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# THE JURISPRUDENCE OF THE YUGOSLAV AND RWANDAN CRIMINAL TRIBUNALS ON THEIR JURISDICTION AND ON INTERNATIONAL CRIMES

By ROBERT KOLB\*

## I. INTRODUCTION

This article presents an overview of the case law of the Yugoslav and Rwandan International Criminal Tribunals. This overview will be limited to matters of substantive law to the exclusion of procedural points. It will deal with the crimes within the jurisdiction of the Tribunals, issues of participation in the commission of crimes, and defences. For reasons of space, only trial and appeal judgments will be considered;<sup>1</sup> interlocutory decisions<sup>2</sup> will be mentioned in passing where appropriate. For the same reasons no attempt will be made to consider closely the post-Second World War jurisprudence on which the present ad hoc criminal Tribunals rely heavily. Where a comparison seems warranted, some references will be offered. Critical comments will also be provided where necessary.

The importance of jurisprudence in the development of the law need hardly be stressed. It has a constitutive role in areas such as that of international criminal law where the law is uncertain on many points and where previous decisions were rendered on the basis of differing legislation and legal systems. Some points decided by the present ad hoc Tribunals are still unsettled, for example those subject to appeal. But the main lines of this jurisprudence do already emerge clearly. These are the pillars on which the edifice of international criminal law is being erected, and which will be the focus of this article.

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<sup>1</sup> The following judgments will be considered. For the ICTY: (1) *Tadic* case, judgment of the Appeals Chamber on the legality of the establishment of the ICTY and on its jurisdiction, 2 October 1995 (hereafter: *Tadic* (1995)); (2) *Tadic* case, judgment of the Trial Chamber, 7 May 1997 (hereafter: *Tadic* (1997)); (3) *Tadic* case, judgment of the Appeals Chamber on the merits, 15 July 1999 (hereafter: *Tadic* (1999)); (4) *Erdemovic* case, judgment of the Appeals Chamber, 7 October 1997; (5) *Delalic and others* case (also called *Celebici*), judgment of the Trial Chamber, 16 November 1998; (6) *Furundzija* case, judgment of the Trial Chamber, 10 December 1998; (7) *Aleksovski* case, judgment of the Trial Chamber, 25 June 1999; (8) *Jelusic* case, judgment of the Trial Chamber, 14 December 1999. For the ICTR: (1) *Akayesu* case, judgment of the Trial Chamber, 2 September 1998; (2) *Kayishema and Ruzindana* case, judgment of the Trial Chamber, 21 May 1999; (3) *Rutaganda* case, judgment of the Trial Chamber, 6 December 1999. All the substantive judgments containing developments as to the law and rendered up to the end of 1999 are thus reviewed.

<sup>2</sup> Also those under Rule 61 of the Rules of the ICTY.

## II. THE CONDITIONS FOR THE JURISDICTION OF THE TRIBUNALS

There are certain general jurisdictional conditions which must be fulfilled for both Tribunals. First, the substantive prohibition breached (the criminal offence) must be part of customary international law, or at least of treaties binding upon the State on whose territory the conflict takes place and which are adopted into its municipal law. Moreover, the breach of the rule concerned must give rise, under customary international law, to international criminal responsibility. Second, the violations of international humanitarian law have to possess a certain seriousness and to have taken place in a certain location and time-period.

Other conditions are linked to one only of the two Tribunals, or only to a particular crime. For the ICTY there is a general requirement of the existence of an armed conflict, subject only to one qualification for the application of Article 2 of the Statute (the grave breaches regime) where it must additionally be shown that the conflict was international in character. Moreover, there must be a *nexus* between the acts of the accused (i.e. the alleged offence) and the armed conflict. Roughly speaking, the situation of the ICTR is the reverse. There is no general requirement of the existence of an armed conflict, subject only to one qualification for the application of Article 4 of the Statute (violations of Common Article 3 to the Geneva Conventions of 1949 and of Protocol II of 1977) where it must be shown that a non-international armed conflict existed and that the acts of the accused were closely linked to that conflict. This difference stems from the fact that the conflict in the former Yugoslavia was considered of mixed international and internal character whereas the one in Rwanda was exclusively internal, and from the overlapping fact that the crimes to be punished in the former Yugoslavia were committed exclusively in the context of the armed conflict whereas in Rwanda most of the genocidal acts were perpetrated alongside the armed conflict and independently from it.

### 1. *The Requirement that the Rules of International Humanitarian Law Applied Be Part of Customary Law*

The origin of this requirement can be traced back to the *Report of the Secretary-General of the United Nations pursuant to paragraph 2 of Security Council Resolution 808 (1993)* presented on 3 May 1993.<sup>3</sup> It was the opinion of the Secretary-General, when asked to comment on the legal implications of the creation of an ad hoc criminal tribunal, that

<sup>3</sup> UN Doc., S/25704.

respect for the principle *nullum crimen sine lege* requires that the tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. In this way the problem of adherence of some but not all States to specific Conventions would not arise.<sup>4</sup> This position was partly endorsed by the Security Council, which however also allowed applicable conventions to be taken into account.<sup>5</sup> When it first considered this question, the ICTY also widened the sources admissible to found its jurisdiction. In the *Tadic* case (1995), it held that the core of the matter was to apply sources binding upon the parties at the moment of the offence. Therefore, the Tribunal would fully comply with the stated purpose of not infringing the *nullum crimen* principle if it applied any treaty binding upon the parties at the moment of the offence.<sup>6</sup> The Chamber, however, also sought to establish the customary law character of the rules to be applied wherever possible. It thereby inaugurated a practice often followed in later trials.<sup>7</sup> In the *Tadic* case (1995), the Chamber attempted to specify what the customary rules of international humanitarian law governing internal armed conflict are, precisely in order to satisfy the requirement set forth by the Secretary-General. It found that the corpus of customary rules was composed of some rules relating to the protection of the civilian population which had hardened through State practice since the Spanish Civil War, and of a series of conventional rules, such as Common Article 3 of the Geneva Conventions of 1949, rules contained in Additional Protocol II (1977), and some rules on the methods and means of warfare, especially on the use of certain weapons.<sup>8</sup>

It does not seem that this requirement that the rules applied be customary in character was either necessary or beneficial. The *nullum crimen* principle does not call for such a restriction. It was developed during the period of the enlightenment as a protection against arbitrary acts and extraordinary penalties (*poenae extraordinariae*).<sup>9</sup> Under the principle thus developed, any criminal conviction must rest on a law prohibiting a particular conduct; this law must be in force at the time the acts were committed; and the law must be clear in describing the conduct prohibited (*Bestimmtheitsgrundsatz*).<sup>10</sup> In international law, the principle

<sup>4</sup> *Ibid.*, para. 34.

<sup>5</sup> S/PV.3217 (25 May 1993), e.g., pp. 19, 23. See also, for Article 2 of the Statute, *ibid.*, pp. 11, 15.

<sup>6</sup> *Tadic* (1995), paras. 143–5. This course was followed in other cases: see, e.g., *Furundzija*, para. 166, or *Kayishema*, para. 156.

<sup>7</sup> See, e.g. *Tadic* (1997), para. 611; *Delalic*, paras. 307 ff., 315; *Furundzija*, paras. 137, 168; *Akayesu*, para. 495.

<sup>8</sup> *Tadic* (1995), paras. 100 ff.

<sup>9</sup> The formula was coined by J. P. A. von Feuerbach (*Lehrbuch des peinlichen Rechts* (1801), p. 20). See, earlier, T. Hobbes, *De Cive*, cap. XIII, and *Leviathan*, cap. XXVIII, and S. Pufendorf, *De jure naturae et gentium*, lib. VIII, cap. III, par. VII.

<sup>10</sup> See ECHR, *Kokkinakis v. Greece* (1993), Series A, No. 260A, p. 22, para. 52.

has always been applied with more flexibility than in municipal law.<sup>11</sup> If one takes into consideration its essential content, it can be seen that in the case of the ad hoc tribunals it is sufficient that the contemplated conduct was punishable on the territory where the acts took place. The principle only requires a pre-established law applicable *to the accused*.<sup>12</sup> It is clearly not necessary (but may be a separate requirement of international law) that the law be applicable *erga omnes* on the universal plane in order also to be applicable to a particular accused. Subsidiarity and economy of means suggest the application of a general rule according to which the more specific basis of judicial action should be examined first. Therefore, it may be useful to enquire if conduct is prohibited by customary law only if no applicable treaty or equivalent internal legislation can be found relating to the territory where the acts were committed. This view is beginning to find some favour with the Tribunals. Thus, in the *Kayishema* case (1999), the ICTR held that the Geneva Conventions of 1949 and Protocol II were binding on Rwanda and the offences charged did constitute crimes under the laws of Rwanda in conformity with these instruments. Under such conditions the Chamber thought it superfluous to go into the question of the customary status of that source.<sup>13</sup> The customary-law requirement seems thus grounded more on political imperatives than on legal necessity.

It may be added that the broader approach, looking to the customary character of the rules, is not as beneficial to the development of the law as may be thought at first sight. The natural tendency of the Tribunals will be to postulate custom wherever possible in order to bypass the jurisdictional obstacle. The practice has already shown that these postu-

<sup>11</sup> It has even been suggested that the principle had no standing in the international criminal procedure: see the conclusions of the Judge Advocate in the *Peleus Trial* (British Military Court, Hamburg, 1945), *Law Reports of Trials of War Criminals, United Nations War Crimes Commission*, vol. I, (London, 1947), p. 15. What is certain is that in international criminal law the principle has never been applied to the same extent as in the continental legal tradition based on Roman law. See the synthesis of the post-Second World War case-law in: *Law Reports . . .*, op.cit., vol. XV, (London, 1949), 166 ff. For instance, the principle '*nulla poena sine lege scripta*', which operates to the exclusion of customary law, has for obvious reasons never been applied on the international stage. On the contrary, international customary law has always been the primary basis for international criminal adjudication; for the post-Second World War trials, see the *Law Reports . . .*, op.cit., vol. XV, London, 1949, p. 5 ff. Another exception which has permeated the internal legal systems also has its origin in international law and has been codified in Article 15(2) of the International Covenant on Civil and Political Rights (1966): 'Nothing in this article [codifying the principle *nullum crimen*] shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'. See to the same effect also Article 7(2) of the European Convention on Human Rights (1950). Moreover, in international law, the penalties incurred were never clearly set out. But the gravity of the acts concerned made it clear that life sentences or even the death penalty could be applied, as it was in the trials after the Second World War. Another exception was developed in the jurisprudence of municipal law: the priority of the more lenient later law (*lex mitior*).

<sup>12</sup> If the source is international law, especially treaty law, it may be necessary that it be adopted into municipal law through legislation.

<sup>13</sup> *Kayishema*, para. 156.

lates of custom largely rest on undemonstrated assertions. A real analysis of the elements of custom is in effect unimaginable within the compass of the task of the Tribunals. Weak assertions made in more than one case do not add to the authority the Tribunals may enjoy.<sup>14</sup> Moreover, an excessive blurring and blending of conventional and customary law tends to produce unwelcome side-effects and to weaken the proper mechanisms of treaty law.<sup>15</sup>

Apart from international customary and general treaty law, or internal legislation, some other sources could also provide a basis for the jurisdiction of the Tribunals. In the first place, any special agreement among the warring parties to apply a particular set of rules of international humanitarian law—for example, to apply some rules relating to an international armed conflict in an internal conflict too—must be held to extend to the provisions of criminal law enforcing the substantive provisions.<sup>16</sup> Such an agreement existed among the belligerents in the Bosnian war; it was concluded on 22 May 1992.<sup>17</sup> A unilateral declaration committing oneself to certain rules of humanitarian law has the same effect. What is essential is not the nature of the bond undertaken but the acceptance to be bound by the rules contemplated. Thus, in *Kayishema* (1999), the ICTR found that the Rwandan Patriotic Front (RPF)<sup>18</sup> had declared itself bound by the rules of international humanitarian law.<sup>19</sup> That would have been sufficient to give the Tribunal jurisdiction over violations of Common Article 3 of the Geneva Conventions (1949) or Protocol II (1977) as against the members of the RPF. In such cases some of the combatants may not have been informed of such an undertaking; it may then be necessary to consider the defence of ignorance of the law which has sometimes been allowed if the accused had in fact no knowledge of the terms in question and if he could not reasonably be expected to know of the illegality of the conduct.<sup>20</sup> A

<sup>14</sup> An example of a problematic assertion of customary law can be found in the *Delalic* case (1998), where the Chamber confronts three different definitions of torture current in international law and then simply concludes that the 'more specific definition' of torture in the Torture Convention of 1985 is representative of customary international law (para. 459). There is not even an attempt to buttress this statement.

<sup>15</sup> Some inconveniences have been pointed out by P. Weil in quite sharp words: P. Weil, 'Cours général de droit international public', *RCADI*, vol. 237, 1992-VI, p. 179 ff.

<sup>16</sup> For the legal basis of such agreements, see Article 96(2) and (3) of Protocol I (1977).

<sup>17</sup> *Tadic* (1995), para. 73.

<sup>18</sup> The RPF was the political party of the Tutsis. During the civil war it fought in Rwanda against the Hutu-controlled governmental agencies.

<sup>19</sup> *Kayishema*, para. 156.

<sup>20</sup> Cf. the *Scuttled U-Boats* Case (1946), *Law Reports* . . . (*supra*, n. 11), vol. I, (London, 1947), pp. 69–70; the *Von Leeb* (*The High Command*) case (1948), *Law Reports* . . . (*supra*, n. 11), vol. XII, (London, 1949), pp. 73–4; the *Latzka* case (1947), *Law Reports* . . . (*supra*, n. 11), vol. XIV, (London, 1949), p. 69. See generally, *Law Reports* . . . (*supra*, n. 11), vol. XV, (London, 1949), pp. 182–4.

glance at the type of offences included in the Statutes of the ad hoc Tribunals shows that this will hardly ever be the case.<sup>21</sup>

Another source which may provide a basis of jurisdiction is the general principles of law as recognized through the various municipal legal systems. The idea that an offence must be universally held to be criminal in order to apply it to an individual, evidenced through the customary-law requirement, is found even more conspicuously in the general principles to which the Tribunals have already often turned for the determination of substantive points.<sup>22</sup> That the application of such principles is not at odds with the *nullum crimen* rule was suggested by Cicero<sup>23</sup> and has been acknowledged in various human rights instruments.<sup>24</sup>

## 2. *The Requirement that the Violation of the Rule must Entail, under Customary International Law, Individual Criminal Responsibility*

This requirement is automatically satisfied for the crimes exhaustively codified in the Statutes, such as genocide and crimes against humanity. It is precisely because it is recognized that they give rise to criminal responsibility that they were included in the Statutes. Thus, when Article 4 of the ICTY Statute confers power on the Tribunal to prosecute persons committing genocide, it is implicit that if certain acts are qualified as 'genocide' they give rise to individual criminal responsibility. The only doubt which may arise is whether a certain act can legally be described as genocide. But this is not a jurisdictional question. It goes to the substance of the criminal charge. For the jurisdiction of the Tribunals, it is sufficient that the prosecution claims that the acts or omissions must be qualified as genocide. In the context of such crimes precisely set out in the Statutes, the requirement has no place.

<sup>21</sup> According to the general principle *ignorantia iuris neminem excusat* the standard of proof is generally high. It was held not to be possible to be discharged for crimes that offend against the elementary bonds of human decency and which must thus be known to be illegal by anyone (*mala per se*). See the *Von Weizsäcker (The Ministries)* case, in: *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, vol. XIV, (Washington, 1952), p. 339: '[The accused] cannot be heard to say that he did not know the acts in question were criminal. Measures which result in murder, ill-treatment, enslavement, and other inhumane acts perpetrated on prisoners of war, deportation, extermination, enslavement, and persecution on political, racial, and religious grounds, and plunder and spoliation of public and private property are acts which shock the conscience of every decent man. These are crimes *per se*.' The showing of the existence of a general principle of law recognized by the municipal legal systems may also invalidate such a claim.

<sup>22</sup> See, e.g., *Erdemovic*, Joint. Sep. Op. McDonald/Vohrah, paras. 56 ff; Sep. and Diss. Op. Cassese, paras. 11 ff; *Furundzija*, paras. 174 ff (for the definition of rape).

<sup>23</sup> *In Verrem*, lib. II, cap. XXXXII.

<sup>24</sup> Cf. Article 15(2) of the International Covenant on Civil and Political Rights (1966) or Article 7(2) of the European Convention on Human Rights. Cf. M. Novak, *U.N. Covenant on Civil and Political Rights, Commentary* (Kehl/Strasbourg, 1993), p. 281. L. E. Pettiti/E. Decaux/P. H. Imbert (eds.), *La Convention européenne des droits de l'homme—Commentaire* (Paris, 1995), pp. 299 ff.

The *raison d'être* of the requirement presently discussed is that certain offences are incorporated in the Statutes only by way of a *renvoi*. Such is the case, for example, for the violation of the laws and customs of war. The ICTY Statute contains only the phrase that there shall be prosecution for such crimes, limiting itself to giving a few examples of the offences involved (Article 3). The rest of the offences covered have to be searched for in the body of customary or conventional international law. For the offences specifically listed, there is again no question that they were (and must be) considered as giving rise to criminal responsibility under customary law. But for the great number of other rules on warfare which may be breached, the inquiry into the type of responsibility to which their breach leads was delegated to the Tribunal to be handled as the cases arise.

It is doubtful if this requirement was necessary as a general and distinct condition for jurisdiction. It seems that, in order to understand it better, a distinction must be made between the rules pertaining to international armed conflicts and rules relating to non-international armed conflicts.

In the context of international armed conflicts the requirement is, it is suggested, redundant. On a proper reading of the Nüremberg and other post-Second World War trials, it appears to have been acknowledged that *all* serious violations of the laws of war give rise to criminal responsibility.<sup>25</sup> There was no review of any pre-existing international custom for the single offences;<sup>26</sup> it would have been difficult to find. The principles emerging from that jurisprudence were then eventually endorsed by States and by the main organs of the United Nations. It may be argued that since that time, criminal responsibility has been inherent in the important substantive rules on the laws of war. It is thus customary law itself which dispenses with a case-by-case analysis into State practice in the context of a prosecution for a single offence. It establishes a simpler equation: as it is a general conception of law that any breach of engagement involves an obligation to make reparation,<sup>27</sup> so it is a general conception of humanitarian law that any serious breach of an important rule of the laws and customs of war entails criminal responsibility. The aforementioned *Report of the Secretary-General pursuant to Resolution 808* expresses the same idea by saying that all persons who

<sup>25</sup> To all of them the following famous *dictum* applies: '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' (*Judgment of the International Military Tribunal at Nüremberg*, (London, 1947), Cmd. 6964, p. 41 or in *AJIL* vol. 41 (1947), p. 220). When the Tribunal moved to the specific war crimes it considered that the various rules of the Hague Conventions or Regulation (1907) were applicable automatically also for founding a criminal responsibility (*Judgment . . .*, loc.cit., pp. 44 ff or *AJIL*, vol. 41 (1947), pp. 224 ff).

<sup>26</sup> The Tribunal at Nüremberg limited itself to asserting *generally* that there has been a previous practice of prosecution of war criminals (on the national level): See *Judgment . . .*, loc.cit., p. 40 or *AJIL*, vol. 41 (1947), p. 218.

<sup>27</sup> P.C.I.J., *Chorzów Factory (Merits)* case (1928), ser. A, no. 17, p. 29.

participate in the execution of *serious* violations of international humanitarian law are individually responsible for their acts.<sup>28</sup> It therefore seems that, since the Statutes limit the jurisdiction of the Tribunals to 'serious violations of international humanitarian law' (for example, Article 1, ICTY Statute), the existence of individual responsibility was already implicit. It may be added that a case-by-case analysis of the existence of a previous practice of individual accountability encounters serious obstacles. The case-law is sparse, except for classical crimes where there is anyway no difficulty. Moreover, the basis on which many of the post-World War II trials were decided is municipal law, with its specific if not idiosyncratic offences. As was to be expected, the ICTY limited itself, when confronted with the question, to asserting in general and wholly unsupported terms that the offence charged was 'clearly' recognized as giving rise to individual responsibility under customary law.<sup>29</sup> It may be asked if the legal construction proposed in the present article would not be clearer, simpler, more direct and intellectually more honest.

The situation is different in the case of rules belonging to the law of non-international armed conflicts. The question of whether the serious violation of the laws governing civil strife entails individual criminal responsibility was not settled by the post-World War II trials since those trials had to deal only with international armed conflict. Hence no general acceptance of the community of States as to the criminal consequences of the violation of such rules existed. The question was raised in the *Tadic* (1995) case. The appellant had maintained that prohibitions concerning internal armed conflict do not entail individual criminal responsibility. The Chamber made reference to some factors mentioned by the Nuremberg Tribunal as warranting the conclusion that there should be criminal responsibility. It summarized these criteria in a tighter way than the Nuremberg judgment had done: '[There must be a] clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals'.<sup>30</sup> It may be noted that an emerging *opinio juris* of the necessity of prosecution and some proceedings in municipal courts (in application of municipal law) may be considered sufficient under that holding. The material element (practice) is subordinated to the subjective element (opinion). The Chamber concludes that it has no doubt that the (serious) violations of humanitarian rules in issue also entail criminal responsibility when committed in internal armed conflicts.<sup>31</sup>

<sup>28</sup> UN. Doc. S/25704, para. 54, emphasis added.

<sup>29</sup> See, e.g., *Delalic*, para. 307 ff (for Common Article 3 of the Geneva Conventions of 1949); *Furundzija*, para. 140 (for torture) and para. 169 (for rape and other serious sexual assaults).

<sup>30</sup> *Tadic* (1995), para. 128.

<sup>31</sup> *Ibid.*, para. 129.

The Chamber puts forward a number of military manuals and national legislation, some convictions arising out of the Nigerian Civil war before Nigerian courts and certain resolutions adopted unanimously by the Security Council of the United Nations.<sup>32</sup> Moreover, Yugoslav legislation allows a direct applicability of the two Protocols of 1977 to which Yugoslavia was a party.<sup>33</sup> There was thus on this point a significant assimilation of the legal regimes of international and internal armed conflict so far as the ICTY is concerned. It may in the future be possible to apply the equation previously discussed (all serious violations of international humanitarian law entail criminal responsibility) to non-international armed conflicts.

3. *The Requirement that the Violations of Humanitarian Law are Serious and Took Place at a Certain Location and during a Certain Period of Time*

The Statutes of both Tribunals restrict the jurisdiction of those bodies to 'persons responsible for *serious* violations of international humanitarian law'.<sup>34</sup> This criterion again applies above all to the violation of the laws of war (Art. 3 ICTY Statute; Art. 4 ICTR Statute), since the crimes of genocide or crimes against humanity are inherently grave crimes which in principle suppose the utmost seriousness when violated. In the case-law it has been held that a violation is serious if (i) the rule breached protects important values and (ii) the breach involves grave consequences for the victim.<sup>35</sup> The first criterion attaches to the quality of an offence in the abstract, the second to the specific consequences its breach produced in a single case. These criteria are cumulative, since there may be some violations of important rules which are so minor as not to involve grave consequences for the victim. According to the ICTY Chamber in the *Tadic* (1997) case, the prohibitions of Common Article 3 of the Geneva Conventions (1949) are rules protecting important values, as they give expression to the elementary considerations of humanity.<sup>36</sup> Conversely it was held in the *Delalic* case (1998) that the systematic plunder of private property of internees by the accused was of so modest monetary value that the appropriation did not involve grave consequences for the victims.<sup>37</sup> Thus the Chamber held it did not possess jurisdiction over that crime. It therefore seems that the seriousness of the violation of law should be denied only for rules or breaches of international humanitarian law which are manifestly not deserving of any

<sup>32</sup> *Ibid.*, paras. 130-4.

<sup>33</sup> *Ibid.*, para. 132.

<sup>34</sup> Art. 1 ICTY / ICTR Statutes, emphasis added.

<sup>35</sup> *Tadic* (1997), para. 610, 612.

<sup>36</sup> *Ibid.*, para. 612.

<sup>37</sup> *Delalic*, para. 1154.

criminal consequences. The old maxim *de minimis non curat praetor* applies. The interpretation of these exceptions has to be strict.

It has already been suggested that there is a link between this element of 'seriousness' and the requirement that an offence must give rise under customary law to individual criminal responsibility.<sup>38</sup> The substantial overlapping of these elements covers only the first branch of the test adopted by the ICTY, i.e. that the rule breached protects in the abstract important values. It cannot extend to the considerations proper only to the single case.

There are moreover two jurisdictional conditions, *ratione loci* and *ratione temporis*. With respect to the condition *ratione loci*, Article 1 of the ICTY Statute contains the simpler rule. The violations of humanitarian law must have been committed 'in the territory of the former Yugoslavia'. The term 'territory' is a legal term of art which must be understood in the sense given to it by public international law; it includes the territorial sea, airspace, etc. According to general principles of law, it is sufficient that the effect of criminal conduct be felt on the territory of the State; the classic example is that of the shot across the boundary. But the effects principle may also apply to conspiracy or instigation committed abroad with the aim of provoking a criminal result on the territory of the third State. One may here refer to the territoriality principle as the basis for criminal prosecution.

The problem is more intricate for the ICTR. Article 1 of its Statute provides that all persons committing the incriminating acts in Rwanda shall be prosecuted, as well as Rwandan citizens responsible for such violations committed in the territory of neighbouring States. The conflict is here treated as a unity, including the neighbouring States where the conflict spilled over. Thus there is a mixed *ratione loci vel personae* criterion. The acts or omissions must have been committed (i) either in Rwanda on the basis of the already discussed territoriality-principle; or (ii) in one of the neighbouring States where the conflict in fact spilled over, if the crime is committed there by Rwandan citizens. This bond of nationality must be considered according to the rules of public international law. As can be seen the ICTR enjoys a larger jurisdiction *ratione loci*.

As for the conditions *ratione temporis*, for the ICTY the offence must have been committed between 1991 (i.e. after 31 December 1990)<sup>39</sup> and the conclusion of peace on 1 December 1995 (i.e. the Dayton Agreement).<sup>40</sup> At the ICTR the time-span is expressed even more precisely: the offence must have been committed between 1 January 1994 and 31 December 1994.<sup>41</sup>

<sup>38</sup> *Supra*.

<sup>39</sup> *Report of the Secretary-General*, UN.Doc. S/25704, para. 62: 'On or after 1 January 1991'.

<sup>40</sup> See generally *Tadic* (1995), para. 70.

<sup>41</sup> Article 1 ICTR Statute.

#### 4. *The Existence of an Armed Conflict*

##### a) *The ICTY*

Article 1 of the ICTY Statute dealing with the competence of the Tribunal does not contain any express reference to the existence of an armed conflict, nor does the Report of the Secretary-General address this point. The conflict in Yugoslavia was considered as a mixed international and internal conflict; the question was not further elaborated, leaving it to the Tribunal to reach its own conclusions.<sup>42</sup> However, the requirement of an armed conflict seems implicit in the condition that international humanitarian law must have been violated, as this branch of law applies only if there is an armed conflict. Therefore the Chamber in the *Tadic* (1997) case could conclude that it must be shown that the incriminating acts were committed 'within the context of an armed conflict'.<sup>43</sup>

Must the conflict be an international armed conflict, or is it sufficient, subject to express exceptions, that there is an armed conflict, international or internal? This distinction has been of the greatest importance up to 1949, shaping two distinct bodies of law, one relative to situations which were classified as war between two or more States, the other relative to civil strife. States were always reluctant to admit international rules to govern internal disturbances which they considered pertained exclusively to their domestic jurisdiction. In the *Tadic* (1995) case this distinction has been wholly upset for the purposes of international criminal law. The Chamber there held that the Statute of the Tribunal referred indistinctly to international *and* to internal armed conflicts, with the exception of Article 2, the grave breaches régime, which according to Additional Protocol I and customary law applies only to international armed conflicts.<sup>44</sup> This finding is based mainly on a teleological and an implied powers argument: the purpose of the Security Council to prosecute all the persons responsible for serious violations of international humanitarian law could not be served otherwise than by extending the jurisdiction of the Tribunal to the entirety of the conflict, international and internal. Moreover, as the Security Council knew that the conflict was generally considered of a mixed international and internal character, it must by necessary implication have granted the Tribunal jurisdiction also for the internal part of the conflict, for otherwise only a part of the persons responsible for serious violations of

<sup>42</sup> The *Report of the Secretary-General*, UN.Doc. S/25704, para. 62, is at pains to stress that 'no judgment as to the international or internal character of the conflict is being exercised'.

<sup>43</sup> *Tadic* (1997), para. 559.

<sup>44</sup> *Tadic* (1995), para. 71 ff, 81-3. Judge Abi-Saab, in his Separate Opinion, was even prepared to apply the grave breaches régime equally in internal armed conflicts. He roots his argument in the growing practice going in that direction. This practice has in his view the force of a subsequent practice modificatory of the conventional provisions of Protocol I and also the strength of a new rule of customary international law.

international humanitarian law could have been prosecuted. And this is precisely what the Security Council wanted to avoid: it would have been absurd to treat differently horrific cruelties according to the fortuitous fact of having been committed before or after a specific date, or at one place rather than another on the territory of the former Yugoslavia. Now, it may be contended that the whole argument was superfluous, as the conflict in the former Yugoslavia was at all the material times an international armed conflict<sup>45</sup> (a position that recommends itself). But if one starts from the assumptions accepted by the Chamber, one may grasp the extent of international legislation attributed to the Security Council by the Chamber in *Tadic*. Under the influence of criminal law there is a strong tendency to a merger of the law relating to international and internal armed conflicts.<sup>46</sup> This extremely important evolution prompts an array of legal consequences which cannot be mentioned here.

For the purposes of this new customary law on the obligations of participants in any armed conflict, the Chamber set out the single yardstick on which it measures the existence of an armed conflict. It thus gave the following definition of armed conflict: '[An armed conflict exists] whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.<sup>47</sup> This definition, which has been endorsed by all the later trials,<sup>48</sup> marks the threshold at which the Tribunal will have jurisdiction, irrespective of the intrinsic quality of the armed conflict (except for the grave breaches régime). As explained by the Trial Chamber in the *Tadic* (1997) case, this definition has two aspects: there must, first, be a certain material *intensity* of the conflict; there must, second, be a certain *organization* of the armed forces involved which distinguishes their operations from short-lived insurrections, riots or banditry. On the first aspect there must be some sustained and concerted military operations. On the second point there must be a certain military order, probably a responsible command, and such effective control over a part of the territory as to enable the groups concerned to carry on military operations and implement the laws of war.<sup>49</sup> On the facts, the different Chambers of the Tribunal have always found that there has been at the material times fighting of such intensity on the Bosnian territory as to qualify as armed conflict.<sup>50</sup> It would be difficult to contest that finding.

<sup>45</sup> See e.g. the Diss.Op. Rodrigues, *Aleksovski* case, paras. 22 ff.

<sup>46</sup> There is no evidence that the Security Council itself intended to extend the scope of existing substantive law.

<sup>47</sup> *Tadic* (1995), para. 70.

<sup>48</sup> *Delalic*, paras. 182 ff; *Furundzija*, para. 51 ff; *Aleksovski*, paras. 42 ff; *Jelusic*, paras. 29-30.

<sup>49</sup> For details on these criteria, see ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva, 1987), pp. 1347 ff.

<sup>50</sup> See, e.g., *Tadic* (1995), para. 70; *Delalic*, para. 192; etc.

There do not have to be actual fighting activities amounting to an armed conflict in the location where the accused is said to have committed his crimes. As was explained in the *Delalic* case (1998), it is sufficient that there existed such a conflict in the 'larger territory of which it forms part'.<sup>51</sup> Thus it is enough to prove that there is an armed conflict in Bosnia-Herzegovina in order to cover all acts or omissions perpetrated on its territory.

#### b) *The ICTR*

The conflict which afflicted Rwanda in 1994 was an internal armed conflict. This is the reason why the régime of grave breaches was not included in the ICTR Statute; the grave breaches régime was thought to be limited to international armed conflicts. On the other hand mass killings happened in Rwanda independently from the military operations by the contending factions.<sup>52</sup> The prosecution of genocide and crimes against humanity is thus placed on a legally autonomous basis which is not affected by any finding as to the existence of or link with an armed conflict.

To this state of affairs there is one exception which can be found in Article 4 of the Statute. This Article deals with violations of Common Article 3 of the Geneva Conventions of 1949 and of Additional Protocol II of 1977. Under customary and conventional law those provisions or instruments only apply if there is at least a non-international armed conflict. This requirement was thus read to have also been indirectly incorporated into the Statute to the extent that it refers to those provisions and instruments.<sup>53</sup>

If for the ICTY there must as a general rule be shown that there existed an armed conflict, for the ICTR the general rule is the reverse, subject in both cases to specific exceptions (Article 2 for the ICTY; Article 4 for the ICTR).

### 5. *The Existence of a Nexus between the Offences and the Armed Conflict*

As all the offences listed in the Statute of the ICTY are subjected to the competence of this Tribunal only if there is at least a non-international armed conflict, the requirement that there must be a nexus between the acts or omissions of the perpetrator and the armed conflict applies to all the offences. Conversely, for the ICTR, a similar condition applies only for Article 4 of its Statute concerning violations of Common Article 3 of the Geneva Conventions (1949) and of Protocol II (1977).

<sup>51</sup> *Delalic*, para. 185.

<sup>52</sup> Such killings were often perpetrated by civilians.

<sup>53</sup> See *Akayesu*, paras. 619 ff, 622 ff.

Moreover, for the ICTR the link requirement is not a condition for the jurisdiction of the Tribunal; its absence goes to the merits of the case and leads to the acquittal of the accused.

In the *Tadic* (1997) case, the Chamber of the ICTY expanded on the notion of the nexus.<sup>54</sup> It found that the incriminating acts must be 'closely related'<sup>55</sup> to the hostilities. It is sufficient to prove that the offence was committed in the course or as a part of the hostilities in, or in occupation of, an area controlled by one of the parties. It is not necessary that the armed conflict was occurring at that place or at that exact time, since the acts do not have to be committed in actual combat. Nor is it necessary to show that the incriminating acts were endorsed by the State authorities. In the *Kayishema* case (1999), the ICTR, in the context of Article 4 of its Statute, took up this requirement and asked for a 'direct connection',<sup>56</sup> it added that what a direct connection requires must be appreciated on a case-by-case basis. This last point was endorsed by another Chamber of the ICTR in the *Rutaganda* case (1999).<sup>57</sup>

For a better understanding of the practical scope of this requirement it is useful to look at the way it was applied. In the *Tadic* (1997) case, the acts of ethnic cleansing and the acts perpetrated in a prisoners' camp were considered connected with the armed conflict, as they were endorsed by the Serb authorities; indeed, they were acts done in execution of the Serb war policy.<sup>58</sup> Thus, acts done in furtherance of the war policy of one party to the conflict are considered closely related to the conflict. In the *Delalic* case (1998) it was found that the incriminating acts were committed in the prison camp of Celebici, operated by the governmental authorities of Bosnia-Herzegovina. The prisoners of that camp had been arrested as a result of military operations conducted on behalf of that government. Thus there was clearly a nexus of the character required.<sup>59</sup> In the *Furundzija* case (1998) the existence of a link was accepted because the accused had acted as a commander of a Croat paramilitary unit.<sup>60</sup>

In considering this jurisprudence it can be said that the nexus condition neither requires an endorsement of the acts by a party to the conflict, nor, at the other extreme, is it sufficient that the incriminating acts are not wholly unrelated to the armed conflict. To require that they are imputable to the State is too high a standard. On the other hand, to exclude only acts performed on purely personal grounds is too low a

<sup>54</sup> *Tadic* (1997), paras. 572 ff.

<sup>55</sup> *Ibid.*, para. 573.

<sup>56</sup> *Kayishema*, para. 188: 'A direct connection . . . should be established factually. No test, therefore, can be defined *in abstracto*'. See also para. 600 ('a direct link'), para. 604.

<sup>57</sup> *Rutaganda*, under ch. 2.4 (no paragraphed version of this judgment is available at the present time).

<sup>58</sup> *Tadic* (1997), paras. 574-5.

<sup>59</sup> *Delalic*, paras. 193 ff, 196.

<sup>60</sup> *Furundzija*, paras. 61 ff, 65.

standard. What must be shown is that (i) either the accused acts for the benefit of one party to the conflict or in furtherance of its war effort or policy; or (ii) that he acts on behalf of one party to the conflict.

Some interesting light is shed on the question of the link by the jurisprudence of the ICTR on Article 4 of its Statute. In all the cases adjudicated up to this moment the ICTR has acquitted the accused from the charges under Article 4 because the link between the acts committed and the armed conflict has not been established.<sup>61</sup> The cardinal criterion shaped by this jurisprudence is that for the nexus requirement under Article 4 to be satisfied it must be proved that the accused 'actively supported the war effort',<sup>62</sup> or that he acted for one party in the conflict 'in execution of their respective conflict objectives'.<sup>63</sup> In the cases decided by the ICTR, the accused were civilians holding local political mandates, or businessmen. The ICTR considered that it was not proved that the acts perpetrated by these accused were committed in conjunction with the armed conflict or in supporting the war effort of one party. The Tutsis were attacked by civilian authorities as part of a campaign of hatred designed to exterminate the Tutsi population in Rwanda. Neither the Government nor the RPF army were involved in these massacres.<sup>64</sup> Thus, as can be seen, the link requirement under Article 4 of the ICTR Statute follows substantively the findings of the ICTY under its own link condition, whereas procedurally it has another scope, not being a preliminary question of jurisdiction but a condition of criminal responsibility of the accused.

### III. ARTICLE 2 OF THE ICTY STATUTE: GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 1949<sup>65</sup>

In order to apply Article 2 of the Statute two conditions must be met: (1) there must exist an international armed conflict; and (2) the victims must be protected persons in the sense given by the Geneva Conventions of 1949.

#### 1. *The Requirement of an International Armed Conflict*

(a) As the Geneva Conventions of 1949 and Protocol I of 1977 are limited to *international armed conflicts*, the régime for the suppression of

<sup>61</sup> *Akayesu*, paras. 638 ff. *Kayishema*, paras. 590 ff. *Rutaganda*, under ch. 5.6.

<sup>62</sup> *Akayesu*, para. 642.

<sup>63</sup> *Ibid.*, para. 640.

<sup>64</sup> See, e.g., *Kayishema*, paras. 619–23.

<sup>65</sup> On the régime of grave breaches, see ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva, 1987) pp. 973 ff.

grave breaches contained therein<sup>66</sup> applies only to such conflicts and not to internal conflicts. This position has been recognized also under customary international law. That is the reason why the ICTR Statute does not contain any provision dealing with grave breaches: the conflict in Rwanda was non-international. For the same reasons, the ICTY stated clearly that in order to apply Article 2 of its Statute it had first to be satisfied that there existed an international armed conflict at the time and location that the crimes were perpetrated.<sup>67</sup>

This limitation of the scope of Article 2 was not accepted by all the judges. In the *Tadic* (1995) case, Judge Abi-Saab invoked a growing practice of application of the grave breaches régime also in internal conflicts. According to him this practice had already attained the complexion of a new customary rule. It could alternatively (and preferably) be analysed as a subsequent practice modifying the treaty régime.<sup>68</sup> For Judge Abi-Saab there is thus an evolution of the law within the system of the sources containing the grave breaches régime. For Judge Rodrigues, in the *Aleksovski* case (1999), there is no requirement of an international armed conflict because Article 2 of the Statute is autonomous with respect to the conventional régime of grave breaches and does not operate any *renvoi* to these sources. The Security Council did not qualify the conflict either as internal or international, leaving that question open; this shows that the Council wanted to incorporate the grave breaches régime into the Statute independently from any specific qualification of the conflict. In fact the references to the Geneva Conventions were only made in order to have a list of the offences, not for incorporating all the other conditions linked to the application of those instruments. Article 2, Judge Rodrigues continues, makes no reference whatsoever to the internationality of the conflict. Recent practice, as Judge Abi-Saab had explained, further grants some support to such an extensive reading of the grave breaches régime and to its independence from the Geneva Conventions.<sup>69</sup>

Both these positions rest on the idea of some act of legislation, either by the Tribunal, by consecrating an evolution of the law which is far from achieved, or by the Security Council, which would have carved out of its ordinary context the grave breaches régime. The Tribunal avoided striking out that far. Considering that most of the grave breaches easily

<sup>66</sup> Cf. Articles 49-50 / 50-51 / 129-139 / 146-7 Geneva Conventions I-IV; Article 85 of Protocol I.

<sup>67</sup> *Tadic* (1995), para. 81-3. *Tadic* (1997), para. 569. *Tadic* (1999), paras. 83 ff. *Delalic*, paras. 199 ff, 204 ff. *Aleksovski*, para. 46.

<sup>68</sup> Sep.Op. Abi-Saab, *Tadic* (1995), chap. IV.

<sup>69</sup> Diss.Op. Rodrigues, *Aleksovski*, paras. 29 ff. It must be said that the main argument on the choice of the Security Council has no compelling force. The Council did indeed not qualify the conflict; it left that question to be performed by the Tribunal. Its incorporation of the grave breaches régime can therefore very well be read as an instruction to the Tribunal to apply that régime *to the extent that* it should find that the conflict was international in character.

qualify also as war crimes there may not be much legal loss on the balance.

(b) When does an international armed conflict exist? This apparently simple question has prompted the greatest problem heretofore encountered in the jurisprudence of the ICTY. It is clearly not the definition of the concept, but its application to the circumstances of the war in Bosnia, that raised the difficulties to be discussed. As to the definition, it was stated in *Tadic* (1999) that an armed conflict is international if either (i) it takes place between two or more States, (ii) a foreign State intervenes in an internal conflict through its troops, or (iii) some of the participants in an internal conflict act on behalf of a foreign State.<sup>70</sup>

(aa) The question if the armed conflict was international for the purposes of Article 2 of the Statute first arose, albeit indirectly, in the *Tadic* (1997) judgment of the Trial Chamber. The Chamber did not discuss the character of the conflict independently from the second condition necessary to the application of Article 2, i.e. the status of the victims as protected persons. It thought that it could dispose of the applicability of Article 2 exclusively on this second ground. The reasoning of the Chamber is as follows. According to Article 4 of the Geneva Convention IV of 1949, a civilian is a protected person (and thus the grave breaches régime is applicable) if he is in the hands of a party to the conflict of which he is not a national. After the withdrawal of the JNA<sup>71</sup> from Bosnia on 19 May 1992, the Bosnian-Serb armed forces were a legal entity distinct from the FRY. The civilians it took into custody could only be considered in the hands of a party whose nationality they did not possess if the acts of the Bosnian-Serb armed forces could be imputed to the FRY; otherwise Bosnian civilians would have been held by Bosnian (-Serb) military forces, no difference of nationality existing. According to the Chamber, the acts of the Bosnian-Serb army (VRS) could be imputed to the FRY only if they acted as *de facto* organs of that State. As has been held by the International Court of Justice in the *Nicaragua* (*Merits*, 1986) case,<sup>72</sup> under customary law a person or entity can be considered a *de facto* organ of a State if there is *effective control* by the State over that person or entity. There must be a great dependency on the one side and power of control on the other. The relationship between the JNA and the VRS after 19 May 1992 did not involve more than a general level of coordination of the activities consonant with their position as allied forces in the Serbian war effort. Neither the FRY nor the JNA directed the military operations of the VRS even if there was

<sup>70</sup> *Tadic* (1999), para. 84. For the *Dictionnaire de la terminologie du droit international* in preparation under the lead of J. Salmon, the present author had defined the international armed conflict as a term covering 'les cas de guerre déclarée, la confrontation armée entre Etats même si la condition de guerre n'est pas reconnue entre eux, les représailles ou les interventions armées sur le territoire d'Etats tiers et les conflits issus de l'exercice du droit à l'autodétermination'.

<sup>71</sup> The army of the FRY.

<sup>72</sup> ICJ, Rep. 1986, p. 64-5, para. 115.

support by equipping, maintaining and staffing it. Therefore, there was no effective control; no attribution of the acts of the VRS to the FRY is possible. Thus, in turn, the victims were not in the hands of a foreign power and could not, in consequence, be regarded as protected persons. The Chamber concludes that Article 2 of the Statute is inapplicable.<sup>73</sup>

This decision and reasoning were quashed on appeal, in the *Tadic* (1999) judgment. The Appeals Chamber considered the question of the attribution of the acts of the VRS to the FRY under the requirement that there exist an international armed conflict. This difference of approach is not really explained but it is of considerable relevance. According to the Appeals Chamber, the question turns on the issue whether the VRS could be considered a *de iure* or *de facto* organ of the FRY, and for that recourse must be had to the legal criteria for the imputability to a State of acts performed by individuals not having the status of State officials.<sup>74</sup> This legal mechanism of imputability is the same under the law of international responsibility and for the purposes of criminal international law because it is a general legal technique. However, the effective control test propounded by the International Court of Justice in the *Nicaragua* case is at variance with international law. Contrary to the holding of the Court, international law does not know an exclusive and all-embracing test of attribution for *de facto* organs; the degree of control required varies in relation to different types of situations. Several reported cases<sup>75</sup> show that in the context of military or paramilitary groups acting factually in the interest of a State, an *overall control* over the group is sufficient for the purposes of imputation. It has not to be shown that each activity was specifically requested or directed by the State. It is sufficient to show that the State equipped and financed the group, or coordinated and helped in the general planning of the military activity.<sup>76</sup> The Appeals Chamber found that in the present case the requisite measure of overall control was exercised by the FRY over the VRS.<sup>77</sup> Hence even after 19 May 1992 the armed conflict in Bosnia was international in character. As

<sup>73</sup> *Tadic* (1997), paras. 584 ff. *Contra*, Sep. and Diss. Op. McDonald, in: ILR, vol. 112, pp. 261–2, 268 ff.

<sup>74</sup> Such an approach was also taken by the majority in the *Aleksovski* case (1999), Joint. Sep. Op. Vohrah/Nieto-Navia, para. 27.

<sup>75</sup> As the *Stephens* case, the *Yaeger* case, the *Loizidou* case or the *Jorgic* case. See *Tadic* (1999), paras. 125–9.

<sup>76</sup> *Tadic* (1999), paras. 122–3, 131, 137: 'The control required by international law may be deemed to exist when a State (. . .) has a role in organizing, coordinating or planning the military actions of the military group . . .'. For individuals not organized into military structures the threshold for attribution is higher: there must be specific instructions or *ex post* approval; the Chamber here quotes the *Teheran Hostages* case (ICJ, Rep. (1980), p. 29–30), *ibid.*, para. 132.

<sup>77</sup> *Ibid.*, paras. 146 ff. The Chamber mentions the transfer of JNA officers to the VRS and the payment of the salaries of the members of the VRS by the FRY; the fact that military operations of the VRS were supervised by organs of the FRY; the fact that members of the FRY's armed forces took part in combats in Bosnia; and the fact that the military goals were still formulated by the FRY. The political settings of the Dayton Agreement also confirmed the control of the FRY over the Republica Srpska.

the Appeals Chamber found that the victims were also protected persons,<sup>78</sup> it concluded that the grave breaches régime was applicable to the case at hand.<sup>79</sup>

The provisionally final stage in this question was reached in the *Delalic* case (1998). As to the international character of the conflict, the Trial Chamber adopts a very flexible and generic standard, avoiding the technical point of attribution. It simply states that with regard to the involvement of outside forces (Croat, Serb) and the degree of control exercised, the conflict was clearly international in nature. This holds true even after 19 May 1992, control and support (and even direct involvement) continuing.<sup>80</sup> The régime of grave breaches could thus be applied if the victims were protected persons.

(*bb*) Summarizing the case-law reviewed, one discovers three different tests adopted in different contexts. In *Tadic* (1997), the test is that of *effective control* propounded in the context of the nationality criterion of the protected persons. In *Tadic* (1999), the test is that of *overall control* in the context of the internationality of the conflict. In *Delalic* (1998), the test is one of *involvement* of external forces again in the context of the internationality of the conflict. What can be said about this state of affairs?

We may ignore at this stage the *Tadic* (1997) judgment, it being concerned with the status of the victims as protected persons, a question to be discussed below. The crux of the decision in *Tadic* (1999) seems to be the pivotal place given to the notion of imputation (or attribution) which in turn calls for control tests (effective or overall control, etc.). This merger of criteria proper to the law of State responsibility and of those necessary to the determination of the international character of an armed conflict does not seem warranted. Attribution and control are necessary if an entity is legally sought to be made responsible for acts performed by third persons as if they were its own.<sup>81</sup> They are not required for establishing the existence of an objective state of things, i.e. the existence of an international armed conflict, where it must only be shown that there is, in fact, a substantial implication of foreign powers. Obviously, the question is not whether these foreign powers have to be responsible for the acts of the local armies as if they were their own; the question is whether their involvement is of sufficient intensity to broaden the scope of the conflict into an international armed conflict. It may be appreciated that the two tests are not at all identical. The threshold to be reached is higher for the first than for the second. These aspects were felt

<sup>78</sup> *Ibid.*, paras. 163 ff.

<sup>79</sup> *Ibid.*, para. 171.

<sup>80</sup> *Delalic*, paras. 204 ff.

<sup>81</sup> Attribution is in fact the legal technique by which acts performed by an individual are legally considered as acts of a moral person, be it a corporation or a State. The acts are then the acts of that entity, as—as pointed out by Windscheid in the nineteenth century—the acts of our hands and feet are considered automatically our own.

by Judge Shahabuddeen, who correctly points out that the question was whether the FRY was using force in Bosnia, not the distinct one whether the FRY was responsible for any breaches of humanitarian law committed by the VRS.<sup>82</sup> It may be added, albeit in passing, that the reading given to the effective control test of the ICJ in *Tadic* (1999) is at least puzzling. This test cannot by any stretch of imagination be said to be rigid and exclusive.<sup>83</sup> It is essentially fact intensive and related to the specific context the Court was confronted with. It may be remembered that the *contras* were not in any way acting 'for' the United States of America as the groups in the *Stephens*, *Yaeger* and other cases quoted by the Appeals Chamber did for the respective States involved. In such a situation, the effective control test (what is 'effective' depending on the circumstances, the discipline of the forces, etc.) was not inappropriate.

## 2. *The Status of the Victims as Protected Persons*

(a) The Geneva Conventions of 1949 define precisely what persons are protected against acts qualifying as grave breaches. Thus, Article 4(1) of the Geneva Convention IV on the protection of civilians in times of war subjects to the protection of the grave breaches régime all persons in the hands of a party to the conflict or an occupying power of which they are not nationals. It is this provision which has raised a number of problems in the case-law of the Tribunals. As the three main cases once more differ in the stand to be adopted, it seems appropriate to start by reviewing their content one by one.

(b) In the *Tadic* (1997) case, the term 'in the hands of' has been given a very broad interpretation in order to cover not only persons physically in the hands of the enemy, but all persons in the territory occupied by the enemy (i.e. a party to the conflict of which they are not nationals).<sup>84</sup> This broad interpretation corresponds perfectly to the legislative intent when drafting that formula, intent clearly reflected in the ICRC's Commentary to Article 4 of the Geneva Convention IV.<sup>85</sup> On the other hand, the Chamber has given a very narrow interpretation of the term 'of which they are not nationals'. As has already been explained,<sup>86</sup> it held that Muslim Bosnians held by Serb Bosnians did not satisfy this criterion because the nationality as a formal bond was the same (Bosnian). It then embarked upon the considerations devoted to the status of the VRS as *de facto* organ of the FRY. If such an organic dependency were established the Muslim Bosnians could be considered prisoners *longa manu* of the FRY; they would then have been in the hands of a party of which they

<sup>82</sup> Sep.Op. Shahabuddeen, *Tadic* (1999), para. 17.

<sup>83</sup> This point was also correctly taken by Judge Shahabuddeen, *ibid.*, para. 19.

<sup>84</sup> *Tadic* (1997), paras. 579 ff. See also *Delalic*, para. 246.

<sup>85</sup> J. Pictet (ed.), *Commentary to Geneva Convention IV* (Geneva, 1958), pp. 45 ff.

<sup>86</sup> See above, 1(aa).

were not nationals. As previously seen, the Chamber found that there was no such organic dependency of the VRS because the FRY did not exercise effective control over it. Hence the victims were not protected persons in the sense of the Geneva Conventions and the grave breaches régime was inapplicable.<sup>87</sup>

This reasoning was reversed in the *Tadic* (1999) judgment. The Appeals Chamber adopted a teleological and finalistic approach. It started by recalling that the bond of nationality has never been crucial under Article 4 (Geneva Convention IV), since the intention of the drafters, as revealed by the *travaux préparatoires*, was to cover also refugees or stateless persons; i.e. all those who could not enjoy the diplomatic protection of a third State. In modern wars where it is often a structurally internal conflict which becomes international by the involvement of external forces, such an approach, departing from formal nationality, is warranted. In conflicts of the type described, ethnicity or other criteria become controlling in place of nationality. It would frustrate the object and purpose of the Convention if nationality was kept as the only criterion in such conflicts. Rather, the effectiveness of the system suggests allegiance as the essential criterion.<sup>88</sup> The Chamber adds that these considerations are strictly speaking *obiter dicta*,<sup>89</sup> as its finding that the VRS was a *de facto* organ of the FRY is sufficient to grant the victims the status of protected persons.<sup>90</sup> The same line of argument was adopted by the Trial Chamber in the *Delalic* case (1998).<sup>91</sup> The Chamber stresses that the aim of Article 4 (Geneva Convention IV) is the protection of persons in real combat situations, not formal requirements of nationality according to municipal law contingencies. The broader approach is also consonant with human rights law. As, in the case under consideration, the persons were arrested on the basis of their Serb identity, they must be considered protected persons under a teleological interpretation of the law.<sup>92</sup>

(c) The teleological approach adopted in the *Tadic* (1999) Appeal judgment and in the *Delalic* case (1998) is to be preferred. The Conventions of 1949 were drafted under the paradigm of inter-State wars. In such a context the criterion of nationality has its place. It is the

<sup>87</sup> *Tadic* (1997), paras. 584 ff. See also the Joint Sep.Op. Vohrah/Nieto-Navia, *Aleksovski*, para.

34.

<sup>88</sup> *Tadic* (1999), paras. 163 ff.

<sup>89</sup> This expression is not used by the Chamber but introduced by the present commentator.

<sup>90</sup> *Tadic* (1999), para. 167.

<sup>91</sup> *Delalic*, paras. 247 ff.

<sup>92</sup> The Chamber also considered the question whether the victims were prisoners of war in the sense of Article 4 of the Geneva Convention III and thus protected persons under that Convention. Article 4 of G.C. III was drafted narrowly according to the conception of war current in 1949. The conditions of Article 4(A)(2) or (6) of the G.C. III are hardly fulfilled in the present case. The victims were neither carrying arms openly, nor was there an invading force. Thus the victims were only civilians in the sense of the G.C. IV. They were all covered by the G.C. IV since there is no gap between G.C. III and IV (*ibid.*, paras. 267 ff.).

adequate legal vehicle for protection—which is the ultimate aim—under such factual assumptions. During the 1950s and 1960s this assumption proved insufficient in the light of the outbreak of endemic civil wars and wars by proxy. The legal system adapted its requirements and *inter alia* broadened the scope of the concept of international armed conflict by extending it to civil wars with external interventions. Unfortunately the Geneva Conventions were not adapted to the new situations on all points (but could that be expected?). Nationality for the purposes of Article 4, Geneva Convention IV, is still a workable criterion for traditional armed conflict, but not for those which are structurally internal, becoming international only by a new legal qualification. In such structurally internal but now legally international conflicts, the nationality criterion leads to the almost complete ineffectiveness of the law, opening disastrous gaps in the protection it affords. As it was the protection which was always the cardinal criterion, and the nationality requirement only a technical means to that end, it must be considered that with the legal internationalization of structurally internal armed conflicts, the nationality requirement has been implicitly modified to make workable the new legal qualification of the conflict within the body of applicable law. This operation is rendered unavoidable by elementary considerations of *effet utile* and of practicability. ‘Nationality’ must thus be read as meaning allegiance, i.e. a civilian is protected if he is in the hands of the adverse party.

The ‘legislative’ effect of such a re-reading of Article 4, Geneva Convention IV, is quite limited, as that interpretation is compelled if the provision is not to become useless. Alternatively, if one wishes to avoid such a course, the finding of a relationship of *de facto* overall control between the VRS and FRY can acquire importance; it provides an autonomous basis for concluding that the victims were protected persons, since it means that being held in the hands of the VRS may legally be equated to being in the hands of the FRY.

The narrow jurisprudence of *Tadic* (1997) has thus been overcome by the later trials of the ICTY with the consequence that the grave breaches régime will find general application to the crimes perpetrated on the territory of Bosnia-Herzegovina.

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

1. This provision covers the traditional heading of war crimes on which there is a rich jurisprudence since the Leipzig, and more conspicuously, since the Nüremberg Trials. Such crimes were traditionally reserved to international armed conflicts; therefore the ICTR Statute does not contain the same type of provision. Instead, its Article 4 covers

breaches of Common Article 3 of the Geneva Conventions of 1949 and of Protocol II (1977). This Article may thus be said to criminalize some war crimes committed within an internal armed conflict. There is a partial overlap between Articles 3 (ICTY) and 4 (ICTR) of the Statutes, as the former applies to international and internal armed conflicts.<sup>93</sup> Article 3 contains the offences criminalized by Article 4 but has a broader range, since it extends also to war crimes committed within an international conflict. We shall first turn to the ICTY Statute and then immediately revert to Article 4 of the ICTR Statute.

2. The case-law of the ICTY has often stressed that Article 3 of its Statute constitutes a *general clause (clause supplétive)* which is intended to cover all serious violations of international humanitarian law not falling under other specific provisions, e.g. Article 2 (grave breaches).<sup>94</sup> It has the function of a residual clause assuring that no one having committed a serious violation of international humanitarian law is left unpunished because of a gap in the listing of the offences.<sup>95</sup> In the light of that purpose, Article 3 has a very broad scope. As was said in *Furundzija* (1998), it covers any serious violation of a rule of customary international law entailing, under customary or conventional international law, individual criminal responsibility.<sup>96</sup> By the same token, the list of war crimes in Article 3 is not exhaustive.<sup>97</sup> It makes reference only to some rules of the Hague Law, but it is meant to cover also the Geneva Law (i.e. no narrow *ejusdem generis* argument is admissible). Moreover it consists only of an umbrella rule, being an open-ended reference to all rules of international humanitarian law. Not only that: it covers the rules of humanitarian law of international armed conflicts as well as those pertaining to internal armed conflicts.<sup>98</sup> This sort of *renvoi mobile* to the rules of humanitarian law as a basis for criminal prosecution can easily come in conflict with the *nullum crimen* principle. It is therefore accompanied by some strict conditions for the application of Article 3, which were set out in the *Tadic* (1997) case: (i) a rule of international humanitarian law must have been violated; (ii) the rule must have been of customary law (or of treaty law applicable to the acts and persons at hand); (iii) the violation must be serious, i.e. the rule breached must protect important values and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail individual criminal responsibility.<sup>99</sup> Most of these conditions have already been discussed in the chapter devoted to the jurisdiction of the

<sup>93</sup> See *Tadic* (1995), para. 89. *Furundzija*, para. 132.

<sup>94</sup> *Tadic* (1995), paras. 86 ff. *Jelusic*, para. 33.

<sup>95</sup> *Ibid.*, para. 91-2.

<sup>96</sup> *Furundzija*, paras. 131-3, 132.

<sup>97</sup> *Ibid.*, para. 133. *Aleksovski*, para 48. *Delalic*, para. 278.

<sup>98</sup> *Tadic* (1995), para. 89. *Furundzija*, para. 132.

<sup>99</sup> *Tadic* (1997), para. 610. *Delalic*, para. 279.

Tribunals and it is sufficient at this point to refer to what has been explained there.<sup>100</sup>

3. Some offences were submitted to the test if they satisfied those requirements for the application of Article 3 of the Statute.

(a) In the *Tadic* (1997) judgment, it was said that Common Article 3 of the Geneva Conventions of 1949 meets these conditions.<sup>101</sup> As to its customary status, the Chamber invoked *inter alia* the *dictum* in the *Nicaragua (Merits, 1986)* case.<sup>102</sup> Moreover, its breach entails criminal responsibility. In the *Delalic* case (1998) this statement was further buttressed by references to the ILC Draft Code on Crimes against the Peace and Security of Mankind, the Rome Statute on an International Criminal Court, the ICTR Statute and the Criminal Code of the former SFRY.<sup>103</sup> The conditions for the application of Article 3 of the Statute for breaches of Common Article 3 were thus fulfilled. In the *Tadic* (1997) case, the Chamber moreover explained what is to be understood by the words 'taking no active part in hostilities' contained in Common Article 3. The criterion is negative: it is enough to show that the victim was not directly taking part in the hostilities; if he is *hors de combat* that condition is fulfilled.<sup>104</sup> In the *Delalic* case, the Chamber added that a violation of Common Article 3 could also be covered by Article 2 of the Statute and qualify as a grave breach. It would be sufficient to somewhat extend the notion of grave breaches. For the case at hand, the Chamber preferred to follow the more cautious approach by including violations of Common Article 3 in Article 3 of the Statute.<sup>105</sup>

(b) The question of the application of Article 3 of the Statute was also raised for acts of plunder. In the *Delalic* case (1998), it is said that there is no doubt as to the customary nature of the prohibition of plunder and as to the criminal responsibility arising from its breach. The Chamber makes reference to the Hague Regulations of 1907 and the Geneva Conventions of 1949 and also, for the criminal aspect, to the Nüremberg Trials.<sup>106</sup>

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

1. Common Article 3 of the Geneva Conventions of 1949 represents an attempt to spell out some core aspects implicit in the famous Martens

<sup>100</sup> See above, II.

<sup>101</sup> *Tadic* (1997), paras. 611 ff. *Delalic*, paras. 281 ff.

<sup>102</sup> ICJ, Rep., 1986, pp. 113/4.

<sup>103</sup> *Delalic*, paras. 307 ff.

<sup>104</sup> *Tadic* (1997), para. 614/6.

<sup>105</sup> *Delalic*, para. 317.

<sup>106</sup> *Delalic*, para. 315.

Clause whereby all civilians and combatants, in whatever armed conflict, shall remain under the protection and authority of the principles of humanity.<sup>107</sup> Therefore Common Article 3 contains minimum guarantees of humanity which must be respected also in internal armed conflicts. It prohibits murder, mutilation, cruel treatment, torture, outrages upon personal dignity (such as humiliating and degrading treatment), the taking of hostages, and the passing of sentences without a previous fair trial. Additional Protocol II of 1977 constitutes an attempt to further develop the legal content briefly set out in Common Article 3. Article 4 of Protocol II in particular adds some specifically prohibited acts to those contained in Common Article 3, i.e. collective punishments, acts of terrorism, slavery, pillage, and the threat to commit any of the previously listed acts.

2. According to the jurisprudence of the ICTR, several conditions must be fulfilled for Article 4 of its Statute to be applicable. There are five such conditions, some of them containing more than one aspect.

(a) First, the offences applied must represent *customary international law* and the substantive rules from which they are derived must give rise, under customary international law, to individual criminal responsibility. It may here be recalled that the ICTR Chambers found that Common Article 3 of the Geneva Conventions (1949) and at least Article 4 of Protocol II—the only one whose application was sought—represent customary law; moreover international and national case-law shows that violations of those rules entail criminal responsibility.<sup>108</sup> These aspects have already been discussed when dealing with the jurisdictional issues.<sup>109</sup>

(b) Second, there must exist a *non-international armed conflict* as distinguished from simple internal disturbances or tensions, such as riots or sporadic acts of violence. The question, as already discussed,<sup>110</sup> turns on the intensity of the conflict and the level of organization of the (armed) forces involved. According to Article 1 of Protocol II, there must be organized armed groups, under responsible military command, exercising control over part of the territory of the State and carrying out sustained and concerted military operations putting them in a position to apply the rules of warfare.<sup>111</sup> These conditions have been found fulfilled for the situation in Rwanda in 1994.<sup>112</sup>

<sup>107</sup> On this clause, see H. Strebler, 'Martens Clause', *EPIL*, vol. 3, pp. 252-3.

<sup>108</sup> *Akayesu*, paras 601 ff. *Kayishema*, paras 155 ff. (the criminalization of these offences under the laws of Rwanda is sufficient). *Rutaganda*, under ch. 2.4.

<sup>109</sup> See above, II. 1. and 2.

<sup>110</sup> See above, II. 4.a).

<sup>111</sup> For the precise application of these criteria, see ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, 1987), pp. 1347 ff.

<sup>112</sup> *Akayesu*, paras. 619 ff. *Kayishema*, paras. 170 ff. *Rutaganda*, under ch. 2.4.

(c) Third, there are two conditions *ratione personae*. To start with, the *victims* have to be persons 'taking no active part in hostilities'<sup>113</sup> or persons 'who do not take a direct part or who have ceased to take part in hostilities'.<sup>114</sup> In the *Kayishema* case (1999), this is equated with being a civilian; but the term is given a broad interpretation in order to cover all persons who are not combatants, i.e. also prisoners of war<sup>115</sup> or persons *hors de combat*.<sup>116</sup> The Chamber in the *Rutaganda* case (1999) proposed a slightly different criterion. The victim is a civilian in the sense asked for if he falls outside the category of persons who can be perpetrators of the violations of Common Article 3 or Protocol II (see beneath). This definition is not entirely satisfactory, because it is recognized that civilians may also be accountable as perpetrators. Now it is clear that the perpetrator cannot at the same time be the victim. Apart from that, it is uncertain if the definition discussed carries the matter any further. According to the Chamber in the same *Rutaganda* case (1999), to take 'direct' part in the hostilities means taking part in acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.<sup>117</sup>

The second aspect relates to the *perpetrators* of the violations of Common Article 3 and Protocol II. It has been pointed out that the perpetrator must be a member of the armed forces.<sup>118</sup> This is not limited to commanders and combatants but, in view of the protective purpose of the provisions involved, should be interpreted in the broadest possible sense.<sup>119</sup> Civilians may also be held accountable if they are mandated or holding *de facto* public authority in the context of the war effort.<sup>120</sup>

(d) Fourth, there is a condition *ratione loci*. The protection afforded extends to the whole territory of the State engaged in conflict, not only to the combat area.<sup>121</sup>

(e) Fifth, and last, there are two conditions *ratione materiae*. In the first place there must be a nexus between the commission of the offence and the armed conflict.<sup>122</sup> This aspect has been discussed previously.<sup>123</sup> It may be remembered that in all three cases decided up to now by the ICTR, the accused was acquitted on the count of offences relating to Article 4 of the Statute because such a link between his acts and the armed conflict was not established on the evidence. According to the

<sup>113</sup> Common Article 3 to the Geneva Conventions (1949).

<sup>114</sup> Art. 4 Protocol II (1977).

<sup>115</sup> *Kayishema*, para. 179.

<sup>116</sup> *Rutaganda*, under ch. 2.4.

<sup>117</sup> *Ibid.* See also on the whole question *Akayesu*, para. 629.

<sup>118</sup> *Akayesu*, paras. 630-1. *Kayishema*, paras. 173 ff., 175. *Rutaganda*, under ch. 2.4.

<sup>119</sup> *Rutaganda*, under ch. 2.4.

<sup>120</sup> *Akayesu*, para. 631. *Kayishema*, para. 175. *Rutaganda*, under ch. 2.4.

<sup>121</sup> *Akayesu*, paras. 635 ff. *Kayishema*, paras. 182 ff. *Rutaganda*, under ch. 2.4.

<sup>122</sup> *Akayesu*, paras. 638 ff. *Kayishema*, paras. 185 ff. *Rutaganda*, under ch. 2.4.

<sup>123</sup> See above, II. 5.

jurisprudence the existence of a direct connection to the conflict is a fact-intensive notion to be appreciated on a case-by-case basis.<sup>124</sup>

In the second place, the violation of the law must be serious, a criterion also already discussed.<sup>125</sup> The ICTR has recalled that violations of Common Article 3 of the Geneva Conventions of 1949 and of Article 4 of Protocol II (1977) are normally *per se* such serious violations.<sup>126</sup>

There is not much to add on these conditions. What is noteworthy is the rigorous reading of the nexus condition which has prevented up to now any conviction under Article 4 in the particular conditions of the Rwandan conflict. But in a certain sense a conviction under Article 4 was unnecessary since the accused were condemned for the graver crimes of genocide and crimes against humanity. As their acts were not related to the armed conflict, but motivated by genocidal hatred, the result reached by the Chambers of the ICTR is understandable.

## VI. ARTICLE 4 ICTY STATUTE/ARTICLE 2 ICTR STATUTE: GENOCIDE

1. The definition of genocide contained in Article 4 ICTY Statute and Article 2 ICTR Statute follows that given by the Convention on the Prevention and Punishment of the Crime of Genocide concluded in 1948.<sup>127</sup> According to the case-law of the ad hoc Tribunals, this definition of the offence has become customary.<sup>128</sup> In *Kayishema* (1999) it was even stressed that the elements of the offence thus listed are part of the international public order (*ius cogens*).<sup>129</sup> In this case it was also pointed out that genocide constitutes a type of crime against humanity. However, unlike crimes against humanity, genocide requires a specific intent to exterminate a protected group in whole or in part. For crimes against humanity it is sufficient to target the civilian population as part of a widespread or systematic attack.<sup>130</sup> The family link between genocide and crimes against humanity was already recognized in the Nuremberg subsequent proceedings, in the *Justice Trial* (US Military Tribunal, 1947).<sup>131</sup> It was also taken up by the United Nations Ad Hoc Committee which drew up the Genocide Convention; some of its members considered genocide to be the most typical of the crimes against humanity.<sup>132</sup>

<sup>124</sup> *Kayishema*, para. 188. *Rutaganda*, under ch. 2.4.

<sup>125</sup> See above, II. 3.

<sup>126</sup> *Kayishema*, para. 184. *Rutaganda*, under ch. 2.4.

<sup>127</sup> Article 2 of the Genocide Convention. See U.N.T.S., vol. 78, pp. 277 ff.

<sup>128</sup> *Akayesu*, para. 495. *Kayishema*, para. 88. *Rutaganda*, under ch. 2.2. *Jeliscic*, para. 60.

<sup>129</sup> *Kayishema*, para. 88.

<sup>130</sup> *Ibid.*; para. 89.

<sup>131</sup> *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. VI (London, 1948), pp. 32, 48, 75, 99.

<sup>132</sup> Ad Hoc Committee on Genocide (5 April—10 May 1948), *Report of the Committee and Draft Convention drawn up by the Commission*, ECOSOC, E/794, pp. 2-3.

It seems that since that time a difference between them was made in that genocide is aimed against groups, whereas crimes against humanity do not necessarily involve offences against or persecutions of groups.<sup>133</sup>

Genocide, as defined by modern international law, is made up of two main elements: (1) the *actus reus* consisting of a series of acts having the effect of destroying a particular group; and (2) the *mens rea* consisting of the specific intent to destroy, in whole or in part, that particular group. These elements need some further comment.

## 2. *Actus reus*

The *actus reus* of genocide consists of the following types of acts on which the jurisprudence of the ad hoc Tribunals has shed some light.

(a) *Killing members of the group*.<sup>134</sup> There is a slight divergence between the English and French texts of the respective Statutes. In the English version the word 'killing' is used whereas in the French version it is the word 'meurtre'. The question was considered in the *Akayesu* case (1998) which is the first judgment handed down concerned with the offence of genocide. It was held that the English word killing is too general, since it may include both intentional and unintentional homicide. On the other hand the term murder covers only death which has been caused intentionally. Pursuant to the general principles of criminal law, the version more favorable to the accused has to be preferred. Thus the term 'killing' has to be interpreted as the intentional and unlawful infliction of death, i.e. intentional homicide.<sup>135</sup>

(b) *Causing serious bodily or mental harm to members of the group*. The harm must not be permanent or irremediable. It consists, *inter alia*, of acts of torture, inhuman or degrading treatment, and persecution.<sup>136</sup> 'Serious bodily harm' means harm that seriously injures the health, causes disfigurement or causes any serious injury to the external or internal organs or senses. The term is thus considered largely self-explanatory.<sup>137</sup> 'Serious mental harm' should be interpreted on a case-by-case basis.<sup>138</sup> No further indications emerge from the case-law.

(c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*. These are indirect means of physical destruction, i.e., as the Chamber said in *Akayesu* (1998), 'methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical

<sup>133</sup> *Law Reports* . . . , op.cit., vol. XV, London, 1949, p. 138.

<sup>134</sup> As to the protected groups, see *infra*, 4.

<sup>135</sup> *Akayesu*, para. 500-1. See also *Kayishema*, paras. 102-4. *Jelusic*, paras. 63-5.

<sup>136</sup> *Akayesu*, para. 502-4. On the term of persecution, see also *infra*, VII)1.b.ee.

<sup>137</sup> *Kayishema*, para. 109.

<sup>138</sup> *Ibid.*, para. 113.

destruction'.<sup>139</sup> The following examples of such means are given: subjecting a group to a subsistence diet, systematic expulsion from homes, lack of housing, reduction of essential medical services below minimum requirements, lack of clothing or hygiene, excessive work or physical exertion, starvation, and rape.<sup>140</sup>

(d) *Imposing measures intended to prevent birth within the group.* In the *Akayesu* case (1998) several examples of physical measures of this category were given: sexual mutilation, sterilization, forced birth control, separation of sexes, prohibition of marriages, using rape as a means to traumatize women in order not to have them subsequently procreate or in order to impregnate them by men of another group with the result that the child will not belong to the mother's group.<sup>141</sup> To this, the Chamber in the *Rutaganda* case (1999) adds also mental measures with similar traumatizing effects. No examples are given.<sup>142</sup>

(e) *Forcibly transferring children of the group to another group.* The objective of the prohibition is not only to sanction a direct act of forcible physical transfer, but also to sanction the infliction of threats or traumas which would lead to the forcible transfer.<sup>143</sup>

### 3. *Mens rea: Specific Intent*

The *mens rea* of genocide is made up of a *specific intent* to destroy, in whole or in part, a national, ethnical, racial, or religious group. This specific intent must be established for any one of the acts committed, ranging from the killing of members of the group to the forcible transfer of children. The purpose of the actions or omissions of the perpetrator must always be to destroy the group as a distinct entity;<sup>144</sup> therefore the victim is singled out not because of his or her individual characteristics but because s/he is a member of the persecuted group. Through the victim, it is the group which is targeted. The logic is: *pars pro toto*. It is the *genus*, not the *species* which is controlling. There is thus at the basis of genocide a persecution based on discriminatory grounds.<sup>145</sup> The specific intent must be formed prior to the commission of genocidal acts; the individual acts need not however be premeditated, if only they are done in furtherance of the genocidal intent.<sup>146</sup> This is nothing other than the application of the general principle of criminal law according to which *dolus subsequens non nocet*. It is sufficient that the intention relates

<sup>139</sup> *Akayesu*, para. 505.

<sup>140</sup> *Akayesu*, para. 506. *Kayishema*, paras. 115–16.

<sup>141</sup> *Akayesu*, paras. 507–8.

<sup>142</sup> *Rutaganda*, under ch. 2.2.

<sup>143</sup> *Akayesu*, para. 509. *Rutaganda*, under ch. 2.2.

<sup>144</sup> *Akayesu*, paras. 517 ff. *Rutaganda*, under ch. 2.2. *Jelisić*, paras. 67, 78–9.

<sup>145</sup> *Jelisić*, paras. 67 ff, 73 ff.

<sup>146</sup> *Kayishema*, para. 91.

to the partial ('in part') destruction of the group. What must be achieved is the destruction of an important part of the group. This can be true quantitatively or qualitatively. Quantitatively it is necessary to have an intention to destroy a considerable number of individuals who are part of the group.<sup>147</sup> Qualitatively, there is destruction of an important part of the group if the attack is directed against a representative fraction of the group, e.g. its élite or its leaders.<sup>148</sup> Genocide may also be perpetrated in a geographically limited area.<sup>149</sup>

The specific intent of the perpetrator may be inferred from the facts, i.e. the words and speeches, the methodical way of planning the acts, the selection and number of the victims, the scale of atrocities committed, etc.<sup>150</sup> Finally, the group need not in effect be physically extinguished. Acts of sexual violence like rape may form part of the process of destruction even if they fall short of causing death.<sup>151</sup> Acts not intending to cause death (but intending to contribute to the destruction of the group) are thus also covered.

#### 4. *Groups Protected*

There is, lastly, the question of what *groups* are protected by the prohibition of genocide. The Statutes make reference to national, ethnical, racial or religious groups. A 'national group' is based on common citizenship; an 'ethnic group' is based on common language or culture; a 'racial group' is based on hereditary physical traits; a 'religious group' is based on common religious beliefs or modes of worship.<sup>152</sup> This list of groups contained in the Statutes is not exhaustive.<sup>153</sup> Other stable groups of comparable nature may be added according to the *ejusdem generis* principle. On the other hand not all groups displaying a certain feeling of common interests is covered. The group must be relatively stable and permanent, membership not being challengeable by its members, who belong to it automatically, by birth or otherwise in a continuous or irremediable manner.<sup>154</sup> Therefore groups where the membership is voluntary and mobile, e.g. political groups, are not protected.<sup>155</sup> The question of who belongs to the groups cannot be answered solely on objective criteria. The perception of the members of the group as being distinct from the rest of the community (subjective

<sup>147</sup> *Ibid.*, para. 97.

<sup>148</sup> *Jelisc*, paras. 81-2.

<sup>149</sup> *Ibid.*, para. 83.

<sup>150</sup> *Akayesu*, para. 523. *Kayishema*, para 93. *Rutaganda*, under ch. 2.2.

<sup>151</sup> *Kayishema*, para. 95.

<sup>152</sup> *Akayesu*, paras. 512-15.

<sup>153</sup> *Ibid.*, para. 516.

<sup>154</sup> *Ibid.*, para. 511. *Rutaganda*, under ch. 2.2. *Jelisc*, para. 69.

<sup>155</sup> *Ibid.*

criterion) or the stigmatization by the community is also material.<sup>156</sup> As was added by the Chamber in the *Rutaganda* case (1999), the determination according to the aforementioned criteria must take into account the socio-cultural background in which any genocide is irremediably bedded.<sup>157</sup> Finally it must be added that the special intent of the perpetrator must be directed to destroying the group persecuted,<sup>158</sup> but his intent need not also relate to the intrinsic quality of the group as being national, ethnical, racial, or religious. He must seek to destroy the group, but he does not have to intellectually qualify it as national, ethnical, etc. In other words, the quality of the group represents an objective condition for the application of the prohibition (*objektive Strafbarkeitsvoraussetzung*) at which the *mens rea* need not be directed.

These conditions relating to the application of the offence of genocide have been considered fulfilled in the *Akayesu* (1998), *Kayishema* (1999), and *Rutaganda* (1999) cases. In the only case of the ICTY where genocide was raised, the accused has been acquitted. According to the trial Chamber in the *Jelusic* case (1999), there was not sufficient evidence as to a plan of destruction of the Muslim group. The Serb plans for the future of the region of Brcko made allowance for a certain percentage of Muslims (from 5–20 per cent) who would be able to stay in their homes. Furthermore a number of Muslim prisoners were liberated or exchanged against other (Serb) detainees. The accused, whatever his violent words of hatred, often chose his victims accidentally whereas at the same time he gave *laissez-passer* documents to others. Therefore, the Chamber concludes, the acts of the accused do not show a clear intent to destroy totally or partially a group as such.<sup>159</sup>

It may well be that the Chamber on the whole correctly appreciated the absence of a sufficient intent to destroy a group. But it may be asked whether it took sufficiently into account that the intent of a partial destruction of the group is enough under the law. Thus, the argument that a percentage of 5–20 per cent of Muslims would be allowed to stay may seem more in favor of than at odds with a conviction for genocide. Moreover, the exchange of prisoners may be related to practical reasons and does not automatically disprove or even weaken the special intent required. The fact that certain victims were randomly selected may also add rather than detract from an otherwise intact will of partial destruction of a group: it may merely show that in addition to genocide the accused also murdered. All these doubts remain, but it is difficult to carry the matter any further as this would depend on a careful weighing of evidence which is unavailable.

<sup>156</sup> *Jelusic*, para. 70.

<sup>157</sup> *Rutaganda*, under ch. 2.2.

<sup>158</sup> *Akayesu*, paras. 517 ff.

<sup>159</sup> *Jelusic*, paras. 88 ff., 107.

### 5. *Complicity in Genocide*

Under paragraph 3(e) of the respective Statutes, complicity in genocide is made punishable *per se*. The crime of genocide must have been in effect committed by the principal(s) in order for the accomplice to be punishable. Complicity may take the form of instigation or of aiding and abetting, e.g. by procuring means for the perpetration of the offence. The accomplice must furthermore act knowingly; he must know that he is assisting the commission of an offence. He need not himself possess the special intent of genocide (intent to destroy a particular group) if only he knows or could not ignore that the principal had that specific intent.<sup>160</sup> The point may be summarized as follows: '[A]n accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.<sup>161</sup>

The absence of the specific intent requirement for the accomplice under paragraph 3(e) distinguishes this form of complicity from the general provisions on participation in a crime (Article 7 ICTY Statute; Article 6 ICTR Statute). Moreover, complicity under paragraph 3(e) requires positive acts of participation, whereas aiding and abetting under the general provision may consist in failing to act or refraining from action.<sup>162</sup>

### 6. *Direct and Public Incitement to Commit Genocide*

This form of participation is criminalized by paragraph 3(c) of the respective Statutes. To 'incite' means to encourage or to persuade another to commit an offence. 'Public' means done in a public place, i.e. a place accessible to all, or to a public at large through mass media. 'Direct' means that the incitement must be specific, not only by vague or indirect suggestions. The cultural background has to be taken into account as has the quality of the persons to whom the message is addressed. Thus, because of the moral authority the *bourgmestre* enjoys in Rwanda, his words may more easily qualify as direct incitement than those of some obscure person. As to the *mens rea*, there must be an intent to directly prompt or provoke another to commit genocide. There must moreover exist the specific intent of genocide, i.e. the intent to destroy a particular group.<sup>163</sup>

It is because of the particular dangerousness and savagery of the crime

<sup>160</sup> *Akayesu*, paras. 525 ff.

<sup>161</sup> *Ibid.*, para. 545.

<sup>162</sup> *Ibid.*, paras. 547-8.

<sup>163</sup> *Ibid.*, paras. 549 ff.

that such an incitement is punishable even if it remains unsuccessful, i.e. if it was not acted upon.<sup>164</sup>

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

1. Crimes against humanity have attained the status of customary law through the post-Second World War trials and especially the Nüremberg proceedings.<sup>165</sup> Roughly speaking these are crimes and atrocities like murder, extermination, enslavement, deportation, or other inhumane acts, or persecutions on discriminatory grounds, committed on a widespread and systematic basis against any civilian population. There are slight differences in the conditions of application of this offence between the ICTY and the ICTR. According to the ICTY Statute, the crime must be committed in armed conflict, whether internal or international; this requirement does not exist in the ICTR Statute. On the other hand, the ICTR Statute requires that the attack on the civilian population be committed on discriminatory, i.e. on national, political, ethnical, racial, or religious grounds; the ICTY Statute is silent on this point. Bearing in mind these two divergences we may comment point by point on the elements legally required to constitute a crime against humanity under the Statutes of the ad hoc Tribunals.

(a) *The crimes must be committed in an international or internal armed conflict (only for the ICTY Statute).* As the Appeals Chamber in the *Tadic* (1995) case reminded us, it is by now accepted customary law that a connection to an armed conflict is not necessary in order to have a punishable crime against humanity. Therefore, this link, as required by the Statute, is narrower than is necessary under general international law.<sup>166</sup> By the same token there is no violation of the *nullum crimen* principle, since the liability to the crime has been restricted rather than widened. In the *Tadic* (1997) case, it was added that the acts committed must present a nexus with the armed conflict. It is enough that the act occurred in the course or duration of the armed conflict if it is geographically and temporally linked with it and if it is not done for purely personal motives.<sup>167</sup> It may once more be recalled that this requirement of an armed conflict does not exist under the ICTR Statute.

<sup>164</sup> *Ibid.*, para. 562.

<sup>165</sup> On the concept and its origin, see B. B. Ferencz, 'Crimes against Humanity', *EPIL*, vol. 8 (1985), pp. 107-9.

<sup>166</sup> *Tadic* (1995), paras. 138 ff., 141.

<sup>167</sup> *Tadic* (1997), paras. 627 ff.

(b) *The prohibited acts.* Law No. 10 of the Allied Control Council for Germany (1945), in Article 2, paragraph 1, provided that crimes against humanity are 'atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the countries where perpetrated'.<sup>168</sup> With respect to the law developed by the Nüremberg Trials, where many uncertainties persisted, some kind of homogenous body of rules seems to emerge out of the jurisprudence of the ad hoc Tribunals on this point. In particular, the Tribunals were at pains to describe the elements of the prohibited acts as precisely as possible. In that, there is a marked difference to the approach of the Nüremberg subsequent proceedings.

As was said in *Akayesu* (1998), the acts contemplated under the heading of crimes against humanity must be inhumane in nature and character, causing great suffering, or serious injury to the body or to mental or physical health.<sup>169</sup> Several of such acts are listed in the Statute, ranging from murder to rape, following the pattern of Control Council Law quoted. The list is closed by a reference to 'other inhumane acts' (letter i) which according to the *Rutaganda* case (1999) is a residual clause for all other types of inhumane acts not previously expressly listed. Thus, as the Chamber states, it may be said that the list of the Statute, as far as the expressly mentioned acts are concerned, is not exhaustive but merely illustrative.<sup>170</sup>

(aa) '*Murder*' means the unlawful and intentional killing of a human being.<sup>171</sup> The elements are thus: (1) the death of the victim; (2) resulting from an unlawful act or omission of the accused (or a subordinate for whom he is responsible); (3) with an intention to kill or inflict grievous bodily harm having known that such bodily harm is likely to cause the victim's death, and recklessness as to whether or not death ensues.<sup>172</sup> The Chamber in *Kayishema* (1999) departed from that view. It held that since the French version of murder in the Statute is 'assassinat', the interpretation has to stick to the narrower term (interpretation in favor of the accused). Thus the standard of *mens rea* required would be that for an 'assassinat', i.e. intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool

<sup>168</sup> See, e.g., in *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. XV (London, 1949), p. 134. See also Article 6(c) of the Statute of the IMT contained in the London Agreement for the Establishment of an International Military Tribunal (1946), which is shorter: *U.N.T.S.*, vol. 82, pp. 279 ff., 288.

<sup>169</sup> *Akayesu*, para. 578.

<sup>170</sup> *Rutaganda*, under ch. 2.3.

<sup>171</sup> *Akayesu*, paras. 587-90. *Jeliscic*, para. 51.

<sup>172</sup> *Rutaganda*, under ch. 2.3, towards the end.

moment of reflection.<sup>173</sup> This discrepancy may be solved on appeal. It does not, however, seem that the translation of murder into 'assassinat' sought to create a substantial difference nor that the term 'assassinat' was intended to refer exclusively to a particular French jurisprudence where it means premeditated killing. It may be recalled that in other systems of law, such as the Swiss, 'assassinat' (*Mord*) is not linked necessarily to premeditation but to the presence of circumstances denoting a particular perversity of the perpetrator ('*besonders verwerfliche Gesinnung*').<sup>174</sup> The interpretation given in *Akayesu* thus seems more in tune with the dominant and modern practice on this type of offence.

(bb) 'Extermination' is mass killing or murder on a massive scale.<sup>175</sup> It also covers the creation of conditions of life leading to the destruction or killing. The act or omission may be done with intention, recklessness or, apparently, gross negligence.<sup>176</sup> The elements of this crime are thus: (1) the accused or a subordinate of the accused participated in the killing of certain named or described persons; and (2) the act or omission was unlawful and intentional<sup>177</sup> (or reckless or, according to the *Kayishema* Chamber, grossly negligent). A single killing is sufficient, where the actor is aware that his act or omission forms part of a mass killing event. In this case the killings must have close proximity in time and space.<sup>178</sup> Moreover, the act or omission need not directly kill, if it cumulatively with other acts or omissions causes the death of the targeted group of individuals.<sup>179</sup> In addition to intention one must stress that in such a case the acts must be proximate causes of the death and that foreseeably, in the ordinary course of events, they would lead to the result reached. Finally it may be added that the accused cannot be convicted for both crimes against humanity under the heading of murder *and* of extermination for the same set of acts; these two counts are mutually exclusive: one consumes the other.<sup>180</sup>

(cc) 'Torture' means intentionally inflicting severe pain or suffering for specific purposes and under official authority or acquiescence.<sup>181</sup>

(dd) 'Rape' is a physical invasion of a sexual nature committed on a person under circumstances which are coercive.<sup>182</sup>

(ee) 'Persecution' in the sense of letter h of the respective Articles of the Statutes is based on some form of discrimination that is intended to be

<sup>173</sup> *Kayishema*, para. 139.

<sup>174</sup> See e.g. S. Trechsel, *Schweizerisches Strafgesetzbuch, Kurzkommentar* (Zurich, 1989), pp. 351 ff., particularly p. 353 n. 7. As to motives satisfying that criterion, see *ibid.*, pp. 354 ff. A. Panchaud/D. Ochslein/V. Van Ruymbeke, *Code pénal suisse annoté* (Lausanne, 1989), pp. 125-6.

<sup>175</sup> *Akayesu*, paras. 591-2. *Kayishema*, para. 142. *Rutaganda*, under ch. 2.3, towards the end.

<sup>176</sup> *Kayishema*, para. 146.

<sup>177</sup> *Rutaganda*, under ch. 2.3, towards the end.

<sup>178</sup> *Ibid.*, para. 147.

<sup>179</sup> *Ibid.*, at the end.

<sup>180</sup> *Ibid.*, under ch. 5.3, second sub-paragraph 3.

<sup>181</sup> See for more details *Akayesu*, paras. 593-5. See also, *infra* VIII) 2.a).

<sup>182</sup> *Akayesu*, para. 596-8.

and results in an infringement of an individual's fundamental rights. It must be inspired by specific grounds, namely race, religion, or politics. The jurisdiction of the Tribunals is limited to these grounds. But the list of grounds given in the Statute is not exhaustive as a matter of customary international law, where the discrimination can be based also on ethnicity or culture.<sup>183</sup> The fact that the incriminating acts also fulfil the conditions of other crimes, e.g. war crimes, does not impede their qualification as crimes against humanity (persecution). Conversely, the persecutions may rest on acts which are not otherwise crimes in the Statute, such as the limitation on the type of professions opened to the targeted group, collective fines, creation of ghettos, etc.<sup>184</sup>

(ff) '*Other inhuman acts*': As has been said in the *Rutaganda* case (1999), this is a residual clause which completes the list of expressly mentioned prohibited acts.<sup>185</sup> The acts thus covered must be of comparable seriousness (*ejusdem generis*).<sup>186</sup> This category of acts, according to the Chamber in the *Jelisić* case (1999), corresponds to cruel treatment under Article 3 of the ICTY Statute as defined in the *Delalić* case.<sup>187</sup> Cruel treatment under Article 3 in turn corresponds, according to *Delalić*, to the term 'inhuman treatment' under the grave breaches régime (Article 2 of the ICTY Statute).<sup>188</sup> One thus ends up with the equation: 'other inhuman acts', (Article 5, ICTY Statute) = 'cruel treatment' (Article 3, *ibid.*) = 'inhuman treatment' (Article 2, *ibid.*). Some developments on the character of these 'other inhuman acts' under the crimes against humanity régime can be found in the *Kayishema* case (1999).<sup>189</sup> 'Other inhumane acts' are acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity. The determination has to be made on a case-by-case basis. Serious mental harm can consist in witnessing the killing of family members or other persons. In such a case it is necessary to prove the intent or recklessness of the actor as to the causing of such suffering. Summing up, it can be said that crimes against humanity for other inhuman acts rest on: (i) the commission of an act of similar gravity and seriousness to the enumerated crimes; (ii) the intention to cause that act (or recklessness); and (iii) the knowledge that the act is perpetrated within the overall context of the attack.<sup>190</sup>

<sup>183</sup> *Tadić* (1997), para. 711.

<sup>184</sup> *Ibid.*, paras. 694 ff. That persecutions must be based on discriminatory grounds was already well established under the Nuremberg Trials: see the *Justice Trial* (US Military Tribunal, 1947), *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. VI, (London, 1948), pp. 79 ff.

<sup>185</sup> *Rutaganda*, under ch. 2.3.

<sup>186</sup> *Kayishema*, para. 150.

<sup>187</sup> *Jelisić*, para. 52.

<sup>188</sup> *Delalić*, para. 551. As to the content of these terms, see *infra*, VIII).2.

<sup>189</sup> *Kayishema*, paras. 151 ff.

<sup>190</sup> *Ibid.*, para. 154. As to this criterion of the overall context of the attack, see below, (c) and (d).

It may be worthwhile to recall that the jurisprudence of the post-Second World War trials has ruled out the possibility of committing crimes against humanity by offences against property.<sup>191</sup>

(c) *Attacks directed against any civilian population.* The fact that (only) civilians but any civilians can be victims of crimes against humanity is an essential element of this crime and its whole *raison d'être*. This new type of crime was included in the London Charter for the Establishment of an International Criminal Tribunal (1946) in order to cover all atrocities of the Nazi régime which could not be reached by traditional international offences because they were committed by Germany against its own citizens on its own territory. Crimes against humanity were thus drafted in order to defeat the *domaine réservé* argument which could not be allowed for the type of crimes under consideration. Thus, the Tribunal in the *Justice Trial* (US Military Tribunal, 1947) stressed that crimes against humanity could be committed against German nationals (e.g. Jews) or any stateless person.<sup>192</sup> This point was taken up with approval by the Tribunals in the *Flick Trial* (US Military Tribunal, 1947)<sup>193</sup> and in the *Gerbsch Trial* (Special Court in Amsterdam, 1948).<sup>194</sup> It was stressed again in the *Tadic* (1997) case, where it is remembered that 'any' civilian population is protected and, thus, nationality is not material.<sup>195</sup>

The relevant sources support a broad interpretation of the term 'civilian' in the context of crimes against humanity. For the purposes of crimes against humanity any individual is a civilian if he is *hors de combat* at the moment of the perpetration of the crime,<sup>196</sup> or, as it is said in another case, if he does not actively take part in the hostilities.<sup>197</sup> There is no material difference between these two formulae. Therefore, as was said in *Tadic* (1997), involvement in a resistance movement does not disqualify an individual from the status of civilian, once captured or defenceless.<sup>198</sup> One exception was however made in the *Kayishema* case (1999) for all persons who have the duty to maintain public order and have legitimate means to exercise force.<sup>199</sup> *Quaere* if this exception is not too broad to the extent it could be applied to persons retaining some public execution powers but in contexts unrelated to the persecutions or atrocities. However, it was certainly not such cases which the Chamber

<sup>191</sup> Cf. the *Flick Trial* (US Military Tribunal, 1947), *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. IX, (London, 1949), pp. 48–51, and the *I.G. Farben Trial* (US Military Tribunal, 1948), *Law Reports . . .*, op.cit., vol. X, (London, 1949), pp. 41–2, 64.

<sup>192</sup> *Law Reports . . .*, op.cit., vol. VI, (London, 1948), pp. 39–40.

<sup>193</sup> *Ibid.*, vol. IX (London, 1949), pp. 51–2.

<sup>194</sup> *Ibid.*, vol. XIII (London, 1949), p. 134.

<sup>195</sup> *Tadic* (1997), para. 635. Stateless persons are also covered (*ibid.*).

<sup>196</sup> *Jeliscic*, para. 54.

<sup>197</sup> *Rutaganda*, under ch. 2.3, towards the middle.

<sup>198</sup> *Tadic* (1997), para. 643.

<sup>199</sup> *Kayishema*, para. 127.

had in mind, as it illustrates the exception by speaking of members of the FAR, RPF, and the police/or gendarmerie of Rwanda.

The term 'population' implies crimes of a collective nature. It thus relates to the requirement that the attacks against the population must be widespread and systematic (see below, (d)). The term purports to exclude single or isolated acts<sup>200</sup> (which will be only war crimes, if anything). Thus the individual must be targeted not because of his individual attributes but because of his membership in the persecuted civilian population.<sup>201</sup> It may be a crime against humanity to kill a single person, but only if this killing is related to the attack as a whole (see below, (d)).

Finally, the targeted population must be of a predominantly civilian nature, but the presence of some non-civilians amidst this population does not deprive it of its civilian character.<sup>202</sup> The precise scope of this ruling may be difficult to grasp.

(d) *The attack must be widespread and systematic.* That the attack must be committed on a certain scale in order to qualify as a crime against humanity has been accepted since the very notion of this offence was coined by the post-World War II instruments and trials.<sup>203</sup> Random acts of violence cannot be considered crimes against humanity.<sup>204</sup> The term 'widespread' refers to the number of victims: it implies a massive, frequent, large-scale action, carried out collectively with seriousness and against a multiplicity of victims. The term 'systematic' indicates that a pattern or methodical plan exists: it means thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.<sup>205</sup> This policy element is not formalized; it flows directly from the systematic and widespread nature of the acts.<sup>206</sup> Moreover that policy need not any longer be one of State organs;<sup>207</sup> but there must be some kind of pre-conceived plan or policy.<sup>208</sup> It is sufficient that acts are committed on behalf of entities which *de facto* control the territory or by terrorist groups;<sup>209</sup> businessmen

<sup>200</sup> This limitation was already admitted in the post-Second World War trials; see, e.g., the *Justice Trial* (US Military Tribunal, 1947), *Law Reports* . . . , op.cit., vol. VI (London, 1948), pp. 79-80; the *Flick Trial* (US Military Tribunal, 1947), *Law Reports* . . . , op.cit., vol. IX (London, 1949), p. 51.

<sup>201</sup> *Tadic* (1997), para. 644.

<sup>202</sup> *Tadic* (1997), para. 638. *Jeliscic*, para. 54. *Akayesu*, para. 582. *Rutaganda*, under ch. 2.3.

<sup>203</sup> See, e.g., the *Justice Trial* (US Military Tribunal, 1947), *Law Reports* . . . , op.cit., vol. VI (London, 1948), p. 79.

<sup>204</sup> *Akayesu*, para. 579.

<sup>205</sup> *Tadic* (1997), para. 648. *Akayesu*, para. 580. *Rutaganda*, under ch. 2.3.

<sup>206</sup> *Tadic* (1997), para. 653.

<sup>207</sup> This was the case at the time of the Nuremberg Trials; cf. the *Justice Trial* (US Military Tribunal, 1947), *Law Reports* . . . , op.cit., vol. VI (London, 1948), pp. 79-80 and the *Flick Trial* (US Military Tribunal, 1947), *Law Reports* . . . , op.cit., vol. IX, London, 1949, p. 51.

<sup>208</sup> *Tadic* (1997), paras. 653 ff. *Akayesu*, para. 580. *Rutaganda*, under ch. 2.3.

<sup>209</sup> *Tadic* (1997), para. 654.

can also commit crimes against humanity if they act in coordination with such entities.<sup>210</sup> Even a single act can qualify as a crime against humanity if it be sufficiently linked to the policy of terror or persecution.<sup>211</sup>

The requirements of *widespread* and of *systematic* acts are not cumulative. It is sufficient that the acts be either widespread *or* systematic.<sup>212</sup> The acts can obviously also be widespread *and* systematic, e.g. in cases of a clear policy, of the creation of particular institutions to carry it out, of implication of high State officials, of the importance of the means or of the scale of the attacks launched.<sup>213</sup>

The term 'attack' refers to the acts enumerated in the Statutes under letters (a) to (i).<sup>214</sup> It was added in the *Rutaganda* case (1999) that an attack may also be non-violent, e.g. imposing a system of apartheid or exerting pressure on the population to act in a particular manner.<sup>215</sup>

(e) *Must the acts be committed on discriminatory grounds?* Generally speaking, discriminatory grounds or intent means that the acts must be done for specific reasons, i.e. for religious, racial, ethnic, or political grounds. The situation as to this requirement is different under the law of the ICTY and that of the ICTR.

This attribute was held by the ICTY in the *Tadic* (1997) case to be constitutive of crimes against humanity as defined under its Statute. The Chamber recognized that there is no general condition of this kind under customary international law, where a discrimination is only required for persecution as one type of offence under the heading of crimes against humanity. However, several members of the Security Council interpreted Article 5 of the Statute as limited by this requirement. The Chamber thus accepted this criterion which corresponds to the will of the Council wherefrom the jurisdiction of the ICTY stems. In the present case, the Chamber concluded, there was such a discrimination against non-Serbs.<sup>216</sup>

This decision was quashed on appeal in the *Tadic* (1999) judgment. Four main arguments are made by the Appeals Chamber. First, the ordinary meaning of the words used in Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such an intent is only made necessary for one sub-category, namely persecutions provided for in letter h. Second, there is a logical or *effet utile* argument: the mentioning of discrimination in letter h makes sense only if it is not required elsewhere. Third, the object and purpose of Article 5 is to render all

<sup>210</sup> *Kayishema*, para. 126.

<sup>211</sup> *Tadic* (1997), para. 649.

<sup>212</sup> *Tadic* (1997), para. 646–7. *Rutaganda*, under ch. 2.3. *Jelusic*, para. 53.

<sup>213</sup> *Jelusic*, para. 53.

<sup>214</sup> *Akayesu*, para. 581. *Rutaganda*, under ch. 2.3.

<sup>215</sup> *Rutaganda*, under ch. 2.3.

<sup>216</sup> *Tadic* (1997), paras. 650 ff.

crimes against humanity punishable, which in turn supports the broader definition. Fourth, in cases of doubt the interpretation should be made in order to conform with customary international law; in customary international law no discriminatory intent is generally required. The clear wording of Article 5 and the conformity with customary international law must have precedence over some statements in the Security Council. Moreover, *travaux préparatoires* may not be resorted to if the wording is clear.<sup>217</sup> There are some questionable points in the reasoning of the Appeals Chamber. The argument on the object and purpose, for instance, may be said to beg the question, as it is precisely at issue what shall constitute a crime against humanity to be prosecuted. The marked priority of the words over the intent—notwithstanding Articles 31 and 32 of the Vienna Treaties Convention (1969)—has always seemed suspect to the present commentator, as words exist only to express an idea; moreover customary law may be derogated from by treaty, as happens more than once in the Tribunal's Statutes. But the strongest point in favour of the holding of the Appeals Chamber is that in order to overcome precise words put in the chain of a customary tradition, the derogatory intent should be clearly expressed. It may be doubtful to depart too easily from the general jurisprudence on crimes against humanity. The suggestions within the Security Council may well have been too weak to have such an effect.

On the other hand, as the ICTR Statute expressly makes reference to the requirement of discrimination (unlike the ICTY Statute), it has been held that under this system it has to be given full effect.<sup>218</sup> However, if inhumane acts are committed against persons not falling within one of the discriminatory categories, this may still qualify as a crime against humanity if the perpetrator's intention is to further thereby his attack on a targeted group falling within those specified by the Statute.<sup>219</sup> This can happen if a Belgian priest protecting the Tutsis is slaughtered in order to proceed with the killing of the Tutsis.<sup>220</sup> Moreover, a crime against humanity is also committed when the perpetrator believed himself to be killing members of the group, whereas in fact this was untrue.<sup>221</sup> This would be a criminally irrelevant *error in persona*.

The result is that for the ICTY system discriminatory grounds are only necessary for the sub-category of persecutions, whereas in the ICTR system it constitutes a general condition which must be fulfilled in any case.

<sup>217</sup> *Tadic* (1999), paras. 273 ff, 283 ff. The Report of the Secretary-General also adopted the discrimination requirement: UN.DOC., S/25704, para. 48.

<sup>218</sup> *Akayesu*, para. 583. *Rutaganda*, under ch. 2.3.

<sup>219</sup> *Akayesu*, para. 584. *Rutaganda*, under ch. 2.3.

<sup>220</sup> *Kayishema*, para. 131.

<sup>221</sup> *Ibid.*, para. 132.

(f) *Mens rea: Intent to commit the offence and knowledge of the broader context in which it occurs.* In the first place, the perpetrator must have the intention to commit the offence.<sup>222</sup> In addition, he must know of the broader context in which his acts occur, i.e. he must know of the widespread and systematic attack upon a civilian population.<sup>223</sup> This knowledge may be constructive: knowledge is legally imputed if the perpetrator was wilfully blind or grossly negligent as to facts and circumstances surrounding his crimes.<sup>224</sup> The perpetrator need not have knowledge of what exactly will happen to the victims<sup>225</sup> if only, according to general principles of criminal law, the chain of the events that happened was reasonably foreseeable. The perpetrator is not liable for results which are completely beyond the pale of what could be expected in the light of ordinary experience of life. In accordance with these principles, denunciations may be sufficient to constitute a crime against humanity; several post-World War II judgments can be quoted to that effect.<sup>226</sup>

The question of whether purely personal motives, unrelated to the attack on the civilian population, may suffice is more intricate. In the *Tadic* (1997) case, it was held that while personal motives may be present, they should not be the sole motivation for the acts.<sup>227</sup> Thus, if the act is done for purely personal reasons unrelated to the attack on the civilian population, there would not be a crime against humanity. This course was challenged by the *Tadic* (1999) Appeals Judgment. It held (with two judges dissenting)<sup>228</sup> that subjective motives have no place: the only requirement is the objective nexus between the acts and the attack on the civilian population. If such a nexus exists, there is no point to further inquire if the motives were personal. Moreover, there is a jurisprudence of the post-Second World War trials which admits crimes against humanity also if committed for personal reasons, as e.g. in cases of denunciations.<sup>229</sup>

Looked at closely, there does not seem to be any major difference between the two holdings. In both cases, the 'unrelated to the attack'

<sup>222</sup> *Tadic* (1997), para. 656.

<sup>223</sup> *Tadic* (1997), paras. 656–7. *Jelisić*, para. 56. *Kayishema*, paras. 133–4. See also *R. v. Finta* (Canada, Supreme Court, 1994), *ILR*, vol. 104, pp. 284 ff, 362–3.

<sup>224</sup> *Tadic* (1997), paras. 657, 659. See also *R. v. Finta*, loc.cit.

<sup>225</sup> *Tadic* (1997), para. 657.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*, paras. 658, 659.

<sup>228</sup> Judge Nieto-Navia, Declaration, para. 12 (exclusion of acts done for purely personal reasons unrelated to the attack on the civilian population and to the armed conflict); Judge Shahabuddeen, Sep.Op., paras. 33 ff (exclusion of acts done for purely personal reasons completely unrelated to the attack on the civilian population). Judge Shahabuddeen goes on to give the example of a jealous husband who kills his wife belonging to the attacked civilian population, but for reasons for which he would have killed her also if she did not belong to the targeted group (para. 35). But it is easy to see that here the acts are simply unrelated (legally) to the attack on the civilian population.

<sup>229</sup> *Tadic* (1999), paras. 248 ff. See also Sep.Op. Shahabuddeen, para. 34.

element is controlling. To the extent that both the subjective element (personal motives) and the objective element (attack . . . ) are present, a quite exceptional hypothesis, the latter prevails. The rule here is as follows: if the perpetrator acts for purely personal motives but takes advantage of the system of persecution of which he has knowledge and which he uses to further the desired result of his deeds, there will be a crime against humanity. For that reason the formulation of the Appeals Chamber may be more appropriate: if the acts are related to the attack it will always be a crime against humanity regardless of the existence or not of personal motives. Thus it may be immaterial to inquire into motives. But it must be seen that ordinarily it is the cases where the perpetrator acts for personal reasons which are also unrelated to the attack on the civilian population.<sup>230</sup> And for that hypothesis both tests lead to the same result.

In conclusion, it can be added that in the *Tadic* (1997) case the Chamber held that all the conditions for the application of Article 5 of its Statute were fulfilled. In particular, one aspect of the conflict in the relevant area (Bosnia) was the commission of inhuman acts against the non-Serb population in order to create a Greater Serbia. Moreover, the policy of inhuman acts was based on a recognizable plan.<sup>231</sup> The ICTR also passed several convictions based on this offence (crimes against humanity).<sup>232</sup>

## VIII. ANALYSIS OF INDIVIDUAL OFFENCES

There are several particular offences, e.g. torture, which may apply under different headings, e.g. under the heading of grave breaches or of war crimes. Some of them, such as wilful killing or murder, may qualify under each count contained in the Statutes. There is no point in analysing these offences in depth in the present article. What may be useful is to outline their constitutive elements as they were shaped by the jurisprudence of the ad hoc Tribunals. Whoever has read the post-

<sup>230</sup> To that extent the holding of the Chamber in *Tadic* (1997), para. 659 may still hold good: '[I]f the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity'.

<sup>231</sup> *Tadic* (1997), para. 660.

<sup>232</sup> *Akayesu*, paras. 645 ff. *Kayishema*, paras. 572 ff. (the elements of the crime were found to be fulfilled, but it was thought to be consumed by the conviction on genocide for the same acts; *contra*, Sep. and Diss.Op. Tafazzal Hossain Khan, para. 3). *Rutaganda*, under chs. 5.2-5.5.

Second World War trials will know how few precise indications they contain on this point.

### 1. *Wilful killing and murder*

The meaning of the term 'murder' (or 'assassinat') in the context of genocide<sup>233</sup> and of crimes against humanity<sup>234</sup> has already been discussed. For the purposes of Articles 2 and 3 of the ICTY Statute, it has been said in the *Delalic* case (1998) that there is no difference between wilful killing (Article 2) and murder (Article 3, by renvoi).<sup>235</sup> As to *mens rea*, intention and recklessness are covered: there must be demonstrated 'an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life'.<sup>236</sup> If compared, the different contexts where those terms apply do not entail substantive discrepancies. Murder in all contexts means intentional and unlawful homicide, recklessness being included. Where a Chamber has departed from this view, it is submitted that it erred.<sup>237</sup>

### 2. *Mistreatments*

There are several mistreatments which must be considered separately:

(a) *Torture*. The elements of torture are the following: (i) an act or omission causing severe pain or suffering, mental or physical; (ii) inflicted intentionally; (iii) for purposes such as obtaining information, confessions, punishment, intimidation, coercion of the victim or of a third person, or for any reason based on discrimination; (iv) committed or acquiesced in or instigated by a person acting in an official capacity; and (v) for the purposes of the ICTY Statute, the acts must be linked to an armed conflict.<sup>238</sup> The level of severity or pain required cannot be articulated in the abstract. The practice of the human rights bodies (in particular the European Court of Human Rights) should be taken as a yardstick. This practice recognizes that this threshold depends on the circumstances, as with the related notion of inhuman treatment.<sup>239</sup> As to the prohibited purpose, it has been held that it must simply be part of the motivation behind the conduct; it need not be the predominating or sole

<sup>233</sup> Above (VI)2.a).

<sup>234</sup> Above (VII)1.b)aa).

<sup>235</sup> *Delalic*, paras. 431-3.

<sup>236</sup> *Ibid.*, para. 439.

<sup>237</sup> See above, (VII)1.b)aa).

<sup>238</sup> *Delalic*, para. 494. *Furundziya*, para. 162.

<sup>239</sup> *Delalic*, paras. 461 ff.

purpose. Moreover, the purpose must not be exclusively private.<sup>240</sup> Rape may qualify as torture if the constitutive elements of both offences are met. Guidance can again be gathered from the human rights law jurisprudence, e.g. from the *Meija* case (Inter-American Commission of Human Rights) or from the *Aydin* case (European Court of Human Rights).<sup>241</sup>

The prohibition of torture is customary in character. It applies to times of peace as well as to times of armed conflict. The prohibition is addressed to individuals, who are criminally accountable for its breach.<sup>242</sup> It is an absolute prohibition which can never be derogated from, not even in times of emergency. It has become so important that other particular attributes attach to it. They were considered in the *Furundzija* case (1998). First, the prohibition covers also *potential breaches*. It is insufficient to intervene after the infliction of torture; there is a duty of prevention. Thus, all the measures necessary for implementing the prohibition, or the abrogation of all contrary laws, have to be undertaken immediately.<sup>243</sup> Secondly, the prohibition imposes *obligations erga omnes*. All States have a (correlative) right and may claim in case of a violation.<sup>244</sup> Thirdly, the prohibition is part of the international public order (*ius cogens*). Because of the importance of the values it protects, it has become a peremptory norm having a higher rank in hierarchy than treaty law or even ordinary customary rules. It cannot be derogated from by treaties, local or special customary law, or even general custom not endowed with the same normative force. The principle, by the same token, also overrides contrary municipal law (e.g. amnesty laws). Contrary municipal laws would be internationally unlawful and unopposable. Courts of justice in third States would not be bound by such laws and the perpetrators of torture stay criminally liable whatever the measures taken under municipal law. The *ius cogens* character of the principle leads also to universal jurisdiction for prosecuting torturers.<sup>245</sup> It is not possible in this article to do more than to underline the particularly sweeping and far-reaching conclusions as to the consequences of the prohibition. It may be asked to what extent, as far as terminology is concerned, it would be preferable to speak of international public order instead of *ius cogens*.<sup>246</sup>

(b) *Wilfully causing great suffering or serious injury to body or health*

<sup>240</sup> *Ibid.*, paras. 470 ff.

<sup>241</sup> *Ibid.*, paras. 475 ff. For the *Meija* case, see: *Inter-American Yearbook on Human Rights*, 1996-1, pp. 1120 ff. For the *Aydin* case, see ECHR, *Rep.*, 1997-VI, no. 50, pp. 1866 ff, 1886-1892.

<sup>242</sup> *Furundzija*, para. 140.

<sup>243</sup> *Ibid.*, paras. 148-150.

<sup>244</sup> *Ibid.*, paras. 151-2.

<sup>245</sup> *Ibid.*, paras. 153-7. On the character as *ius cogens*, see also *Delalic*, para. 454.

<sup>246</sup> The reasons have been explained in R. Kolb, *Théorie du ius cogens international* Paris, 2001.

(Article 2 ICTY Statute). The difference of this offence with respect to torture lies in the fact that torture requires a specific purpose whereas wilfully causing etc. does not. The seriousness of the injury may be measurable by considering the incapacity to work ensuing from the offence. Thus, according to the *Delalic* case (1998), the offence is constituted by 'an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury'.<sup>247</sup>

(c) *Inhuman treatment* (Article 2 ICTY Statute). Inhuman treatment is an inhuman act or omission 'which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity'.<sup>248</sup> This definition is relative to that of torture: 'inhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture'.<sup>249</sup> Both offences thus join each other, one on the top, the other beneath, leaving no gap. Whether the required threshold is reached is to be decided in the light of all the circumstances of the particular case. Guidance can be obtained through the human rights case-law which considers the level of severity of the acts in the context of, *inter alia*, the duration of the acts, their nature and effects, sex, age and state of health of the victim, etc.<sup>250</sup>

Inhuman treatment stems from a disdain of human dignity.<sup>251</sup> The term 'inhuman(e)' is best defined in relation to its opposite, 'human(e)', i.e. kind-hearted, compassionate, merciful. It can be illustrated through a non-exhaustive list of acts, e.g. non-protection against attacks, medical experiments, mutilation, exposure to public curiosity or insults, insufficient food and water rations, etc.<sup>252</sup> The standard to be used for measuring is objective: the humiliation or suffering must be sufficiently intense for a normal person to be hurt.<sup>253</sup> The severity of the acts can also be the consequence of the cumulation or repetition of acts being in themselves insufficient.<sup>254</sup> Finally, the *mens rea* is made up by the intention to humiliate or to injure, if the actor is conscious of the foreseeable consequences of his acts.<sup>255</sup> It may be thought that it is enough that the perpetrator should have been aware of these foreseeable consequences of his acts.

<sup>247</sup> *Delalic*, paras. 498 ff, quotation from para. 511. This sentence does not seem well constructed.

<sup>248</sup> *Ibid.*, para. 543.

<sup>249</sup> *Ibid.*, para. 542.

<sup>250</sup> *Ibid.*, paras. 534 ff.

<sup>251</sup> *Aleksovski*, para. 56.

<sup>252</sup> *Delalic*, paras. 518 ff.

<sup>253</sup> *Aleksovski*, para. 56.

<sup>254</sup> *Ibid.*, para. 57.

<sup>255</sup> *Ibid.*, para. 56.

(d) *Cruel treatment (Article 3 ICTY Statute)*. According to the *Delalic* case (1998), cruel treatment for the purposes of Article 3 ICTY Statute corresponds to the definition of inhuman treatment in the context of Article 2 ICTY Statute.<sup>256</sup> It has been held in *Jelusic* (1999) that beatings, cutting off of ears and cuts in the flesh of the arms constitute such cruel treatment.<sup>257</sup>

All these offences under the general heading of 'mistreatments' are indispensable, for it is the most common practice in modern wars to commit them. But it must be said that their open-endedness and fact-intensity ('case-by-case analysis') somewhat detracts from the necessary precision of criminal provisions (*Bestimmtheitsgrundsatz*). It is not suggested that this is avoidable; the problem must however be seen.

### 3. *Rape and other serious sexual assaults*

The elements of rape are the following: (i) the sexual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or of the mouth of the victim by the penis; (ii) this penetration must be obtained by coercion or force, or threat of force, against the victim or a third person.<sup>258</sup> These elements can be gathered, in the absence of a definition of rape in international law, by looking to the various municipal legal systems. In these systems there are discrepancies only as to the legal qualification of the penetration of the mouth of the victim. But the gravity of the act accounts, in the view of the Chamber, for its being treated as rape.<sup>259</sup> If there is no penetration at all, the act may still qualify as serious sexual assault inflicted upon the physical and moral integrity of a person by means of coercion or intimidation in a way that is degrading and humiliating for the victim's dignity.<sup>260</sup> Not only women but also men can be raped.

Rape is prohibited, in times of war, by conventional and customary law entailing, in case of breach, the criminal responsibility of the perpetrator.<sup>261</sup> Human rights treaties ordinarily cover rape by way of their provisions on physical integrity.<sup>262</sup>

### 4. *Unlawful confinement of civilians (Article 2(g) ICTY Statute)*

In cases of international armed conflicts it is lawful to confine enemy civilians to certain areas or in camps. The conditions which must be

<sup>256</sup> *Delalic*, para. 551.

<sup>257</sup> *Jelusic*, paras. 41 ff.

<sup>258</sup> *Furundzija*, para. 185.

<sup>259</sup> *Ibid.*, paras. 182-3.

<sup>260</sup> *Ibid.*, para. 186.

<sup>261</sup> *Ibid.*, paras. 165 ff.

<sup>262</sup> *Ibid.*, para. 170-1.

respected are laid down in the Geneva Convention IV of 1949, especially in Articles 5, 27 and 41-3. The question has been considered in the *Delalic* case (1998).

First, the confinement must rest on a *lawful reason*.<sup>263</sup> The freedom of movement of enemy civilians may be restricted or even temporarily suppressed, but only if the security of the State requires it, especially in cases of spying, sabotage, or hostile activity. The mere fact of being an enemy national cannot in itself be considered as threatening the security of the opposing party. The State must have specific reasons to feel its security threatened, e.g. by activities, special knowledge or qualifications of the individual, etc. The measures of constraint should not affect the fundamental right of persons concerned to be treated with humanity. They must moreover be necessary, no lesser means being available (proportionality *lato sensu*). The Chamber adds that States enjoy in this matter 'a great deal of discretion'.<sup>264</sup>

Secondly, there are *procedural safeguards* as provided for in Article 43 of the Geneva Convention IV (1949).<sup>265</sup> There is a right to have the necessity of the internment periodically reviewed by a court or administrative body. There is also a right to have the names of interned persons delivered to the protecting power. If those guarantees are not respected, the confinement becomes unlawful.

The Chamber concludes that States may confine enemy civilians, but must bear in mind that the measure is an exceptional one, to be taken only for reasons of security.<sup>266</sup> It may be wondered if these extenuating standards correspond to the generally held conceptions and practices (not abuses) on this matter. One may recall that the United Kingdom interned a great number of Argentinian nationals at the time of the Falklands/Malvinas war, this measure arousing no protest as to its legality. More fundamentally, there is some incongruity in the reasoning of the Chamber in *Delalic*. The strict standards proposed (i.e. only an exceptional measure for clear and compelling security interests) are to some extent at odds with the sweeping *dictum* on the great deal of discretion enjoyed by States. It seems in any case that the States have a somewhat greater discretion (or margin of appreciation) than it might seem on reading the judgment.

##### 5. *Plunder (Article 3(e) ICTY Statute)*

Plunder covers all forms of unlawful appropriation of property in armed conflict, including pillage (violent appropriation) or spoliation.

<sup>263</sup> *Delalic*, paras. 564 ff.

<sup>264</sup> *Ibid.*, para. 570.

<sup>265</sup> *Ibid.*, paras. 579 ff.

<sup>266</sup> *Ibid.*, para. 583.

The property may be public or private, but it must belong to the adverse party. The seizure must be linked to the armed conflict.<sup>267</sup> The prohibition of plunder is undoubtedly customary and gives rise, if breached, to individual criminal responsibility.<sup>268</sup>

Some other offences have been provisionally considered under the Rule 61 proceedings of the ICTY. Thus, for instance, in the *Martić* case (1996), the offence of indiscriminate attacks on civilians was considered. The Chamber found that such attacks constitute a grave breach of the Geneva Conventions of 1949 if committed wilfully in violation of the relevant provisions of Protocol I, and causing death or serious injury to body or health.<sup>269</sup> The prohibition is customary in character and applies to both international and internal armed conflict. It cannot be done away with by claiming reprisals.<sup>270</sup>

#### IX. INDIVIDUAL CRIMINAL RESPONSIBILITY AND FORMS OF PARTICIPATION IN A CRIME (ARTICLE 7(1) ICTY STATUTE; ARTICLE 6(1) ICTR STATUTE)

1. Individual criminal responsibility flows from the following five types of action: planning, instigating, ordering, committing or aiding and abetting in the commission of a crime. As has been said in the *Delalić* (1998)<sup>271</sup> and *Kayishema* (1999)<sup>272</sup> cases, each of these types of action entails disjunctively criminal responsibility; but this was, indeed, stating the obvious. In the *Rutaganda* case (1999), the meaning of these types of action was analysed. 'Planning' was not there defined. But it may be considered as the methodical preparation of an offence to be committed. 'Instigating' was defined as direct incitement of another to commit an offence; it is said that the incitement must be public, but that is quite certainly a *lapsus calami*. 'Ordering' supposes a superior/subordinate relationship and the use of the superior's authority to persuade the subordinate to commit a crime. 'Commission' of a crime is the direct act producing the result, or an omission if there is a duty to act. 'Aiding and abetting' is at the lower threshold of criminal participation to a crime and needs further analysis. It may be noted that it covers all acts of assistance in either physical form or in the form of moral support that substantially contribute to the commission of the crime.<sup>273</sup>

2. What are the minimum requirements for criminal participation in an offence? The question arises in the context of 'aiding and abetting'

<sup>267</sup> *Ibid.*, paras. 584 ff. *Jelisić*, paras. 46 ff.

<sup>268</sup> *Delalić*, para. 315.

<sup>269</sup> *ILR*, vol. 108, pp. 44-5, para. 8.

<sup>270</sup> *Ibid.*, p. 45-7, paras. 10 ff.

<sup>271</sup> *Delalić*, para. 321.

<sup>272</sup> *Kayishema*, para. 197.

<sup>273</sup> See *Rutaganda*, under ch. 2.1.

(‘aider et encourager’) which constitutes the lowest form of criminal participation.

(a) First, the participation must have a *direct and substantial effect* on the commission of the crime.<sup>274</sup> The assistance need not always be physical or tangible. It may consist of moral or psychological support and encouragement of the principals in their commission of the crime.<sup>275</sup>

Presence at the place of the crime may be enough if it facilitates the crime, e.g. because of the authority enjoyed by the person who is present or if that person supervises the action.<sup>276</sup> The acts of assistance may be removed in time and space from the actual commission of the offence.<sup>277</sup> Thus, criminal assistance can also be given after the commission of the crime, e.g. if there was a promise to eliminate evidence.<sup>278</sup> Omissions may also be covered.<sup>279</sup> The assistance must obviously not be a condition *sine qua non* for the commission of a crime.<sup>280</sup> In summing up it can be said that the *actus reus* of aiding and abetting requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.<sup>281</sup>

(b) Secondly, as to the *mens rea*, there must be an awareness of the participation in a crime, and an intention to participate in its commission. Knowledge and intent can be inferred from the circumstances.<sup>282</sup> It is not necessary for the accomplice to share the *mens rea* of the principal. It is enough that he has knowledge that his actions assist the perpetrator in the commission of the crime and that he acts nevertheless.<sup>283</sup>

The whole question may be summed up as follows: ‘The accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident’.<sup>284</sup>

3. The category of the ‘*common criminal purpose*’ known in common law systems is a means of imputing the criminal results to all the participants of the group who acted to further the common criminal plan.

<sup>274</sup> *Tadić* (1997), paras. 678 ff, 692. *Delalić*, para. 326. *Furundžija*, paras. 217 ff. *Aleksovski*, para. 61. *Kayishema*, para. 199.

<sup>275</sup> *Tadić* (1997), paras. 679, 689. *Delalić*, para. 326. *Furundžija*, paras. 199 ff.

<sup>276</sup> *Tadić* (1997), para. 689. *Furundžija*, para. 209, *Aleksovski*, paras. 64–5. *Kayishema*, para. 200.

<sup>277</sup> *Delalić*, para. 327.

<sup>278</sup> *Aleksovski*, para. 62.

<sup>279</sup> *Kayishema*, para. 202 (if there is a duty to act: see e.g. Article 6(3) ICTR Statute).

<sup>280</sup> *Furundžija*, para. 209. *Kayishema*, para. 201.

<sup>281</sup> *Furundžija*, para. 235.

<sup>282</sup> *Tadić* (1997), paras. 675–7. *Delalić*, para. 328.

<sup>283</sup> *Furundžija*, paras. 236 ff.

<sup>284</sup> *Tadić* (1997), para. 692.

This category of collective criminality has been applied in the Nüremberg and subsequent proceedings under the heading of the 'common design' to commit crimes.<sup>285</sup> The conditions for its application were held at that time to be: (i) that there was a system in force to commit certain offences; (ii) that the accused was aware of that system; and (iii) that the accused participated in operating the system.<sup>286</sup> The whole question was taken up again in the *Tadic* (1999) Appeals judgment.<sup>287</sup> Two conditions must be fulfilled in order to hold criminally liable for all the acts of the group each member participating in it. First, *all participants must possess the same criminal intention*, e.g. the intent to kill on a systematic basis.<sup>288</sup> If this is the case, it is sufficient that the accused has participated in one aspect of the common design, e.g. the providing of material assistance. This extends especially to persons acting pursuant to a concerted plan within concentration camps. Secondly, the offences committed must at least be a *natural and foreseeable consequence of effecting that common purpose*.<sup>289</sup> This is important for situations where some offences committed were not those actually contemplated in the plan. Criminal responsibility for such 'ultra vires' acts may still be imputed to each member of the group if such acts were a foreseeable corollary of the common design and if the particular accused was either reckless or indifferent to the predictable consequence. At least *dolus eventualis*<sup>290</sup> is required. The *mens rea* is thus made up of two elements: (i) the intention to take part in a joint criminal enterprise; and (ii) the foreseeability and advertent recklessness (*dolus eventualis*) as to the commission of further crimes linked with the common purpose.

This category of the common criminal purpose has been considered customary in character by the Appeals Chamber.<sup>291</sup>

In summing up it may be said that the *actus reus* of the common criminal purpose consists of (i) a plurality of persons; (ii) the existence of a common design, plan or purpose to commit a crime or crimes; (iii) the participation of the accused in that system; and the *mens rea* consists (i) in an intent to perpetrate the crime(s) or at least in the knowledge that it will be perpetrated coupled to an intention to further the system, or (ii) in the foreseeability of further crimes ('ultra vires') with the accused taking willingly that risk.<sup>292</sup>

<sup>285</sup> See the *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. XV (London, 1949), pp. 94 ff.

<sup>286</sup> *Ibid.*, p. 95.

<sup>287</sup> *Tadic* (1999), paras. 190 ff.

<sup>288</sup> *Ibid.*, paras. 196 ff.

<sup>289</sup> *Ibid.*, paras. 204 ff.

<sup>290</sup> I.e. the accused willingly took the risk of further crimes being committed.

<sup>291</sup> *Tadic* (1999), para. 226.

<sup>292</sup> *Ibid.*, paras. 227-8.

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

1. The criminal responsibility of the superior for the unlawful acts of his subordinates, if he failed to discharge his duty of prevention or suppression (after the fact), is well established in customary<sup>293</sup> and conventional international law. That type of responsibility for culpable omissions has been the object of a series of post-Second World War trials<sup>294</sup> and has since been codified in Articles 86-7 of Additional Protocol I (1977).<sup>295</sup> The duty to act—necessary for a responsibility for omission—flows from the duties inherent in the post of command.

2. Three elements must be fulfilled in order to have command responsibility.

(a) First, there must be a *superior/subordinate relationship*.<sup>296</sup> A superior is a person in a position of authority, whether military or civilian. Judicial case-law has recognized that non-military superiors can be held liable, be they political leaders (*Tokyo Trial*) or civil industrialists (*Flick Trial*). The control of the superior over the subordinates may be *de iure* or *de facto*. It is not the formal status which is decisive, but the actual possession of powers of control over the actions of the subordinates. It must be possible legally or factually to give orders in order to prevent the offences or to sanction their authors. For civilian authorities there is normally no direct power to take military sanctions, but the power to pass a report on the situation is sufficient. Conversely, an ineffective formal position will not lead to responsibility if the superior in fact did not have the material ability to act as requested. It is the principle of effectiveness which is controlling in this matter.

(b) Secondly, as to the *mens rea*, the superior *must have known or have had reason to know* about the commission of the offences by the subordinates.<sup>297</sup> The standard is two-fold. The superior may have had *actual knowledge* which may be established through direct or circumstantial evidence. But such knowledge cannot be presumed simply because the acts were widespread, numerous, or occurring over a prolonged period. Such aspects are, however, relevant indicia for knowledge. This is particularly true if the acts are committed near to the place where the superior exercises his powers. A more difficult aspect is the

<sup>293</sup> *Delalic*, para. 343.

<sup>294</sup> See in *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. XV (London, 1949), pp. 65 ff.

<sup>295</sup> *Delalic*, paras. 330 ff.

<sup>296</sup> On the whole point, see *Delalic*, paras. 348 ff, 364 ff. *Aleksovski*, paras. 73 ff. *Kayishema*, paras. 208 ff, 229 ff.

<sup>297</sup> On this point, see *Delalic*, paras. 379 ff. *Aleksovski*, paras. 79-80. *Kayishema*, paras. 225 ff. See also the *Report of the Secretary-General*, UN.DOC. S/25704, para. 56.

second part of the standard, i.e. the 'had reason to know'.<sup>298</sup> A distinction was drawn by the Chamber in the *Delalic* case (1998) between the customary law developed through the post-Second World War trials and the customary law following the adoption of Protocol I (1977). As to the traditional law the Chamber starts by saying that there is a duty on commanders to remain informed about the activities of their subordinates. Thus the superior will be responsible if he has been at fault in having failed to acquire such knowledge, especially where the superior had in his possession information which would put him on notice of the risk of offences being committed or where he was wilfully blind to the acts of his subordinates. On the other hand, Article 86(2) of Protocol I (1977) limits the responsibility of the superior to cases where he had some specific information which would have put him on notice that offences were committed or which would put him on further inquiry.<sup>299</sup> The Chamber concludes that this stricter standard, more favorable to the accused, must be applied. Moreover, the Chamber adds, this stricter standard must be taken to reflect customary international law at the time the offences occurred.<sup>300</sup> The Chamber in the *Kayishema* case (1998) tried to limit the range of that *dictum* by applying it in the first place to non-military superiors. According to this Chamber, the duties of the military commander with regard to being informed are more extensive. The old customary rules would seem to apply. For non-military superiors, on the other hand, it would be necessary to show that they consciously disregarded information which clearly indicated or put them on notice that their subordinates had committed or were about to commit crimes.<sup>301</sup>

The conclusion that the wording of Article 86(2) of Protocol I of 1977 corresponds to new customary law does not seem warranted. Until most recent times the only (judicial) practice available was that of the post-Second World War trials, which does not support such a holding. The adoption of a single, albeit important, conventional rule departing from a well-established principle cannot be held of its own to overturn the previous position in general international law. This does not exclude that special reasons be adduced in order to apply the law of Protocol I as the one more favorable to the accused (nor that a constant application of this law may lead to the emergence of a new customary rule).

(c) Thirdly, the duty to act of the superior is limited to *necessary and reasonable measures*.<sup>302</sup> This standard refers to the circumstances and cannot be further specified in the abstract. The circumstances are that of

<sup>298</sup> *Delalic*, paras. 387 ff. *Kayishema*, paras. 225 ff.

<sup>299</sup> The words of Article 86(2) Protocol I are '[if they had] information which should have enabled them to conclude . . . ' ('des informations leur permettant de conclure . . .').

<sup>300</sup> *Delalic*, para. 393.

<sup>301</sup> *Kayishema*, paras. 227-8. The Chamber relied on the Rome Statute on an International Criminal Court of 1998.

<sup>302</sup> *Delalic*, paras. 394-5. *Aleksovski*, para. 81.

the time of armed conflict in which the commander found himself; due account must be taken of the harshness and limitations inherent in such situations. In particular, a commander (or superior) cannot be obliged to perform the impossible; reasonable measures are only those that the superior has the material ability to perform. This is an application of the general principle of law *ad impossibile nemo tenetur*.<sup>303</sup>

(d) Finally, the Chamber in the *Delalic* case (1998) rejected the requirement that the superior's failure to act must have caused the commission of the offence, as claimed by the defence.<sup>304</sup> It held that such a requirement had not been acknowledged by the previous judicial practice. For the failure to punish committed offences such an element of causation cannot in any case exist, since the failure to punish does not cause the offence but comes after the fact. The present commentator would like to stress that the whole question seems inappropriately dealt with. As a matter of logic, a failure to act (omission) is never causative of the criminal result reached. Causing something and not intervening in order to stop a chain of external causes is not the same. What the Chamber had in mind is not causality in the strict sense, but what is called, in the civil legal systems, 'improper causality'. This type of causality is not a natural fact but a legal *hypothesis*: could the criminal result very probably have been avoided if the accused had acted according to his duty? As can be seen, this is causation in a very indirect and logically profoundly different sense. The test is not that of the *conditio sine qua non* (causality proper), but that of a *conditio cum qua (verisimiliter) non*. The whole question, if at all, should have been considered in that light.

## XI. DEFENCES: THE PLEA OF DURESS

The only defence analysed so far in the case-law of the ad hoc Tribunals is that of duress. The plea of duress consists in the argument that the accused acted under an immediate threat to his life or limb when committing the acts complained of. The defence is also termed 'necessity', 'compulsion', 'coercion', or 'compulsory duress'. It has been considered in various judgments following the Second World War, as for instance in the *Krupp, I.G. Farben*, and *Flick* Trials.<sup>305</sup> At the ICTY, the question of duress was raised in the *Erdemovic* case (1997) in the context of a guilty plea. The problem to be solved was whether duress is a plea in mitigation of the sentence or a complete defence absolving criminal guilt. If it was a complete defence, the guilty plea would have been

<sup>303</sup> See *Dig.*, 50, 17, 185, *regulae iuris* (Celsus). *Corpus iuris canonici, Liber sextus*, tit. 13, *Regulae iuris, regula 6*.

<sup>304</sup> *Delalic*, paras. 396 ff.

<sup>305</sup> *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, vol. XV (London, 1949), pp. 170 ff.

equivocal<sup>306</sup> (and thus void), since a man cannot plead guilty and not guilty at the same time. The question whether duress is a ground of mitigation or a real defence turned out to deeply split the Appeals Chamber, leaving some visible signs of friction between the judges. It also turned out to be nourished by a profound clash of legal traditions, especially between the common law and the civil law. This is regrettable.

Since it was not possible to reach a common position in the judgment, the opinions of the judges have to be analysed separately. Very broadly speaking, two positions were held. First, the traditional common law position: duress as a ground only for mitigation. Secondly, the traditional civil law tradition: duress as a ground for removal of criminal guilt if strict conditions are met (otherwise only as a ground for mitigation).

Judges McDonald and Vohrah represent the first position.<sup>307</sup> They start by stating that in the post-Second World War jurisprudence there is no authority for duress as a complete defence to the killing of innocent persons<sup>308</sup>—with only the exception of a unsubstantiated *dictum* in the *Einsatzgruppen* case.<sup>309</sup> As the common and civil law traditions differ on this point, a general principle can exist only to the limited extent that an accused is less blameworthy if he acts under duress (mitigation). A number of policy considerations point clearly in the same direction. The law relating to the protection of the highest value (life) is based on a moral absolute: you may not kill the innocent even in order to save your own life. One should moreover not engage in a utilitarian logic in weighing life against life, e.g. if it is pleaded that refusal to obey would not have saved the victims but would only have added the accused to the victims. As has been said the rule is a moral absolute and no exceptions should be made. In addition, more can be expected from a soldier than from a civilian. It must also be considered that the Tribunal deals with the most serious crimes; a sweeping defence of duress would be dangerous. The common law approach leaves enough flexibility, since mitigation (or even remittal of punishment) can solve hard cases. Thus, duress is not a general defence but only a ground of mitigation. Judge Li concurs in the result.<sup>310</sup> For him duress may be a complete defence if certain conditions are met,<sup>311</sup> but it may not be such in cases of heinous crimes, e.g. the killing of the innocent.

<sup>306</sup> A separate question was whether the guilty plea was an informed one, this being denied by four of five judges (McDonald, Vohrah, Cassese, Stephen).

<sup>307</sup> Joint Sep.Op. McDonald/Vohrah, paras. 32 ff.

<sup>308</sup> M. Erdemovic had pleaded guilty to have participated in the execution squads which had killed over 1,200 civilians after the fall of Srebrenica. He pleaded that if he had refused to execute the orders, he would have been shot himself too.

<sup>309</sup> For that *dictum*, see *Law Reports* . . . , loc.cit., p. 174.

<sup>310</sup> Sep. and Diss.Op. Li, para. 5.

<sup>311</sup> *Ibid.*, para. 5: (i) the act was done to avoid an immediate danger both serious and irreparable; (ii) there was no other adequate means to escape; and (iii) the remedy was not disproportionate to the evil.

Judge Cassese represents the other position, that of the civil law systems.<sup>312</sup> He starts by an acrimonious rejection of the policy oriented approach of his common-law colleagues. Going into policy considerations, he says, and upholding those of the common law (especially English law) is extraneous to the task of the Tribunal; these policy considerations were meta-legal and contrary to the *nullum crimen* principle. The disregard for the civil law tradition was not warranted. Moreover, if international law was really uncertain on the point at issue, recourse should be had to the law applicable in the former Yugoslavia (allowing duress as a complete defence) and not to policy considerations. The Judge then turns to the substantive point. As a special exception for murder (killing of the innocent) cannot be said to have developed in customary international law, the general rule that duress is a complete defence should have been applied. The conditions to that effect are strict: (i) there must be an immediate threat of severe and irreparable harm to life or limb motivating the acts; (ii) there must not be other adequate means of averting the evil; (iii) the crime committed was not disproportionate to the evil threatened; and (iv) the situation of duress was not voluntarily brought about by the person coerced.<sup>313</sup> Moreover, special duties on the part of the accused towards the victim may preclude the possibility of raising duress as a defence. The same is true if an individual voluntarily becomes a member of a unit which notoriously engages in actions contrary to international humanitarian law.<sup>314</sup> As can be seen, for the killing of the innocent these conditions will seldom be met, but the defence should not be cut off *a priori*. There is at least one case where the defence is clearly made out. If by refusing to obey the accused could not have saved the victims—who would have been killed by other persons—but would only have forfeited his life also, the law cannot treat him as a criminal. Judge Cassese then goes on to show that the post-Second World War jurisprudence which seems to rule out the defence is not as categorical as it was claimed and that other cases, not quoted, support the view of duress as a complete defence.<sup>315</sup> Returning to the policy considerations, Judge Cassese opposes those inherent in the civil law tradition to those claimed by Judges McDonald and Vohrah. Law is based on what society can reasonably expect from its members; it does not require, by criminal sanction, acts of martyrdom. Mitigation is not enough, as the behavior is then still labelled as criminal. Judge Stephen, a common lawyer, joined the civil law position.<sup>316</sup> He stated that the common law exception for murder in pleading duress as a complete defence—a position which he finds hardly appropriate—had been

<sup>312</sup> Sep. and Diss.Op. Cassese, paras. 11 ff.

<sup>313</sup> Ibid., para. 16.

<sup>314</sup> Ibid., para. 17.

<sup>315</sup> Ibid., paras. 19 ff, 30 ff.

<sup>316</sup> Sep. and Diss.Op. Stephen, paras. 24 ff.

applied to situations where the accused had a choice between his and the victim's life, not where such choice was non-existent, it being only a case of either death for one or death for both.<sup>317</sup> The true test seems thus to be if there was a moral choice and if this choice was proportionate. Law cannot compel the choice to die for the highest ethical principles.

As can be seen, this case raises most profound problems lying at the root of criminal law and of a philosophical nature (criminal law knows many of them).<sup>318</sup> It will not be surprising if the present commentator, being a civil lawyer, adheres to the position upheld by Judge Cassese. It may also be noted that the exception in the common law tradition is constantly narrowed and increasingly challenged. While respecting the profound ethical foundations upon which it rests, it seems that law (and particularly criminal law) cannot compel an individual to do what is reasonably impossible to be expected from everybody, i.e. to illuminate one's passage on earth by a heroic gesture. The law has to speak to the average man, not to the saint. In other words: criminal law requires less than morals. Thus, the legality of the killing may still be affirmed, but the author will be criminally excused (*entschuldigender Notstand*).

## XII. CONCLUSION

Through the first eleven substantive judgments rendered, the ad hoc Tribunals on the former Yugoslavia and Rwanda have already helped in affirming and developing the law on a series of points. How much international criminal law needed to be reshaped in order to evolve towards a homogenous and constructive body of law can be wholly appreciated only after a careful reading of the post-Second World War jurisprudence. These old judgments follow each other somewhat haphazardly, based often on municipal law or an amazing intermingling of international law and municipal law. They thereby split into a kaleidoscope of different shapes and tunes. Centralization of the judicial organ administering a branch of law and thus unification of the law itself has always corresponded to a progress in social evolution. The ad hoc Tribunals have thus paved the way for a single international criminal court.

As to the achievements of the Tribunals, three short aspects may be mentioned. First, there is the tendency (whose importance it is difficult to overestimate) to merge international and non-international armed conflicts into a single unit for the purposes of the applicable criminal law. This evolution will in turn retroact on the substantive law applicable. It will strive towards a single legal régime for armed conflicts centered in

<sup>317</sup> Ibid., para. 25.

<sup>318</sup> See e.g. the reflections on problems raised by the plank of Carneades, in A. Kaufmann, *Rechtsphilosophie*, 2nd edn. (Munich, 1997), p. 228.

the protection of the individual, not on distinctions related to sovereignty and the *domaine réservé*. To what extent this constitutes progress will be appreciated in the future. Secondly, one may underline the care with which the elements of the crimes were defined. This was a useful task to be performed since the law was often extremely uncertain on that point. Thirdly, on a more technical level, it is interesting to note the importance given to the principles of effectivity and teleological interpretation on several aspects.<sup>319</sup> The Tribunals also tend to take into account municipal law analogies and general principles of law, this being hardly surprising if one thinks about the many *lacunae* still present in international criminal law. This course is to be welcomed.

This long journey through the case-law of the Tribunals invites other long journeys: one may thus await with interest the case-law to come.<sup>320</sup>

<sup>319</sup> e.g. on the question of nationality in the grave breaches régime; the responsibility of the superior for his subordinates; the imputation of acts of the VRS to the FRY, etc.

<sup>320</sup> If two criticisms may be levied, it is first the often excessive length of the judgments. It is felt that the same could be said in less words, with a simplicity which, according to Ch. De Visscher, realizes 'une véritable économie de pensée et d'action [et] tend à produire un sentiment de certitude' (*Théories et réalités en droit international public*, 4th edn. (Paris, 1970), p. 388). Second, the French or Latin words which appear in the judgments (on the website) are often misspelled or otherwise wrong.