense of honor, etc. There are some people who hardly ever feel pain, are shocked or dishonored; on the other hand, there are some extremely sensitive people, who quite constantly feel pain, are shocked, feel dishonored, etc. The law must define some middle path in this field. That middle path is based, in municipal law, on the reasonable average man; and it can then admit more subjective criteria, linking them to the perpetrator in saying that he knew or must have known about that special sensitivity of the victim and acted all the same (to the extent that that sensitivity could be known to him). Such is, in such matters, the proper legal technique.

²²⁷ *Kvočka* (2001), §140; *Brdjanin* (2004), §487.

²²⁸ *Krnjelac* (2002), §184; *Brdjanin* (2004), §487.

prohibited purposes by the tribunal without clear basis in customary law, it was held, would violate the *nullum crimen* principle.²²⁹ This finding plainly contradicts the holding of the *Kvočka* Trial Chamber.²³⁰

If one looks to the prohibited purposes, they appear to be so largely set that a humiliating behavior can easily be (re-)qualified as having the purpose of intimidating or of discriminating against the victim. Thus, to some extent the strict reading of *Krnojelac* appears to be applied to the wrong object: the list must be seen more as a requirement that there be a deliberate purpose (rather than none), and not as a signpost for strict constructions. *Quaere* if the criminal law context with its strictness requirements really alters the matter: why should not simply a definite purpose be asked for, instead of giving it a particular name? In any case, if 'torture' is not admitted for humiliating purposes, one falls back in the residual category of 'outrages upon personal dignity'.

As to the other forms of mistreatment, 'outrages upon personal dignity' received some consideration in three cases. In *Kunarac* (2001)²³¹ it was explained that such outrages are based on acts which are animated by contempt for the human dignity of another person. They must cause serious humiliation or degradation to the victim, thereby causing real suffering. Outrages are part of the broader concept of 'inhuman treatment'. The suffering must not be lasting. However, the humiliation cannot be measured only subjectively: it must be so intense that a reasonable person would be outraged. That leads to the following definition of outrages: 'any act or omission which would be generally considered to cause serious humiliation, degradation, or otherwise be a serious attack on human dignity.'²³² As to *mens rea*, the accused must know that his act or omission is objectively of such character that it could cause serious humiliation, degradation, or affront to human dignity. However, if the objective threshold of suffering were met, it would be rare that a perpetrator would not also know that the acts could have such an effect.²³³ In the *Kvočka* case (2001) some examples were given: forced public nudity, beatings, trench digging, compulsion to relieve bodily functions in one's clothing, subservient acts to demonstrate the superiority of the detaining forces, fear of beatings, etc.²³⁴

Finally, as to other mistreatments, one may refer to the developments in the cases of *Kordic* (2001),²³⁵ *Krstic* (2001),²³⁶ and *Kvočka* (2001).²³⁷ There is some substantial overlap between this plurality of offences situated

²²⁹ *Krnojelac* (2002), §186.

²³⁰ *Kvočka* (2001), §140.

²³¹ At §§498ff.

²³² *Ibid.*, §507.

²³³ See also *Kunarac* (Appeal, 2002), §§165-6: The perpetrator must simply foresee the possible consequences of his acts or omissions, *i.e.* that they could cause serious harm; the test is once more that of the reasonable person. There is no substantive difference between these holdings: the test is that of the reasonable average man. Thus, the law imports into the matter a standard of proper diligence.

²³⁴ *Kvočka* (2001), §§170ff.

²³⁵ At §§237ff: willfully causing great suffering or serious injury to body or health (under grave breaches); inhuman treatment (grave breaches); violence to life and person (war crimes); cruel treatment (war crimes); inhumane acts (crimes against humanity).

²³⁶ At §§506ff: causing serious bodily or mental harm (genocide); cruel and inhuman treatment (war crimes, crimes against humanity).

²³⁷ At §§159ff: cruel treatment (war crime).

under different headings (willfully causing great suffering, inhuman treatment, violence to life and person, cruel treatment, etc.). It is not possible to discuss them in detail here.

(c) *Rape*²³⁸

Rape is a crime appearing under different headings, whether as war crime, crime against humanity, or even in the context of genocide. A major development took place in its definition. It is equally valid in the different contexts in which the crime appears. Rape had in the previous jurisprudence been defined as a 'sexual penetration, however slight, (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or (b) of the mouth of the victim by the penis of the perpetrator; these acts are done by coercion or force or threat of force against the victim or a third person.'²³⁹ In *Kunarac* (2001),²⁴⁰ a limited but important broadening of this definition occurred. The Chamber rejected the criterion of coercion. It held that the legal good protected is not the freedom from coercion but rather sexual self-determination. Thus, all non-consensual or non-voluntary sexual penetrations are to be considered as rape. It is sufficient that there is no consent by the victim; coercion need not be established. According to the Chamber that broader definition better reflects current municipal criminal law where especially vulnerable victims (mental incapacity, misrepresentations by the perpetrator, etc.) are also protected. This new definition was endorsed in all the subsequent trials.²⁴¹

In the *Musema* case (2000), it was added that the essence of rape cannot be captured by the particular details of the body parts and objects involved, as they were set out in *Furundzija* (1998); the real essence is a sexual aggression construed in context. Such a contextual construction better fits the ongoing evolution of criminal law in the field of sexual assaults.²⁴² This holding also goes in the sense of some relaxation of the criteria for defining rape. But it can be doubted if much is gained by such a blurring of the lines between rape proper and other forms of sexual assault.

Finally, in *Kvočka* (2001) it is affirmed in general terms that captivity vitiates consent.²⁴³ As a strong presumption, this statement holds true; but it should not be taken in the absolute, since exceptions may occur.

(d) *Persecution*²⁴⁴

This offence has given rise to a dense net of jurisprudential statements in the period under review. In the *Kordic* case (2001), a general definition of

²³⁸ See *Kunarac* (2001), §§436ff; *Kvočka* (2001), §§175ff; *Kunarac* (Appeal, 2002), §§127ff; *Musema* (2000), §§226-8; *Semanza* (2003), §§344-5; *Kajelijeli* (2003), §915; *Kamuhanda* (2004), §709.

²³⁹ See *Kunarac* (2001), §437. ²⁴⁰ At §§440ff.

²⁴¹ See *Kunarac* (2001), §§436ff; *Kvočka* (2001), §§175ff; *Kunarac* (Appeal, 2002), §§127ff; *Musema* (2000), §§226-8; *Semanza* (2003), §§344-5; *Kajelijeli* (2003), §915; *Kamuhanda* (2004), §709.

²⁴² *Musema* (2000), §§226, 228. ²⁴³ *Kvočka* (2001), §178.

²⁴⁴ See *Kupreskic* (2000), §§567ff; *Blaskic* (2000), §§218ff; *Kordic* (2001), §§188ff; *Krstic* (2001), §§533ff; *Kvočka* (2001), §§184ff; *Krnojelac* (2002), §§431ff; *Vasiljevic* (2002), §§244ff; *Naletilic* (2003), §§632ff; *Stakic* (2003), §§725ff; *Blaskic* (Appeal, 2004), §§129ff; *Brdjanin* (2004), §§991ff; *Semanza* (2003), §§347ff; *Nahimana* (2003), §§1060ff.

the elements of the crime is to be found: (1) the occurrence of a discriminatory act or omission; (2) the discrimination took place on one of the listed grounds, particularly race, religion, or politics; (3) there is intent to cause, and a resulting infringement of an individual's enjoyment of a basic or fundamental right.²⁴⁵ This definition was refined in many directions in other judgments. The most important is the *Kupreskic* case (2000). The main problem is to find a limit for inclusion of other acts of persecution not listed in the relevant instruments, *e.g.*, in the Statute. In effect, the lists are non-exhaustive,²⁴⁶ and perhaps no other crime has such a tendency to expand than the crime of persecution. Consequently, if it is not to become boundless, a gravity test has to be formulated. The most straightforward way to approach the matter is to require some degree of *ejusdem generis* gravity measured by the yardstick of the crimes already listed in the Statute. In *Kupreskic* the level or required gravity to qualify an act as a crime against humanity received some scrutiny. The Chamber not surprisingly held that acts of persecution must always present the level of gravity of those listed in the Statute.²⁴⁷ Thus, and this precision is of importance, 'only gross and blatant denials of fundamental human rights can constitute crimes against humanity.' Hence the following definition: 'Persecution is a gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.'²⁴⁸ What these fundamental rights are cannot be defined precisely in advance; the point has to be made on a case-by-case basis in order to avoid any evasion of the law by taking advantage of strict definitions.²⁴⁹ In *Stakic* (2003), it was even stated that it is not at all necessary to identify which rights may amount to fundamental rights since persecution can consist of the deprivation of a wide variety of rights, whether fundamental or not, whether derogable or not.²⁵⁰ The acts given as examples of persecution by the case-law are extremely far-reaching: *e.g.*, the right to life, liberty, security, freedom from slavery, torture, arbitrary arrest and detention; destruction of buildings, especially homes or symbolic constructions; destruction of means of subsistence; pillage; deportation;²⁵¹ trench-digging; use of hostages; destruction of religious or educational institutions; sexual

²⁴⁵ *Kordic* (2001), §189.

²⁴⁶ There is a thorough analysis in the *Kupreskic* case (2000) §§589ff of the former judicial practice on this point. The quotations go back to the post-World War II trials. Another aspect of that problem is the question if the crime of persecution must be linked to another crime in the Statute or if it can stand alone: see *Kupreskic* (2000), §§577ff. According to the Chamber, the Statute of the IMT at Nuremberg and that of the ICC seem to require such a link. However, the IMT exercised jurisdiction also in cases of tenuous links to war crimes or crimes against peace: see, *e.g.*, the cases of von Schirach or Streicher. At present, the link requirement disappeared in customary international law (the Chamber quotes various sources). Thus, no link is required and the crime of persecution can stand on its own (albeit the ICC Statute seems to depart from customary international law on this point). In the view of the present commentator, this analysis is legally correct.

²⁴⁷ This list is not exhaustive.

²⁴⁸ *Kupreskic* (2000), §621.

²⁴⁹ *Ibid.*, §623.

²⁵⁰ *Stakic* (2003), §773.

²⁵¹ For all these acts, see *Blaskic* (2000), §§220-34.

violence;²⁵² property offences;²⁵³ indiscriminate or direct attacks on the civilian population;²⁵⁴ constant humiliation and degradation;²⁵⁵ hate speeches on the mass media;²⁵⁶ and so on. To these acts inherently criminal, the jurisprudence adds other acts such as denying bank accounts, employment opportunities, etc., if these are performed in the context of a persecution, and if they equate to other acts which are inherently criminal.²⁵⁷ Thus, for such acts the criminality depends on the context of persecution; they cannot constitute persecution alone, but may be considered along with other criminal acts; they are not independent, but auxiliary offences. In appreciating the level of gravity of the acts, their cumulative effect must be considered.²⁵⁸ A single act may exceptionally constitute persecution if it reaches to the required gravity.²⁵⁹

The acts committed must have discriminatory consequences for the victims; it is not enough that there was intent to discriminate without any real harm or effect.²⁶⁰ Otherwise, there could be a conviction for persecution without anyone having been actually persecuted.²⁶¹ As to the protected groups, the case-law favors a broad definition: the interpretation must be teleological with regard to the aim of protection. The protected groups may include such persons defined by the perpetrators as belonging to the victim's group due to their close affiliations or sympathies for that group.²⁶²

As to *mens rea*, there must be a special (*i.e.* discriminatory) intent. There must be intent to attack persons on account of their ethnic, racial, political, or religious characteristics. From the point of view of *mens rea*, genocide appears to be but an extreme form of persecution: there, the intent to destroy the groups is decisive; here, it is not required.²⁶³ It is not sufficient for the accused to be aware that he is in fact acting in a discriminatory way; he must consciously intend to discriminate (*dolus directus*). This intent need not be exclusive; but it must be a significant element of the motivation. A policy to discriminate is not necessary.²⁶⁴

²⁵² For all these acts, see *Kvočka* (2001), §186.

²⁵³ *Blaskić* (Appeal, 2004), §§146–8; *Stakić* (2003), §§761ff.

²⁵⁴ *Ibid.*, §§157–9.

²⁵⁵ *Stakić* (2003), §§758–60.

²⁵⁶ *Nahimana* (2003), §1076.

²⁵⁷ *Kvočka* (2001), §186. The reference is here made to the post-World War II trials with the persecution of the Jews. In *Kordić* (2001), §§209–10 it is stated that some acts do not raise to the level of required gravity, *e.g.*, encouraging and promoting hatred, or dismissing/removing Muslims from government. But this statement has to be taken *cum grano salis*: it probably means that these acts in themselves do not rise to the level of a crime against humanity, if they are not accompanied by other acts. If this interpretation is true, then there is no substantive difference between *Kordić* and *Kvočka*; otherwise there is a contradiction.

²⁵⁸ See, *e.g.*, *Stakić* (2003), §736; *Naletilić* (2003), §637; *Brdjanin* (2004), §995; *Semanza* (2003), §349.

²⁵⁹ *Blaskić* (Appeal, 2004), §135. *Krnojelac* (2002), §433.

²⁶⁰ *Krnojelac* (2002), §432; *Vasiljević* (2002), §245; *Stakić* (2003), §733.

²⁶¹ That amounts to saying that the crime of persecution is an offence centered on a specific result and not on the abstract endangering of the targeted population alone (*Erfolgsdelikt*, not *Gefährungsdelikt*).

²⁶² See *Naletilić* (2003), §636. *Stakić* (2003), §734.

²⁶³ *Kupreskić* (2000), §636. See also *Blaskić* (2000), §235; *Kvočka* (2001), §194; *Semanza* (2003), §350.

²⁶⁴ *Krnojelac* (2002), §435; *Vasiljević* (2002), §248.

Some doubts have arisen as to the proper object of the intent to discriminate. In *Krnjelac* (2002)²⁶⁵ and in *Vasiljevic* (2002)²⁶⁶ it had been held that the discriminatory intent must relate to the specific act charged as persecution rather than simply to the attack in general (even if the latter will also, in practice, be discriminatory). It is not sufficient that the act merely occurs within the framework of a general discriminatory attack, if there was no special intent to discriminate in the particular act at issue. These findings were somewhat narrowed in *Stakic* (2003).²⁶⁷ The 'particular acts-test' advanced by the two previous cases, it is there said, applies to direct perpetrators; it is not appropriate for co-perpetrators or for superiors, not acting directly on the spot. For such persons, the proof of knowledge of a general discriminatory attack against a civilian population is a sufficient basis for inferring a proper discriminatory intent relating to persecution. Consequently, lack of specific intent by the direct perpetrators would not automatically absolve the superior or the co-perpetrator from criminal responsibility. These statements raise delicate problems of criminal law, on which there is no time to dwell. All in all, we may conclude by saying that persecution is one of the most complex crimes of criminal international law, in which the interplay and balance of the different constitutive elements is particularly challenging.

(e) *Other inhumane acts*²⁶⁸

The main concern voiced as to this heading is that of its relative vagueness and thus its potential for conflict with the *nullum crimen* requirement. An attempt at giving to the offence some more precision was made in *Kupreskic* (2000).²⁶⁹ The Chamber held that a simple *ejusdem generis* argument is insufficient: the argument in this field lacks precision. Rather, the clause must be interpreted in the light of human rights instruments. It is these instruments which set down the basic human rights of the individuals: e.g., prohibition of cruel and degrading treatment, prohibition of forcible transfers, prohibition of enforced prostitution, forced disappearance, etc.²⁷⁰ The *ejusdem generis* rule may, however, still be relevant when it comes to assessing the required level of gravity of the concrete acts falling within such categories. The clause thus covers all types of serious harm to the physical or mental integrity of the victims.²⁷¹

The very idea of a human rights analogy in order to give more precise content to the offence (which is the main point in *Kupreskic*) has since been rejected in *Stakic* (2003). According to the Chamber in the latter case, the human rights instruments referred to provide too many different formulations and contain norms which cannot be held to be recognized in criminal international law.²⁷² This conflict has up to now not been

²⁶⁵ At §436. ²⁶⁶ At §249. ²⁶⁷ At §§742-3.

²⁶⁸ See *Kupreskic* (2000), §§562ff; *Blaskic* (2000), §§237ff; *Kvočka* (2001), §§206ff; *Krnjelac* (2002), §§128ff; *Vasiljevic* (2002), §§234-7; *Stakic* (2003), §§713ff. ²⁶⁹ At §§562ff.

²⁷⁰ In the *Kvočka* case (2001) further examples are mentioned: mutilations, beatings, etc. (§ 208).

²⁷¹ *Blaskic* (2000), §§239ff. ²⁷² *Stakic* (2003), §721.

resolved. Indeed it will be difficult to give a precise shape to the residual clause. Some form of analogy with human rights instruments may be useful, rather than leaving the point completely open; but the analogy must be applied critically and not lock, stock, and barrel.

(f) *New elements of crimes against humanity*

In addition to the offences mentioned above, the ICTY faced three novel crimes, which were not discussed during the previous period of review.

(i) Enslavement²⁷³

According to *Kunarac* (2001),²⁷⁴ enslavement as a crime against humanity consists of the exercise of any or all²⁷⁵ of the powers attaching to the right of ownership over a person; the exercise of these powers must be intentional. The offence is part of customary international law. Several circumstances may point to the existence of enslavement, such as control of movements, psychological control, presence of measures to prevent and/or deter escape, use or threat to use force, assertion of exclusivity over the person, forced labor, subjection to cruel treatment, rape, etc. Mere captivity is not sufficient. In the *Krnojelac* case (2002), it is added that the prohibition of slavery in situations of armed conflict is an inalienable, non-derogable, and fundamental right.²⁷⁶ Moreover, the offences under Article 3 of the Statute (slavery) and under Article 5 of the Statute (enslavement) are identical.²⁷⁷ As to forced labor, the test is if the persons had a real choice as to whether they would work or not.²⁷⁸

(ii) Deportation/forcible transfer²⁷⁹

According to the *Krstic* case (2001), 'deportation' and 'forcible transfer' relate to 'involuntary and unlawful evacuation of individuals from the territory in which they reside'.²⁸⁰ Deportation presumes transfer beyond State borders, forcible transfer relates to displacements within a State.²⁸¹ International humanitarian law condemns both deportation and forcible transfer. Both constitute also inhumane acts under Article 5(I) of the ICTY Statute.²⁸² The proper reach of the distinction between deportation and forcible transfer has been controversial in the following cases. In *Stakic*

²⁷³ See *Kunarac* (2001), §§515ff; *Krnojelac* (2002), §§349ff; *Kunarac* (Appeal, 2002), §§116ff.

²⁷⁴ At §§515ff. The Chamber quotes the jurisprudence of the IMT of Nuremberg, the *Milch* and *Pohl* Trials, the Slavery Convention, the Forced Labor Convention, Human Rights Treaties, and the ILC Draft on Crimes against the Peace and Security of Mankind. See also *Krnojelac* (2002), §350.

²⁷⁵ Thus, not only the traditional chattel-slavery entailing full property rights over a person falls under the description of the crime, but also all forms of partial property rights over a person; the difference is one of degree. See *Kunarac* (Appeal, 2002), §117.

²⁷⁶ *Krnojelac* (2002), §353. The formulation is not felicitous in the sense that the prohibition of slavery is fundamental, inalienable, and non-derogable also outside the narrow context of the law of armed conflict.

²⁷⁸ *Ibid.*, §359.

²⁷⁷ *Ibid.*, §356.

²⁷⁹ See *Krstic* (2001), §§519ff; *Krnojelac* (Appeal, 2003), §§218ff; *Stakic* (2003), §§662ff; *Brđjanin* (2004), §§540ff.

²⁸⁰ *Krstic* (2001), §521.

²⁸¹ *Ibid.* ²⁸² *Ibid.*, §523.

(2003) it is stated that the *actus reus* of deportation is concerned only with forcibly removing or uprooting persons from their homes and not with the destination they are brought to. Consequently, there can be deportation even if the persons are not transferred beyond an international border. The protected legal interest is in effect to stay in one's own home. Moreover, it might be difficult to establish the transfer beyond borders in a situation of armed conflict where such borders may be liable to quick change. Consequently, according to *Stakic*, deportation must be read to imply forced displacement to an area under the control of another party rather than beyond a (formal border).²⁸³ It will be noted that the Chamber thereby avoids conflating forcible transfer with deportation, thus depriving the former of any *effet utile*. It simply broadens the concept of deportation in transforming the boundary test into a effective control test.²⁸⁴

However, the majority in the *Brdjanin* case (2004) rejected that test. It held that customary international law required for deportation that an internationally recognized border be crossed. There are certainly excellent policy reasons, it added, for dispensing with such a border-crossing test; but customary international law has to be applied as it stood at the time of commission of the crimes if the *nullum crimen* principle is not to be violated. Displacement within a State constitutes 'forcible transfer', punishable as 'other inhumane acts' pursuant to Article 5(1) of the Statute.²⁸⁵ The point has not been taken up again; the conundrum is thus not solved. In any event, the point is not essential from the practical point of view: if transfer within a State is punishable as 'other inhuman act' there is no lacuna in the law and the whole point reduces itself to a matter of classification.

The displacement must be forced, not voluntary. Relevant force is not limited to physical violence, but extends to other forms of coercion, e.g. psychological oppression.²⁸⁶ As to *mens rea*, there must be intent;²⁸⁷ the intent must be directed to permanent removal of the persons displaced.²⁸⁸

A concrete application of the foregoing principles is to be found in the *Krstic* case (2001). In that case, the Chamber held that the deportation at issue could not be held to represent an evacuation as allowed by Articles 49 of Geneva Convention IV or by Article 17 of Additional Protocol II (1977): in effect, the people transferred were not returned immediately after the hostilities; they were in fact deported when the hostilities had ceased. Thus, there was no military necessity for the transfer of those persons.²⁸⁹

(iii) Imprisonment²⁹⁰

In the *Kordic* case (2001), it is stated that imprisonment as a crime against humanity means 'arbitrary imprisonment', that is, deprivation of

²⁸³ *Stakic* (2003), §§677–9.

²⁸⁴ Alternatively the allegiance test: this move is intended to fit internationalized armed conflicts to the same extent that the move from formal nationality to real allegiance was intended to bolster the protected persons definition under Article 4 of Geneva Convention IV. See *BYIL* (2000), pp. 278ff.

²⁸⁵ *Brdjanin* (2004), §§542–4.

²⁸⁶ *Stakic* (2003), §682.

²⁸⁷ *Ibid.*, §687.

²⁸⁸ *Brdjanin* (2004), §545.

²⁸⁹ *Krstic* (2001), §§525–7.

²⁹⁰ See *Kordic* (2001), §§273ff; *Krnjelac* (2002), §§108ff.

liberty of the individual without due process of law (fair trial).²⁹¹ For defining more precisely what arbitrary deprivation of liberty means, recourse must be had to human rights instruments and practice. Under the law relating to crimes against humanity a deprivation of liberty is arbitrary if no legal basis can be called upon to justify the imprisonment or its continuation in time.²⁹²

2. Protected populations

The jurisprudence has reaffirmed that the notion of 'civilian' protected under crimes against humanity is to be interpreted most extensively.²⁹³ From the point of view of the object and purpose of the prohibition, we are told, a most extensive ban on atrocities directed against human dignity is intended. The presence of some persons actively involved in the conflict should not prevent the characterization of a population as being civilian, since even resistance fighters are able to claim protection under crimes against humanity.²⁹⁴ Moreover, only the presence of a fairly large number of soldiers within a civilian population may alter its civilian character and render it liable to attack.²⁹⁵

There has been some doubt if military persons *hors de combat* should be included in the protection. According to one trial case, such persons are entitled to protection as 'civilians' within the meaning of crimes against humanity.²⁹⁶ That amounts to creating a special meaning for the concept of civilians under the crimes against humanity law, departing from the sense of that term under international humanitarian law. According to the Appeals Chamber, however, civilians for crimes against humanity are all persons not covered by Article 4 of Geneva Convention III and Article 43 of Additional Protocol I (1977), *i.e.* all non-combatants. Thus, if a person is a member of an armed organization, the fact that he is not armed or in combat at the time of commission of the crime does not accord him civilian status.²⁹⁷ Such military persons remain under the protection of the war crimes provisions.

From a systematic point of view, the narrower interpretation can be justified. After all, the notion of crimes against humanity was initially created in order to fill gaps for acts committed on persons not otherwise protected (especially a State's own nationals). To the extent that there is another largely equivalent protection, the notion of crimes against humanity need not be extended to such cases. As for the ICTR, it has always followed the more restrictive view, defining civilians in this context as 'persons not taking any active part in the hostilities'.²⁹⁸

²⁹¹ *Kordic* (2001), §302.

²⁹² *Krnjelac* (2002), §§113-5. As to the meaning of 'arbitrary deprivation of liberty' in human rights law, see, *e.g.*, M. Nowak, *UN Covenant on Civil and Political Rights*, Commentary, Kehl/Strasbourg/Arlington, 1993, pp. 172-3.

²⁹⁴ *Kupreskic* (2000), §§547-9; *Blaskic* (Appeal, 2004), §113.

²⁹⁵ *Brdjanin* (2004), §134. The point is here one of proportionality.

²⁹⁶ *Blaskic* (2000), §§208ff.

²⁹⁷ *Blaskic* (Appeal, 2004), §114.

²⁹⁸ *Musema* (2000), §207.

²⁹³ *Kupreskic* (2000), §§547ff.

In *Kunarac* (Appeal, 2002), it has been said that the civilian population must be the primary rather than an incidental target of attack. The requirement that the attack be 'directed against' a civilian population excludes collateral damage to the population when other objects are targeted.²⁹⁹

3. *Widespread or systematic attack*

The case-law followed the previous findings on this point;³⁰⁰ we can thus refer back to the discussion in the previous *Year Book*. Two aspects may be added.

First, there has been some diversification in the description of the elements of 'systematic' and 'widespread' attack. In *Musema* (2000), the traditional definition is maintained. Widespread thus means 'a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against multiple victims'; and systematic means 'organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources'.³⁰¹ On the other hand, the ICTY has sometimes broadened the scope of these notions by referring to a series of less clear-cut criteria. Thus, in *Blaskic* (2000)³⁰² and in *Brdjanin* (2004),³⁰³ it referred to factors such as: (i) the consequences of the attack upon the targeted population; (ii) the number of victims; (iii) the nature of the acts; (iv) the participation of officials or authorities, or any identifiable pattern of crimes. These criteria are no more than a restatement of the main distinction: 'widespread' relates to the number of victims, 'systematic' to the presence of a pattern of conduct, to a methodical plan. But the scattered criteria mentioned tend to blur the lines and soften the focus of the analysis. It is therefore submitted that the old clear duality better serves the cause of a proper description of the crime than the somewhat watery factors approach.

Second, the case-law stresses the point that the attack on the civilian population may be non-violent. The *Musema* case (2000) recalls to that effect the apartheid policy of South Africa.³⁰⁴

4. *The perpetrators and the policy element*

In the *Kupreskic* case (2000) it was recalled that private persons may commit a crime against humanity if there is some link with a State, e.g. by direct or indirect approval by State authorities or through a general link to the State's policy. In this matter as elsewhere, the true test is one of furtherance: did the accused act in furtherance of some public policy, formulated or not.³⁰⁵ *Quaere* if the complete dropping of any link with State policy in the case of war crimes (especially for common Article 3 of

²⁹⁹ *Kunarac* (Appeal, 2002), §92.

³⁰⁰ For an *exposé* of the law, see *Blaskic* (2000), §§201ff; *Kunarac* (2001), §415ff; *Brdjanin* (2004), §§130ff; *Musema* (2000), §§202ff.

³⁰² At §203.

³⁰³ At §136.

³⁰⁴ *Musema* (2000), §205.

³⁰¹ *Musema* (2000), §204.
³⁰⁵ *Kupreskic* (2000), §555.

the Geneva Conventions)³⁰⁶ should not apply also for crimes against humanity—perhaps even a *fortiori*.

The question of the proper perpetrator is linked with the question of the existence of a policy. The point has remained controversial in the case law. In some cases, it is stressed that there must be some policy element pursued, and the acts must take place in that context. But the policy, it is added, must not necessarily be formulated by State organs; and it need not be explicit.³⁰⁷ Other cases stress that it is not necessary to hold a strict view on the question of policy: it should be regarded as indicative evidence of the systematic character of the offences charged and no more.³⁰⁸ Finally, still other cases affirm that a true policy need not be established at all.³⁰⁹ The Appeals Chamber in *Blaskic* (2004) has since endorsed the intermediary position of *Kordic*. Thus the final position seems to be that the existence of a policy is not a legal element of crimes against humanity, but that it can serve as evidence showing that a widespread and systematic attack was directed against a civilian population.³¹⁰

5. Mens rea

The *mens rea* required is that the accused must have had the actual (or constructive)³¹¹ knowledge of the attack on the civilian population and have intended to act in that context.³¹² He need not adhere to the plan of attack; it is sufficient that he knows of it and acts in that context, or taking advantage of that context. Taking the risk of participating in the implementation of an ideology of attack is not enough; there must be knowledge of the context of attack and knowledge that the incriminated act is part thereof.³¹³ As to the civilian status of the victim, it is sufficient that the perpetrator could not reasonably have believed that the victim was a member of the armed forces.³¹⁴

For the ICTY Statute, a discriminatory intent is not required, with the only exception of the offence of persecution.³¹⁵ The position is different in the ICTR Statute, where such discrimination is required for all the offences by the Statute itself. The case law of the ICTR thus applied that requirement,³¹⁶ stressing its departure from the ICTY Statute and from customary international law. Because of that departure, the ICTR gave it a strict interpretation, seeking to narrow the gap with the ICTY Statute and with general international law. To that effect, in the *Musema* (2000)³¹⁷ and *Semanza* (2003) cases a furtherance theory was expounded. In the words of *Semanza*: 'Acts committed against persons outside the discriminatory categories may nevertheless form part of the attack where

³⁰⁶ See above, Chapter V. ³⁰⁷ *Ibid.*, §§555; *Blaskic* (2000), §205.

³⁰⁸ *Kordic* (2001), §182. ³⁰⁹ *Krnjelac* (2002), §58.

³¹⁰ *Blaskic* (Appeal, 2004), §120. See also *Kajelijeli* (2003), §872; *Kamuhanda* (2004), §665.

³¹¹ He could not have ignored it.

³¹² *Kupreshic* (2000), §§556ff; *Blaskic* (2000), §§244ff; *Blaskic* (Appeal, 2004), §§121ff.

³¹³ *Blaskic* (Appeal, 2004), §126. ³¹⁴ *Kunarac* (2001), §435. ³¹⁵ *Blaskic* (2000), §260.

³¹⁶ See, e.g., *Musema* (2000), §§208ff. ³¹⁷ At §209.

the act against the outsider supports or furthers or is intended to support or further the attack on the group discriminated against on one of the enumerated grounds [national, political, ethnic, racial, or religious]'.³¹⁸ This furtherance theory allows for some extension of the protection and thus lessens the reductive scope of the discrimination requirement. But the requirement still persists, and it is not the task of a tribunal to set off such a *vinculum legislatoris*.

VIII. COMMAND RESPONSIBILITY: RESPONSIBILITY OF
THE SUPERIOR FOR THE ACTS OF HIS SUBORDINATES
(ARTICLE 7(3) ICTY STATUTE, ARTICLE 6(3)
ICTR STATUTE)³¹⁹

The case-law did not bring many new insights in this area. The position is excellently summarized in the *Galic* case (2003), in a passage which deserves citation at length:

173. The case-law of the International Tribunal establishes that the following three conditions must be met before a person can be held responsible for the criminal acts of another under Article 7(3) of the Statute: (1) a superior-subordinate relationship existed between the former and the latter; (2) the superior knew or had reason to know that the crime was about to be committed or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator. The Appeals Chamber has said that control must be effective for there to be a relevant relationship of superior to subordinate. Control is established if the commander had 'the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.' The Appeals Chamber emphasised that 'in general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a Court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.'
174. In the absence of direct evidence of the superior's actual knowledge of the offences committed by his or her subordinates, this knowledge may be established through circumstantial evidence. The Trial Chamber may consider, *inter alia*, the indicia given by the United Nations Commission of Experts in its Final Report on the armed conflict in former Yugoslavia. The Trial Chamber also takes into consideration the fact that the evidence required to prove such knowledge for a commander operating within a highly disciplined and formalized chain of command with established reporting and

³¹⁸ *Semanza* (2003), §331.

³¹⁹ See BYIL (2000), pp. 309–11. *Blaskic* (2000), §§289ff; *Kunarac* (2001), §§395ff; *Kordic* (2001), §§401ff; *Krstic* (2001), §§603–4; *Kvočka* (2001), §§313ff; *Krnojelac* (2002), §§91ff; *Naletilic* (2003), §§64ff; *Stakic* (2003), §§447ff; *Galic* (2003), §§173ff; *Blaskic* (Appeal, 2004), §§53ff; *Brdjanin* (2004), §§275ff; *Musema* (2000), §§127ff; *Kayishema* (Appeal, 2001), §§280ff; *Semanza* (2003), §§399ff; *Niyitegeka* (2003), §§470ff; *Kajelijeli* (2003), §§770ff; *Kamuhanda* (2004), §§601ff; *Ntagerura* (2004), §§627ff.

monitoring systems is not as high as for those persons exercising more informal types of authority.

175. In relation to the superior's 'having reason to know' that subordinates were about to commit or had committed offences, 'a showing that a superior had some general information in his possession which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he had "reason to know".' The information available to the superior may be in written or oral form. It need not to be explicit or specific. For instance, past behaviour of subordinates or a history of abuses might suggest the need to inquire further. It is not required that the superior had actually acquainted himself or herself with the information in his or her possession.
176. The evaluation of the action taken by individuals in positions of superior authority who have a legal duty to take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators, must be done on a case-by-case basis. Furthermore, it must be kept in mind that the superior is not obliged to perform the impossible; 'a superior should only be held responsible for failing to take such measures that are within his material possibility'.
177. Finally, in cases where concurrent application of Articles 7(1) and 7(3) is possible because the requirements of the latter form of responsibility are satisfied alongside those of the former, the Trial Chamber has the discretion to choose the head of responsibility most appropriate to describe the criminal responsibility of the accused.

The main question giving rise to some jurisprudential controversy related to the 'had reason to know' test. The former case-law, especially in *Delalic* (1998), had followed the special requirements of Article 86 of Additional Protocol I (1977) as being more favorable to the accused, while recognizing that customary international law on the matter contained a broader rule. The Protocol attaches criminal superior responsibility only to the inaction following the obtaining of some specific information which would have put the commander on notice that offences were committed, or which would put him on further inquiry; whereas customary international law shaped through the post-World War II trials centered upon a general negligence standard.³²⁰ The *Blaskic* Trial Chamber (2000) attempted to reverse the former jurisprudence by moving back to customary law, *i.e.* to a negligence standard. After a precise analysis of the post-World War II case-law,³²¹ the Chamber concluded that the correct standard to be applied is to require from any commander to keep reasonably informed about the activities of his subordinates.³²² Consequently, the provision of the Protocol has to be interpreted broadly in order to

³²⁰ *Delalic* (1998), §§387ff.

³²¹ See *Blaskic* (2000), §§314ff. See also: *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. XV, London, 1949, pp. 62-5.

³²² *Blaskic* (2000), §322: 'From this analysis of jurisprudence, the Trial Chamber concludes that after World War II, a standard was established according to which a commander may be liable for crimes by his subordinates if he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction.'

bridge the gap with provision of customary law: the criterion of 'having information' contained in Article 86(2) of the Protocol has to be taken as referring to a general duty to keep informed. Any ignorance which results from the negligence of the commander to keep informed according to a standard of due diligence will fail to exonerate him from criminal responsibility.³²³ It may be added that the case-law has always stressed that the analysis of negligence has to be performed in putting oneself into the situation of the commander at the time the offence is committed, and not by judgement *ex post facto*.

Thenceforward, for some time, the case-law³²⁴ simply ignored the reversal of the *Blaskic* case and continued to apply the 'put on notice test' of *Delalic*. In two cases, a slightly modified standard was applied. That standard was based on negligence, but it defined relevant negligence in a somewhat narrower way: knowledge of the commander may be presumed (or imputed) if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so.³²⁵ The first prong of the test ('had the means to obtain information') seems to relax the criteria, since there is almost always a possibility to obtain information; otherwise a commander is not in effective control, and then *cadit quaestio*; but the second prong tightens the matter considerably, since to deliberately refrain to take the relevant information is not a low standard.

The jurisprudential interlude was abruptly ended by the mighty word of the Appeals Chamber in *Blaskic* (2004). The Appeals Chamber quashed the more liberal approach of the Trial Chamber and reinstated in its full vigor the findings of *Delalic*, *i.e.* the preeminence of the specific information test of Article 86 of Protocol I.³²⁶ It has already been explained why the present commentator disagrees with the specific information test.³²⁷ The conflict with the *nullum crimen* principle seems contrived: since when is a requirement of general customary international law insufficient to found criminal responsibility in international law? And where is the proof that Protocol I modified that customary rule (which it did not)? Or where is evidence that the faulty commanders could rely on the conventional provision to free themselves of the customary responsibility on a sort of *bona fide* plea? Absent all that, it is submitted that the Appeals Chamber erred in the determination of the law and that the correct standard is a negligence standard construed with studied and appropriate restraint.

Two further aspects of the jurisprudence may be noticed.

First, as to the *effective control* criterion applied to determine who is a commander, it must be noted that the jurisprudence is strict as to the degree of required control. In the case of military commanders it requires more than 'substantial influence' on the subordinates. The test seems to be whether the commander had the *material ability* to prevent

³²³ *Blaskic* (2000), §332.

³²⁴ See, *e.g.*, *Kordic* (2001), §437; *Kvočka* (2001), §318; *Krnjelac* (2002), §94; *Naletilic* (2003), §75; *Galic* (2003), §175; *Kajelijeli* (2003), §778.

³²⁵ *Stakic* (2003), §460; *Brdjanin* (2004), §278.

³²⁶ *Blaskic* (Appeal, 2004), §§58–62.

³²⁷ BYIL, (2000), p. 310.

or to punish the offence of his subordinates.³²⁸ Thus, the real point is apparently not to distinguish between effective control and substantial influence, but on the more precise point of the material ability. If that is true, the case-law should concentrate on that point (material ability) rather than multiplying concepts (contrary to Occam's advice). But even then the standard is not completely free from doubt. From a certain perspective, the material ability to punish exists in all cases. In effect, if it is sufficient that the commander issues a report to the competent office (and that has already been considered enough to trigger responsibility), how could it be said that such a report could not be written, for it obviously always can? The only point would be to establish when it *must* be written and when not, but not if it *can* be written. Moreover, as to the material ability to prevent, the question turns again largely on knowledge: if the commander knew (or must have known), he could certainly prevent the acts by informing the person in effective control, if that person is not himself. Thus, in one word, the problem is that if one equates the power to issue reports (or to inform) with the finding of responsibility, one thereby pushes the effective control criterion more and more in a sort of legal limbo. The exact relationship of the two factors seems not to have given rise to sufficient reflection.

Second, the case-law (correctly) held that the two duties, that of preventing and that of punishing, are not to be put at the same level: the obligation to prevent is primary; the obligation to punish is subsidiary, for the cases the prevention was impossible (*e.g.* for non-negligent lack of knowledge).³²⁹ No commander can exculpate himself by claiming that he did not prevent, but that he in fact punished *post festum*.³³⁰

Two further questions remain.

First, the jurisprudence invariably states that the commander is required to take all necessary and reasonable measures; but that he cannot be held to perform the impossible.³³¹ However, no tribunal has so far ventured into the question of measures not impossible but onerous or difficult. Certainly, this aspect can be solved under the reasonableness test. But it would be interesting to know what measure of reasonableness the tribunals will apply by way of a standard. Is it only possible measures, as the effective control-test seems to imply? Is it due diligence measures? In a word: is it a high or low standard of care? To address that point would be more rewarding than to continuously put oneself only at one end of the spectrum, that of impossible measures in the circumstances of the time of commission of the crimes. As to that, it is evident that the maxim *ad impossibile nemo tenetur* applies.

Second, the tribunals have never made any distinction as to unconscious negligence, conscious negligence, and *dolus eventualis* of the commander.

³²⁸ See, *e.g.*, *Brdjanin* (2004), §276.

³²⁹ See, *e.g.*, *Semanza* (2003), §407.

³³⁰ *Ibid.*: 'A superior with such knowledge and the material ability to prevent the commission of the crime does not discharge his responsibility by opting simply to punish his subordinates in the aftermath.'

³³¹ See, *e.g.*, *Galic* (2003), §176; *Semanza* (2003), §406.

They have concentrated just on the knowledge side neglecting the will side. But the question may be posed: is a commander responsible only for conscient negligence or *dolus*, or for any negligence? The point is not the same as the one raised earlier: we are no more concerned with whether there was negligence in failing to get knowledge of the relevant facts. We are now concerned with whether there was negligence in the way the commander handled these facts. What if he had some knowledge, but in the heat of the situation considered that the danger of offences being committed was low? That may prove to be a misjudgement; but will it give rise to criminal responsibility? Or will a commander be responsible only if there is at least *dolus eventualis*? In a word: any negligence, or only some negligence, or no negligence at all? That question would deserve some elaboration.

IX. DEFENCES

In the period under review, three interesting defences were raised: reprisals; state of necessity; and self-defence.

1. Reprisals

On this old vexed question, the *Kupreskic* case (2000) brought notable developments. It sets the path of the ICTY's doctrine on reprisals, which is marked by an almost total outlawry of this device. This is thus a further high-water mark for the absoluteness of obligations under humanitarian law, for their non-reciprocity and *jus cogens* character, in one word for the progressive 'humanization' of the law of armed conflicts. The Chamber starts by stating in peremptory terms that there is no place for reciprocity or reprisals in the field of international humanitarian law. Its protective obligations are absolute ones: '[One must stress] the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have absolute and non-derogable character. It thus follows that the *tu quoque* defence has no place in contemporary international humanitarian law.'³³² Moreover, there is an absolute character of the prohibition of reprisals against civilian populations.³³³ The Chamber recalls that the *tu quoque* argument has been rejected in the post World War II jurisprudence.³³⁴ According to the Chamber, it is a flawed principle, since it envisions international humanitarian law as being based on a bilateral exchange of rights and obligations, whereas it in reality lays down absolute obligations, unconditional and not based on any reciprocity.³³⁵ To that effect, common Article 1 of the Geneva Conventions was also quoted. The Chamber itself stressed the idea of

³³² *Kupreskic* (2000), §511.

³³³ *Ibid.*, §513.

³³⁴ On that point see also: *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. XV, London, 1949, pp. 177–82.

³³⁵ *Ibid.*, §517.

progressive humanization of the law of armed conflict: it reflects the fact that humanitarian law norms are seen as designed to benefit individuals as human beings and not simply States' interests.³³⁶ Thus, there is here a translation of a Kantian categorical imperative into the law. As a further consequence, the obligations at stake are due to the international community as a whole (*erga omnes*).³³⁷ These norms of international humanitarian law are also *jus cogens* norms, non-derogable and overriding.³³⁸

These principles are then applied to the question of reprisals against civilians.³³⁹ The Chamber recalls that Geneva Convention IV prohibits such reprisals for all civilians in the hands of the adverse party. For civilians in combat zones, there is Article 51(6) of Additional Protocol I. Does that provision reflect customary international law? This is an area where customary law is shaped more heavily by *opinio juris* than by *usus*, *i.e.* mainly by demands of humanity and dictates of public conscience, even if practice is scant (the Martens Clause).³⁴⁰ Reprisals against civilians are an inherently barbarous means of warfare. They are contrary to fundamental human rights, which heavily contributed to shape modern humanitarian law.³⁴¹ Moreover, reprisals are not any more justified, as in the past, as sole effective means of ensuring compliance of the law by the enemy: there is now national and international prosecutions of crimes committed.³⁴² Where is the *opinio juris* of such prohibition of reprisals to be found? One has to refer to: (1) military manuals, which limit reprisals to enemy armed forces and thus *a contrario* exclude them for civilians; (2) United Nations General Assembly Resolutions, especially Resolution 2675 (1970) on Basic Principles for the Protection of Civilian Populations in Armed Conflicts; (3) the absence of claims for such reprisals in State practice (except by Iraq and the UK); (4) the work of the ILC on State responsibility in the field of admissibility of counter-measures, which prohibits counter-measures contrary to fundamental human rights; (5) Common Article 3 of the Geneva Conventions, applicable *a fortiori* in international armed conflicts.³⁴³ Even if held to be admissible (*quod non*), reprisals would be limited, according to the Chamber, by several principles: (i) last resort (*ultima ratio*); (ii) special precaution, *e.g.*, the decision-making would have to take place at the highest political and military level; (iii) proportionality; (iv) elementary considerations of humanity.³⁴⁴ It may be added that the *Kunarac* Appeals Chamber (2002) founded itself on the same reasoning to reject reprisals in the field of crimes against humanity.³⁴⁵

Such is the abolitionist doctrine of the ICTY. This is a most important contribution to the law if one bears in mind the highly controversial state of the matter. On the admissibility of reprisals, the views have always been split. The Anglo-Saxon States were traditionally concerned to maintain the legality of reprisals, in which they saw the only practical

³³⁶ *Ibid.*, §518.

³⁴⁰ *Ibid.*, §527.

³⁴⁴ *Ibid.*, §535.

³³⁷ *Ibid.*, §519.

³⁴¹ *Ibid.*, §529.

³⁴⁵ *Kunarac* (Appeal, 2002), §87.

³³⁸ *Ibid.*, §520.

³⁴² *Ibid.*, §530.

³³⁹ *Ibid.*, §§527ff.

³⁴³ *Ibid.*, §§531ff.

means to enforce the application of the relevant norms by the enemy. Conversely, the so-called third world States were fiercely attached to the outlawry of reprisals (especially against civilians) which they considered barbaric.³⁴⁶ For a long time the state of the law has been rather permissive. At the beginning of the twentieth century, legal writings allowed reprisals in an often quite unchecked way. Thus, the leading textbook of Oppenheim stated in its third edition of 1921: '[R]eprisals between belligerents are admissible for any and every act of illegitimate warfare, whether it constitutes an international delinquency or not.' It is added that even prisoners of war may be made the object of reprisals, and that there is 'hardly any doubt' on that matter.³⁴⁷ The *refoulement* of reprisals then began through the Geneva law: reprisals were forbidden with respect to protected persons.³⁴⁸ At the same time, reprisals were still permitted in the Hague law, as the bombing practice of World War II tends to show.³⁴⁹ It is only in the 1970s that a further step was taken: by Additional Protocol I of 1977, the prohibition of reprisals entered expressly the body of rules of the Hague law: see especially Article 51(6) of that Protocol. The point, however, remained controversial, and some Anglo-Saxon States refused or hesitated to ratify or to accede to the Protocol. With the step taken by the ICTY, the prohibition is held to have been completed: the ship has steered as much towards absolute prohibition as Oppenheim's statement had gone towards absolute permission.

One will note that the statements by the ICTY rest essentially on the moral argument of a Kantian imperative: torts suffered do not allow you to commit further torts; innocents cannot be weighed up against other innocents. That argument is certainly just. But the nerve of the matter lays also in the principle of equality of belligerents, which is a fundamental principle:³⁵⁰ if one disallows reprisals completely, one thereby tends to sharpen inequality, since it will be possible for one side to violate the law whereas the other will remain bound by the applicable rule (and not only Geneva law) to the full extent. This, from the point of view of

³⁴⁶ See F. Kalshoven, *Belligerent Reprisals*, Leyden, 1971; F. Kalshoven, 'Belligerent Reprisals Revisited', *NYIL*, vol. 21, 1990, pp. 43ff. See also S. Hampson, 'Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949', *ICLQ*, vol. 37, 1988, pp. 818ff; C. Greenwood, 'The Twilight of the Law of Belligerent Reprisals', *NYIL*, vol. 20, 1989, pp. 35ff; E. David, *Principes de droit des conflits armés*, 2nd. ed., Brussels, 1999, pp. 362ff.

³⁴⁷ L. Oppenheim (R. Roxburgh, editor), *International Law, War and Neutrality*, vol. II, London, 1921, p. 337, in the text and in footnote 2. For the law of the nineteenth century, see, e.g., the elaborate statements by A. Pradier-Fodéré, *Traité de droit international public européen et américain*, vol. 8, Paris, 1906, pp. 824ff, deploring that undetermined state of the law which permits almost everything.

³⁴⁸ See, e.g., Article 2(3) of the Geneva Convention relative to the Treatment of prisoners of war (1929); and the four Geneva Conventions of 1949: Article 46 Convention I; Article 47 Convention II; Article 13 Convention III; Article 33 Convention IV. The legality of reprisals in strict law (at least for the aggressed State) has been maintained even thereafter, but with the advice not to use the faculty because of humanitarian considerations: see G. Schwarzenberger, 'Legal Effects of Illegal War', in: *Essays in Honour of A. Verdross*, Vienna, 1960, p. 251-2.

³⁴⁹ See E. Stowell, 'Military Reprisals and the Sanctions of the Laws of War', *AJIL*, vol. 36, 1942, pp. 643ff. See also A. R. Albrecht, 'War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949', *AJIL*, vol. 47, 1953, pp. 590ff.

³⁵⁰ See H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, 1970.

many powerful States, tends to weaken in an excessive way the possibility of enforcing the law. The fact that there might be criminal prosecution, an argument advanced by the ICTY, is obviously not of much avail: that is a post-conflict matter, which moreover is wholly speculative since very often such prosecutions are hampered in one way or another. Thus, the preventive effect of criminal law is minimal with respect to warfare. We are finally left with a bold and morally correct statement of the ICTY which may arouse some doubts as to its practicability and especially as to its acceptance by some of the most frequent belligerents, whose practice is to that very extent particularly visible. Further developments in this field will be of particular interest.

2. *State of necessity*

In the *Aleksovski Appeal* (2000)³⁵¹ counsel for the accused pleaded the state of necessity. The claim was that the mistreatments inflicted on the persons detained were the lesser evil with respect to what these persons would have faced if they had been liberated. Thus, it was advanced, the illegal acts had been committed in order to avoid a graver violation; hence they should be excused. The Appeals Chamber rejected that argument, which in effect is wholly misconceived. According to the Appeals Chamber, the choice was to mistreat the detainees or not; it was not to suppose that the persons involved would have suffered more if not detained. The choice was to mistreat or not; it was not as to liberate or not.³⁵² In simpler words, one can say that the object of the necessity argument was wrong: the accused could have detained the persons (in order to protect them from supposed harsh consequences of liberation) without mistreating them; the mistreatment did not save them from graver violations; it was the detention which would have protected them. Thus, there is no causal link between the mistreatments and the protection. Thus the argument of necessity must fail categorically.

3. *Self-defence*

In the *Kordic* case (2001) the exception of individual self-defence³⁵³ was raised in order to justify some violations of the law of warfare.³⁵⁴ The Chamber responded that individual self-defence does not provide a justification for serious violations of international humanitarian law.

³⁵¹ At §§39ff. ³⁵² *Ibid.*, §54.

³⁵³ This self-defence must not be confused with self-defence of States as enshrined in Article 51 of the United Nations Charter.

³⁵⁴ See Article 31(1)(c) of the ICC-Statute: 'The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph'.

However, individual self-defence can be a recognized criminal defence in specific cases, especially if performed in response to an imminent and unlawful use of force, and if proportionate. The assessment of such requirements must be made on a case-by-case basis. The simple fact of conducting a 'defensive operation' does not in itself constitute a ground for the exclusion of responsibility.³⁵⁵

X. CONCLUSION

The foregoing analysis focussed on the points which are most salient and which are of some interest to public international lawyers in general, to the exclusion of purely criminal law matters. The overview shows how many matters are addressed by the *ad hoc* Tribunals and how rich the corpus of case-law has become. The Tribunals did not avoid delicate questions. One of the most striking features of the period under review is the marked tendency of the tribunals towards some 'humanization' of the law of armed conflicts. There has been a shift towards a more individual-centered law rather than a more State-centered law. It remains to be seen to what extent such a shift will prove workable in practice. The contributions of the tribunals to the strengthening of the law are not limited to the matters here reviewed. They are also to be found in many statements scattered throughout the judgments. Thus, for example, one can find interesting passages on the concurrence of offences. In this context, the ICTY refers to municipal law analogies under the guise of general principles of law. These analogies are pushed to their utmost.³⁵⁶ Elsewhere, the ICTY prompts some in depth consideration of the rule of *stare decisis* (the importance of precedent) in international law, which forms rewarding reading for any generalist.³⁵⁷ Apart from procedural law, the tribunals made also subliminal statements as to substantive matters: thus, in the *Delalic Appeal* (2001)³⁵⁸ the Chamber made an important statement as to universal jurisdiction. It recalled that there is compulsory universal jurisdiction for grave breaches, which *must* be prosecuted by a State at least in the case of physical presence of the accused in its territory. And that there is optional universal jurisdiction for other breaches of the Geneva Conventions, which *may*, but need not, be prosecuted by a national court of a State which is not otherwise connected with the crime. As a last example one may quote from the *Brdjanin* case (2004),³⁵⁹ where it is stated that persons not falling under Geneva Conventions I to III necessarily

³⁵⁵ *Kordic* (2001), §§451–2. See also *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. XV, London, 1949, p. 177.

³⁵⁶ *Kupreskic* (2000), §§728ff. Not only municipal law analogies are discussed: there is also recourse to 'general principles of justice' absent specific common principles traceable in municipal law. The whole theoretical point of judicial law-making is there raised. The point at stake was the liberty of the tribunal to modify the legal qualification of a crime as balanced against the right of an effective defence.

³⁵⁷ *Aleksovski* (Appeal, 2000), §§92ff.

³⁵⁸ At §176.

³⁵⁹ At §125. See already *Delalic* (1998), §271.

fall under the protection of Geneva Convention IV, subject to the requirement of Article 4 of that Convention. Thus, irregular combatants³⁶⁰ would be entitled to the protection of Geneva Convention IV.³⁶¹ The importance of that statement is apparent if one bears in mind how much this finding was controversial in the last fifty years in international humanitarian law; and even more, if one is aware of the efforts of the present US government to sustain exactly the opposite.³⁶²

Perhaps the most striking point in the adventure of the tribunals is the continued evidence of appalling wrongs man commits on man. No words can depict the depressing events to which these cases bear testimony. One is thence transported by mixed feelings: by the heavenly promises of eternal peace, but also by the raging words of the *Requiem's Dies Irae*: 'Day of wrath and doom impending, David's word with Sibyl's blending! Heaven and earth in ashes ending ...'

³⁶⁰ These are persons who participate in the fighting without being entitled to do so according to the rules of Article 4 of Geneva Convention III and of Articles 43–4 (inasmuch as they are applicable or customary in nature) of Additional Protocol I (1977). These persons are not legally recognized as combatants; they are thus not entitled to the protections under Geneva Convention III. Moreover, being factually combatants (albeit irregular ones), they are on the face of things not 'civilians', and could thus be excluded also from the scope of Geneva Convention IV. If that line of argument is taken, such persons are entitled to nothing more than the minimum guarantees (under customary international law) of common Article 3 of the Geneva Conventions and of Article 75 of Additional Protocol I; to these protections, the human rights guarantees, especially as enshrined in the two Covenants of 1966, could be added. The ICTY seems to accord them a higher standard of protection, precisely under Convention IV.

³⁶¹ The fact that Convention IV speaks of civilians is in itself no insurmountable obstacle. Legal concepts are relative to a certain juridical context and legislative aim. The proper meaning of 'civilian' under Convention IV is not only a matter of grammatical construction but depends on general teleological and systematical elements, such as, precisely, its proper and sensible relation with Convention III.

³⁶² The question of the status of irregular combatants is again of great actuality since the war in Afghanistan (2003) and the detainees in Guantanamo Bay. The policy of the United States of America is in this respect systematically one of lowering the standards of protection in order, it is claimed, to better fight international terrorism. On the whole question of irregular combatants, see K. Dörmann, 'The Legal Situation of "Unlawful/Unprivileged" Combatants', *International Review of the Red Cross*, vol. 85, 2003, pp. 45ff. As to the position of the US Government after September 11th, see A. de Zayas, 'The Status of Guantanamo Bay and the Status of the Detainees', *University of British Columbia Law Review*, vol. 37, 2004, pp. 277ff, 308ff, with many references. See also J. Wiczorek, *Unrechtmässig-ge Kombattanten und humanitäres Völkerrecht*, Berlin, 2005.