General Remarks – The Creation and Jurisdiction of the \textit{ad hoc} Tribunals

On 22 February 1993, the United Nations Security Council expressed its ‘grave alarm at continuing reports of widespread violations of international humanitarian law’ in the territory of the former Yugoslavia.\(^1\) Determined to put an end to such crimes, to bring peace and stability back to the region and with a view to punishing those responsible, the Security Council took the unprecedented step of setting up an international criminal tribunal pursuant to Chapter VII of the Charter of the United Nations. The Tribunal thus created was given the authority to prosecute and judge serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991. Grave breaches of the Geneva Conventions of 1949, other serious violations of the laws or customs of war, genocide, and crimes against humanity were all crimes which came within its jurisdiction. The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, or ICTY, was drafted to provide jurisdiction over any of the above categories of crimes committed anywhere on the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace, and territorial waters since 1991.\(^2\) And although the jurisdiction of the International Tribunal and that of domestic courts were to be concurrent, the former was given primacy over the latter.\(^3\)

At the time, it was hoped that the establishment of the Tribunal, and the punishment of such crimes, could contribute to the restoration of peace and stability in the region, all other measures having failed. Unfortunately, the establishment of the ICTY did not stem the flow of very serious violations of humanitarian law in the former Yugoslavia. Nor does it seem to have stopped it


\(^2\) See Article 8 and Article 1 of the ICTY Statute. The argument of the Defence in the \textit{Opđanić} case that the jurisdiction \textit{ratione temporis} of the ICTY did not extend to the events that took place in Kosovo in 1998 was rejected by the Trial Chamber and by the Appeals Chamber (see \textit{Milutinović} Kosovo Jurisdiction Decision). See also Šešelj Vojvodina Decision, paras 15 and 17 concerning Šešelj’s challenge to the \textit{ex post facto} nature of the Tribunal in relation to the crimes charged against him.

\(^3\) Article 9 of the ICTY Statute.
anywhere else, for that matter, least of all in Rwanda where, in 1994, atrocities on a scale not witnessed for half a century were carried out in the course of a few months. On 8 November 1994, the Security Council once again seized itself of the matter and decided to establish an international tribunal for the purpose of prosecuting persons responsible for genocide and other serious violations of humanitarian law in Rwanda in 1994. The Statute of the International Criminal Tribunal for Rwanda (ICTR) provides for a subject-matter jurisdiction which, apart from slight nuances, is essentially similar to that of the ICTY. Its jurisdiction ratione temporis and ratione loci is concerned with crimes committed in Rwanda or neighbouring states between 1 January 1994 and 31 December 1994. As had been the case with the ICTY, the Rwanda Tribunal was given primacy over domestic courts in relation to the crimes within its jurisdiction. Ratione personae, the jurisdiction of both Tribunals is limited to natural persons and excludes any official privileges or state immunities that such persons might otherwise have enjoyed before domestic courts (Articles 7(2) and 6(2) of the ICTY and ICTR Statutes). The individual criminal responsibility of any individual who was sufficiently involved in the commission of a statutory crime might be engaged if he 'directly' took part in the planning, instigating, ordering, committing, or otherwise aiding and abetting of any of those crimes (Articles 7(1) and 6(1) of the Statutes) or if he was the commander of those who committed such crimes (Articles 7(3) and 6(3) of the Statutes).  

4 There is a wealth of literature on the events in Rwanda. Only a few books are mentioned here as examples of the many publications on the subject: P. Gourewich, We Wish to Inform You that Tomorrow We Will Be Killed with Our Families (New York: Farrar, Straus & Giroux, 2000); G. Prunier, The Rwanda Crisis: History of a Genocide (New York: Columbia University Press, 1995); Y. Mukagama and A. Kanyamibwa, Les Béliers du silence (Kigali: Actes Sud, 2004).  

5 Security Council Resolution 955 (1994), UN Doc. S/RES/955 (8 November 1994). The resolution expresses the Security Council’s grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda.  

6 The Commission of Experts for Rwanda in its Final Report had suggested that the ICTY should simply expand its jurisdiction to include crimes committed in Rwanda (Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994), S/1994/1405 (3 December 1994); (Final Report of the Commission of Experts for Rwanda), par 179; Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), S/1994/1125 (1 October 1994). (Preliminary Report of the Commission of Experts for Rwanda), par 139). Although this solution was eventually rejected, and a distinct ad hoc Tribunal for Rwanda was set up, the two Tribunals are closely interconnected in various manners. For instance, the judges that make up the Appeals Chamber are the same in both Tribunals and, until September 2003, the Tribunals had a common Prosecutor.  

7 Article 7 of the ICTR Statute. Concerning the scope of the jurisdiction ratione temporis of the ICTR, see, however, Nahimana Trial Judgment, par 1044, where the Trial Chamber held that acts of conspiracy (to commit genocide) which had occurred prior to 1994, but which may be shown to have resulted in the commission of genocide in 1994, would come within the Tribunal’s jurisdiction.  

8 Article 7 of the ICTR Statute.  

9 See generally Part V below. For the purpose of this book, perpetrators and accused persons will generally be referred to in the masculine form. Traditionally, perpetrators of mass atrocities have been overwhelmingly male; two female accused (Bilajita Plavski at the ICTY and Pauline Nyiramasuhuko at the ICTR) have so far appeared before the ad hoc Tribunals.

2

Subject-Matter Jurisdiction and Applicable Law – Customary International Law and Treaty Law?

2.1 ICTY

The Statute of the Yugoslav Tribunal does not expressly provide for the body of law which the court is to apply to determine the scope of its jurisdiction ratione materiae and to define the crimes which come within that jurisdiction. In his Report to the Security Council accompanying the proposed Statute of the Tribunal, the Secretary-General of the United Nations had made it clear, however, that the Tribunal was expected to apply 'rules of international humanitarian law which are beyond any doubt part of customary law' when making that jurisdictional determination. In effect, judges in The Hague were told to satisfy

1 Report of the Secretary-General (ICTY), par 29.  
themselves that the crimes with which an accused had been charged were crimes under customary international law at the time when they were committed, that is, that the relevant acts were both recognized as criminal under customary international law and that they were sufficiently defined under that body of law. 3

Consistent with that general directive, the Appeals Chamber made it clear on several occasions that the subject-matter jurisdiction of the Tribunal needed to be based on firm foundations of customary law 4 and that Chambers of the ICTY were bound to apply, ratius materiare and ratius personam, customary international law. 6

The Tribunal only has jurisdiction over a listed crime [in the Statute] if that crime was recognized as such under customary international law at the time it was allegedly committed. The scope of the Tribunal's jurisdiction ratius materiare may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence qua custom at the time this crime was allegedly committed. 7

In other words, the International Tribunal for the former Yugoslavia does not have jurisdiction over violations of treaty law or violations of domestic law unless the [Security] Council was, for the first [and as far as anyone know, for the only] time, establishing as a binding enforcement measure a judicial organ, having the power to sentence individuals to imprisonment, it was thought prudent, in spite of temptation, not to use the occasion to advocate "progressive" interpretations, clarifications or additions, but rather to stick as much as possible to what was incontrovertible customary international law. At the time of the drafting of the ICTY Statute, Mr Larry Johnson was Principal Legal Officer, Office of the Legal Counsel, United Nations. 8

See Vasićović Trial Judgment, para 202 (if customary international law does not provide for a sufficiently precise definition of a crime listed in the Statute, the Trial Chamber would have no choice but to refrain from exercising its jurisdiction over it, regardless of the fact that the crime is listed as a punishable offence in the Statute. This is so because, to borrow the language of a US military tribunal in Nuremberg, anything contained in the statute of the court in excess of existing customary international law would be a usurpation of power and not of law) and Kordić and Čerkez Articles 2 and 3 Jurisdiction Decision, para 20 ("The Trial Chamber agrees that the principle of legality is the underlying principle that should be relied on to assess the subject-matter jurisdiction of the International Tribunal, and that the International Tribunal only has jurisdiction over offences that constituted crimes under customary international law at the time the alleged offences were committed."). See also R. Zaklin, Some Major Problems in the Drafting of the ICTY Statute, 2(2) Journal of International Criminal Justice 361, 363 (June 2004).

[See, in particular, Hadžiahmetović Command Responsibility Appeal Decision, para 55 (see also ibid., para 55, 44-46) and Vasićović Joint Criminal Enterprise Decision, para 9; Blažević Joint Criminal Enterprise, paras 110, 139, and 141.]

According to the Aleksandri jurisprudence, Trial Chambers are bound by the decisions of the Appeals Chamber (Aleksandri Joint Criminal Enterprise, para 113).

See generally, Hadžiahmetović Command Responsibility Appeal Decision, paras 12, 35, 44-46, and 55; Vasićović Joint Criminal Enterprise Decision, paras 9-10; Blažević Joint Criminal Enterprise, para 141. See also, concerning the definition of the crime of genocide, Krišto Joint Criminal Enterprise, para 224.

Vasićović Joint Criminal Enterprise Decision, para 9 (footnotes omitted). See also Kordić and Čerkez Articles 2 and 3 Jurisdiction, para 20: "The Trial Chamber agrees that the principle of legality is the underlying principle that should be relied on to assess the subject-matter jurisdiction of the International Tribunal, and that the International Tribunal only has jurisdiction over offences that constituted crimes under customary international law at the time the alleged offences were committed.

ICTY 7

those conventional or national prohibitions have additionally become part of customary international law. 9 In a number of obiter dicta, however, Chambers of the Tribunal had hinted at— but had never actually acted upon—the possibility that it could, under certain circumstances, have recourse to treaty law (in particular, to the Geneva Conventions and their Additional Protocols) and could base a conviction upon such a conventional, rather than on a customary, basis. 9

Only on one occasion (in the Galic Judgment of 5 December 2003) has a Trial Chamber relied upon a treaty to anchor its jurisdiction over a particular type of conduct. In this case, Trial Chamber I convicted Stanislav Galic for, inter alia, terror and attacks on civilians, based on Additional Protocol I of the Geneva Conventions. 10 In so doing, the Trial Chamber not only set aside the direction of the Secretary-General of the United Nations that the Tribunal should only apply those rules which are beyond any doubt part of customary law, but it also discarded the binding jurisprudence of the Appeals Chamber mentioned above which requires that its jurisdiction be grounded on firm foundations of customary law. 11

Theoretically, a treaty could very well provide, explicitly or even perhaps implicitly, that a particular conduct should be regarded as criminal. The Statute of the International Criminal Court is a perfect example of the availability of such a mechanism. It is also true that a treaty provision might be self-executing and might apply not only between state parties but also directly to the individuals

9 A good illustration of that point may be found in the Strogar Appeals Chamber decision of 22 November 2002 in which the Appeals Chamber made it clear that the basis upon which the accused had been charged with 'attacks on civilians', and could be convicted thereupon, was not the provisions of the Additional Protocols to the Geneva Conventions which provide for the prohibition against attacks on civilians and civilian objects, but consisted of these principles embedded in those provisions as found in customary law (Strogar Jurisdiction Decision, paras 10, 13, and 18). See also Vasićović Trial Judgment, para 198, which provides that 'Each Trial Chamber is thus obliged to ensure that the law which it applies to a given criminal offence is indeed customary.' See also Cekuolić Appeal, para 170, where the Appeals Chamber said that the Tribunal has jurisdiction over crimes which were already subject to individual criminal responsibility prior to its establishment. See also, Blažević Joint Criminal Enterprise, paras 110, 139, and 141 ("While the Statute of the International Tribunal lists offences over which the International Tribunal has jurisdiction, the Tribunal may enter convictions only where it is satisfied that the offence is prescribed under customary international law at the time of its commission," where the Appeals Chamber reiterated that its jurisdiction ratius personam depends on the consent of customary international law at the time the acts in question were allegedly committed).

10 Most famously, in an obiter dictum, the Appeals Chamber in Tadić held that the International Tribunal is authorized to apply, in addition to customary international law, any treaty which (i) was unquestioningly binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law as are most customary rules of international humanitarian law (Tadić Jurisdiction Decision, para 143). It added that: 'We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute' (ibid., para 143). See also, e.g., Blažević Trial Judgment, para 101; see Senušić Trial Judgment, para 533; references quoted therein: Kajyšević and Razzouk Trial Judgments, paras 115-117; and Čižković Trial Judgment, para 206.

11 Hadžiahmetović Command Responsibility Appeal Decision, para 55.
subject-matter jurisdiction

cconcerned. Even more explicitly, it may be that the state parties to the treaty have
enacted domestic legislation criminalizing the conduct in the relevant treaty, as
has been the case in numerous state parties to the International Criminal Court. 12

The problem as far as the ad hoc Tribunals are concerned is that, with the excep-
tion perhaps of the Genocide Convention, none of the instruments which they
could apply in relation to their subject-matter jurisdiction may be said to provide
for international crimes. First, there is no international treaty which could
arguably be said to provide for the criminalization of crimes against humanity.
Concerning war crimes, it must be noted that neither the Geneva Conventions,
nor their Additional Protocols may serve – nor were they even meant to serve – as
a basis for a criminal conviction. 13 As noted by the International Committee of the
Red Cross in its Commentary to the Geneva Conventions, ‘[a]ll international
Conventions, including this one [i.e. Geneva Convention IV], are primarily
the affair of Governments. Governments discuss them and sign them, and it is based
upon Governments that the duty of applying them devolves.’ 14 The Geneva
Conventions and their Additional Protocols are international treaties and as such,
in principle, are binding on states only. 15 Even if it were accepted that some of
their provisions might be self-executing and would therefore apply to individuals
qua treaty, none of those provisions, not even their grave breaches sections, were
ever meant to be regarded per se as an international criminal code the breach of
which could entail individual criminal responsibility directly under the treaty
regime. When it had been suggested by the Soviet delegate during the negotiation
of the Geneva Conventions to replace the expression ‘breaches’ in the ‘grave
breaches’ phrase with the expression ‘crimes’, it was pointed out to him that:

an act only becomes a crime when this act is made punishable by a penal law. The
Conference is not making international penal law but is undertaking to insert in the
national penal laws certain acts enumerated as grave breaches of the Convention, which
will become crimes when they have been inserted in the national penal laws. 16

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12 See, for example, the amendments to the Australian Criminal Code Act 1995 (Cth) made by
the International Criminal Court (Consequential Amendments) Act 2002 (Cth), which added
defences under the categories of genocide, crimes against humanity, and war crimes to the Australian
Criminal Code.

13 At the end of the negotiations, all delegates were reminded that the Diplomatic Conference
which led to the adoption of the Conventions ‘is not here to work out international penal law. Bodies
for none competent than are we have tried to do it for years’ (Fourth Report drawn up by the Special
Committee of the Joint Committee, 12 July 1949, Final Record of Diplomatic Conference II, Section B, p 115).

14 See J. Pictor (gen. ed.), Commentary, Geneva Convention Relative to the Protection of Civilian

15 The Preamble of Additional Protocol I makes it clear, for instance, that this instrument is
directed to and binding upon the High Contracting Parties, i.e. states parties to this treaty.

According to the Commentary of the ICRC, ‘[i]t is unequivocally refers to the States for which
these treaties are in force in accordance with their relevant provisions’ C. Pilloud et al. (eds.),
Commentary on the Additional Protocols of Conventions 8 June 1977 to the Geneva of 12 August 1949
(Geneva: ICRC, 1987), (‘ICRC Commentary to the Additional Protocols’).

16 Fourth Report drawn up by the Special Committee of the Joint Committee, 12 July 1949, Final
Record of Diplomatic Conference II, Section B, p 115.

17 The distinction between the illegality and the criminal nature of an act under international law
was raised by defendant Müller in the Belgian case Prosecutor v. Strach et collin but it was rejected
by the Belgian Court of Cassation without motivation (Strach et al., Belgium, Court of
Cassation, decision of 22 July 1949, in Processe hoge, 1949, 568–563. Summary in English in
Annual Digest 1949, 408).

18 Van den Berk Judgment, 1545, p 77. See also Advance Trial Judgment, par 489.

19 See, e.g., ibid., footnote 1210 (Although the ICC Statute does not necessarily represent the present
status of international customary law, it is a useful instrument in continuing the content of customary
international law. These provisions obviously do not necessarily indicate what the status of the relevant
law was at the time relevant to this case. However, they do provide some evidence of state opinion as to the
relevant customary international law at the time at which the recommendations were adopted;:
Formulering Trial Judgment, par 227; Tadić Appeal Judgment, par 223.
however, some of the findings of the ad hoc Tribunals as to the state of customary law might already be outdated. Findings of the ad hoc Tribunals that a particular principle or a particular crime (or elements of a crime) is or is not part of customary international law must therefore be considered in light of the timeframe in relation to which such findings were made.

2.2 ICTR

On the face of it, the subject-matter jurisdiction of the ICTR appears to have been defined more expansively than that of the ICTY. In his Report, the Secretary-General of the United Nations wrote that the Security Council had drawn the subject-matter jurisdiction of the Rwanda Tribunal more broadly than it had for the ICTY by including not only violations of customary international law but also certain violations of treaties.20

The Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed individual criminal responsibility of the perpetrator of the crime. Article 4 of the ICTR statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law [ . . . ].

It is not totally clear whether that position intentionally departed from that adopted by the ICTY or whether it was, as one author has suggested, 'an unintentional distinction'.21 Based on the Secretary-General's statement, however, a number of Trial Chambers have suggested that the ICTR's jurisdiction ratione materiae was defined more broadly than that of the ICTY and that the Rwanda Tribunal was therefore empowered to apply both customary international law and treaty law, insofar as it was binding in Rwanda at the relevant time.22 Most of those Chambers, however, when defining a particular crime or when determining its content did not limit the scope of their considerations to those treaties on which they claimed they could rely to base their jurisdiction. The Chambers often failed to make it clear what body of law they were in fact applying to determine the scope of their jurisdiction.


See e.g. Akayesu Trial Judgment, paras 606–607; Kagiribwami and Naturalisation Trial Judgment, paras 156–158, 597–598; Musango Trial Judgment, para 242; Semacs Trial Judgment, para 353.

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By contrast, on those few occasions where it discussed that issue, the Appeals Chamber has hinted that the ICTR too should be applying customary law to its jurisdiction ratione materiae. In the Celebhid case, for instance, the Appeals Chamber pointed out that the Security Council, when establishing the ICTR, 'was not creating new law but was inter alia codifying existing customary rules for the purposes of the jurisdiction of the ICTR'.23 Also, the Appeals Chamber of the ICTR made it clear that it would be both 'unnecessary and unfair' to hold an accused person responsible in relation to a conduct which was not clearly defined under international criminal law.24 Such definitions might be found in certain treaties, but very few would be of sufficient clarity.

There are, in fact, good reasons why the ICTR should also be applying custom: first, treaties are, in principle, binding upon states, not individuals, and the ICTR must determine what rules are applicable to individuals, not states. As noted above, the fact that a treaty might have been breached is not yet sufficient to conclude that an international crime has been committed. Even if the ICTR were permitted to rely upon treaties to determine the contours of a particular prohibited conduct, it would still have to establish that the violation of that provision entails individual criminal responsibility under international law. And as noted above, at the time relevant to the Tribunal's jurisdiction, and insofar as Rwanda is concerned, there was no treaty applicable that provided for the criminalization of either war crimes or crimes against humanity. Secondly, where treaties regulating certain conduct do exist (as in the case of the Geneva Conventions of 1949), they might be so outdated in some respects that their application in the circumstances of contemporary conflicts would sometimes be all but impossible. In contrast, by relying upon customary international law, judges are able to take into consideration the gradual evolution of contemporary laws of armed conflict without departing from the politically potent legalism necessary to the legitimacy of the Tribunals.23 Thirdly, treaties might exist in relation to some, but not all of the crimes provided for in the Statute of the ICTR, and where no treaty exists in relation to a particular crime, the Tribunal would generally have no choice but to rely on customary law. Thus, for instance, there is no convention relating to the definition and elements of crimes against humanity and the ICTR may turn nowhere other than custom for its definitions. Finally, applying customary international law at the ICTR would promote a degree of homogeneity in the jurisprudence of both ad hoc Tribunals in relation to the definitions of international crimes and would prevent the injustice that might result from two ICTR Trial Chambers which could apply different bodies of law (sometimes treaties, sometimes custom) to different accused who have been charged with the same crimes.

Celebhid Appeal Judgment, para 170.

Kagiribwami Appeal Judgment, para 34.

3

Identifying Customary International Law
and the Role of Judges in the
Customary Process

Penetrating ‘les ténèbres du droit coutumier’¹ and identifying customary rules in
the field of international criminal law is a truly daunting task, particularly as most
instances of state practice will occur ‘in juridical outer space’² and out of judicial
sight:³

When attempting to ascertain State practice with a view to establishing the existence of a
customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual
behaviour of the troops in the field for the purpose of establishing whether they in fact
comply with, or disregard, certain standards of behaviour. This examination is rendered
extremely difficult by the fact that not only is access to the theatre of military operations
normally refused to independent observers (often even to the ICRC) but information on
the actual conduct of hostilities is withheld by the parties to the conflict; what is worse,
often recourse is had to misinformation with a view to misleading the enemy as well as
public opinion and foreign Governments. In appraising the formation of customary rules
or general principles one should therefore be aware that, on account of the inherent nature
of this subject-matter, reliance must primarily be placed on such elements as official
pronouncements of States, military manuals and judicial decisions.

Locating opinio juris will be no easier than identifying state practice. Even
where the Tribunal is satisfied that a particular prohibition exists under customary
international law, it must still establish that this prohibition applies to individuals
(and not only to states), that the standard that it sets out is sufficiently foreseeable
and accessible to meet the requirements of the principle of legality, and that
the breach of that prohibition entails individual criminal responsibility under
customary international law.⁴

¹ V. Pella, La Guerre-Crime et les criminels de guerre: Réflexions sur la justice pénale internationale
³ Tadić Jurisdiction Decision, par 99.
⁴ In the jurisprudence of the Tribunals, opinio juris systematically plays the dominant role (see,
e.g. Kajoohevi Trial Judgment, par 527). State practice often operates more as a way of explaining or
justifying the finding of the court that a norm is indeed customary, rather than for that practice to
constitute the rule. Customary rules in international criminal law have therefore emerged even where
Wars have traditionally been unique opportunities for all sorts of egregious criminal conduct as they foster an environment in which 'the powerful do what they will, and the poor suffer what they must'.1 Whilst fear and blind hatred for the enemy give some appearance of legitimacy to the use of force as a tool of self-preservation, the relevancy of the law as a traditional inhibitor of criminal conduct appears to diminish with every instance of abuse and atrocities. The laws and customs of war are an attempt to recast the use of indiscriminate violence as war in its true aberrational character, by creating a sufficiently potent disincetive upon that 'perpetual temptation to behave badly' at war.2 The extent to which the laws of war will be successful in doing so in practice depends not only on the standards set by those rules, but primarily on the consequences that an infringement is likely to trigger for the perpetrator.

The creation of the *ad hoc* Tribunals is an important advance in both respects: insofar as their Statutes recognise minimum standards of conduct at war which, if breached, attract penal sanctions and also set up a judicial mechanism whereby those standards may be enforced and the guilty punished. The recognition in the Tribunals' Statutes that certain serious violations of the laws of war entail individual criminal responsibility, and the provision of a clear enforcement mechanism for the trial and punishment of those crimes, gives new potency to the standards. The fact that the United Nations Tribunals were given jurisdiction over various categories of serious violations of the laws or customs of war gives meaning to the idea that such violations as well as their punishment are matters of universal interest and concern.

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War Crimes in the Statutes of the Tribunals

‘War crimes’, as serious violations of the laws or customs of war are commonly known, are sometimes understood as involving a different, intrinsically less serious, often unplanned, sort of criminality than either crimes against humanity or genocide. In many ways, war crimes are regarded as the most inevitable criminal consequence of any armed conflict. A war crime, in its technical, legalistic, sense is, however, both more restricted and more complex than this popular perception would have it. A war crime, for the purpose of the ad hoc Tribunals, consists in a serious violation of the laws or customs of war entailing individual criminal responsibility. Within this general framework, the Statutes of the ad hoc Tribunals contain a list of war crimes over which the Tribunals may in principle exercise their jurisdictions. Whereas the subject-matter jurisdiction of both ad hoc Tribunals is almost identical in relation to crimes against humanity and genocide, their respective jurisdictional framework has been cast quite differently in relation to war crimes.

5.1 War crimes in the Statute of the ICTY

The ICTY Statute contains two articles – Article 2 and Article 3 – which deal specifically with war crimes. Article 2 is concerned solely with a specific category of war crimes, namely, ‘grave breaches of the Geneva Conventions of 1949’, whilst Article 3 covers other serious violations of the laws or customs of war:

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) willful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) willfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

The jurisprudence of the Tribunal has established a clear ‘division of labour’3 between Articles 2 and 3 of the ICTY Statute. Article 2 is only concerned with those acts and omissions which may be said to constitute ‘grave breaches’ of the Geneva Conventions. Article 3 of the Statute has been said to constitute a general and residual clause covering all serious violations of international humanitarian law not covered by the other articles of the Statute.4 In particular those which do not fall within Article 2 of the Statute (‘lest [Article 2] should become superfluous’).5 That, in turn, means that whenever an accused person is being charged cumulatively under both articles of the Statute in relation to the same conduct, and if the conditions and requirements of Article 2 are met, he or she may not additionally be found guilty under Article 3 of the Statute.6 The list of offences enumerated in Article 3 are, as the language makes clear, illustrative and not exhaustive,7 and it may cover other serious violations of international humanitarian law not explicitly listed in the Statute, provided they are recognized by customary law and do entail individual criminal responsibility in case of breach.8

According to the Appeals Chamber, the role and function of Article 3 of the ICTY Statute is to fill those gaps which the legislator, the Security Council, may have left in the text of the Statute, but which were intended to come within its terms:9 Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.10

When interpreted in such a way, the Appeals Chamber concluded, Article 3 fully realizes the primary purpose of the establishment of the International

3 Čelebić Appeal Judgment, par 137, by reference to Čelebić Trial Judgment, par 297.
4 See, inter alia, Tadić Jurisdiction Decision, par 89–91; and Kunđžić and Cerkez Articles 2 and 3 Jurisdiction Decision, paras 17–23; Čelebić Appeal Judgment, para 125; Kunđžić Appeal Judgment, par 68; Tadić Trial Judgment, par 559; Blažič Trial Judgment, par 168; Jelšečki Trial Judgment, par 55.
5 Tadić Jurisdiction Decision, par 87.
6 See above, chapter 23. See also Article 2 is more specific than common Article 3 (Čelebić Appeal Judgment, par 420).
7 See below, chapter 23. See also Tadić Jurisdiction Decision, par 67.
9 Tadić Jurisdiction Decision, par 91.
Tribunal 'not [to] leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed'.

In practice, Article 3 of the ICTY Statute has been interpreted to criminalize several categories of war crimes: (i) serious violations of the Hague law applicable in international conflicts and/or internal conflicts; (ii) serious infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches' by those Conventions; (iii) serious violations of common Article 3 of the Geneva Conventions and other customary rules applicable to internal conflicts; and (iv) serious violations of certain provisions of Additional Protocols I and II to the Geneva Conventions. Also, grave breaches of Additional Protocol I have been held to fall under Article 3 of the ICTY Statute, rather than under Article 2.

Articles 2 and 3 of the ICTY Statute are not, despite their areas of overlap, purely interchangeable provisions, whereby the latter only becomes relevant whenever the former is not. Whereas Article 2 of the Statute may only apply in the context of an international armed conflict (or in the case of a state of occupation), Article 3 applies to 'crimes perpetrated in the course of both inter-state wars and internal strife'. Furthermore, Article 2 only applies to 'protected persons' and 'protected properties' (see below) and is limited to grave breaches of 1949 Geneva Conventions. By contrast, Article 3 projects a broader group of individuals and interests. In particular, and as noted above, it encompasses violations of both Hague as well as of Geneva law, including violations of common Article 3, and other serious violations of international humanitarian law.

10. Tadić Jurisdiction Decision, par. 92.
11. Ibid., par. 89; confirmed in Čelebići Appeal Judgment, paras 125 and 136. See also, for instance, Natale Trial Judgment, par. 401; Kostić and Gacić, Articles 2 and 3 Jurisdiction Decision, par. 22.
12. See Martić Rule 61 Decision, par. 8. Procedural undertakes under Rule 61 of the Rules of Procedure and Evidence serve as a mechanism by which the International Tribunal may react to the failure of the accused to appear voluntarily and to the failure to execute the warrants issued against them. It permits the charges in the indictment and the supporting material to be publicly exposed and allows the victims to use this forum to have their voices heard. Rule 61 proceedings are not a trial in absentia, as they involve no finding of guilt and no verdict, and they do not deprive the accused of his right to contest the charges against him. Given the absence of the accused, the 'subpoena' which cause out of such proceedings is to be taken with caution, and it is exceptional that it is ever cited by any Chamber of either ad hoc Tribunal as precedent.
15. Čelebići Appeal Judgment, para 134; Kostić Appeal Judgment, paras 68.

5.2 War crimes in the Statute of the ICTR

The regulation of war crimes as provided in the Statute of the Rwanda Tribunal differs markedly from the regime set out above. Article 4 of the ICTR Statute provides as follows:

Article 4
Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health or physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) Collective punishments;
(c) Taking of hostages;
(d) Acts of terrorism;
(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) Pillage;
(g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
(h) Threats to commit any of the foregoing acts.

The scope of the ICTR's subject-matter jurisdiction in relation to war crimes is narrower than that of the ICTY in at least two respects. First, it is limited, from a substantive point of view, to serious violations of common Article 3 of the Geneva Conventions and serious violations of Additional Protocol II. The more limited jurisdictional reach of the ICTR in relation to war crimes reflects the view that, for the purpose of the Rwanda Tribunal, the armed conflict that took place in Rwanda at the time should be regarded as an 'internal' one. The list of war crimes within its jurisdiction ratione materiae was tailored accordingly, limiting them to those which constitute serious infringements of rules and provisions applying in the context of internal armed conflicts.

As a result, certain conduct which may be regarded as criminal under the ICTY Statute would fall outside of the jurisdiction of the ICTR, including conduct that

16. See Secretary-General Report (ICTR), par. 11.
would constitute a grave breach of the Geneva Conventions (Article 2 of the ICTY Statute), unless they also constitute a serious violation of common Article 3 or Additional Protocol II. Secondly, the Statute of the ICTR does not appear to cover any violations of Hague law, except for those Hague rules which have made their way into Additional Protocol II. As pointed out above, and by contrast, Article 3 of the ICTY Statute extends the jurisdiction of the ICTY to a number of serious violations of both Geneva and Hague law.

On the other hand, the jurisdictional scope of the ICTR in relation to war crimes is broader than that of the ICTY in at least one, though minor, respect: Article 4(h) of the ICTR Statute provides for the criminalization of 'threats' to commit any of the listed offences, whereas the ICTY Statute does not do so (at least not explicitly). Perhaps unsurprisingly, given the volume of crimes actually committed during events in Rwanda and the large number of potential accused, the possibility to charge an accused with a mere threat to commit such a crime has not yet been used by the ICTR prosecutor and may in fact never be.

The narrower jurisdictional focus of the Rwanda Tribunal in relation to war crimes appears not only to be the result of the different nature of the armed conflict in Rwanda as opposed to the former Yugoslavia, but also to be a reflection of the fact that the criminal activity in each context revolved around different cores: an attempt to exterminate a whole group in the case of Rwanda and a violent ethnic partition of a country in the Yugoslav context. In turn, the relevancy of war crimes as a criminal idiom capable of labelling the sort of crimes committed in Rwanda appears much less potent than it may be in the Yugoslav context.²

As is clear from the text of the Statute of the ICTY, the list of war crimes over which the Tribunal may exercise jurisdiction is not exhaustive and the ICTY has in fact exercised jurisdiction over a number of serious violations of the laws of war which are not expressly mentioned in their Statutes where those violations satisfied a number of substantive and jurisdictional requirements set by the court. The ICTR, by contrast, would appear to have limited the scope of its war crimes jurisdiction to those expressly provided in the statute.

² It is quite significant in that respect to note that, until the Judgment of the Appeals Chamber in Rutaganda (26 May 2003), no single accused had been found guilty of war crimes at the ICTR. Equally revealing, perhaps, is the fact that this first conviction for war crimes at the ICTR was imposed, not by any Arusha-based Trial Chamber, but by the Hague-based Appeals Chamber.

6

Chapeau Elements of War Crimes

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6.1 General remarks

The laws or customs of war may be defined generally as the 'rules of international law with which belligerents have customarily, or by special conventions, agreed to comply in case of war.'¹ The content of that body of rules is not static, 'but by continual adaptation follows the needs of a changing world.'² so that the determination of what may constitute a war crime (or a serious violation of the laws or customs of war) will depend on the state of the laws of war at the time when that determination is made.³

A 'war crime' may in turn be defined as a serious violation of the laws or customs of war which entails individual criminal responsibility under international law.⁴

¹ History of the United Nations War Crimes Commission and the Development of the Laws of War, compiled by the United Nations War Crimes Commission (London: His Majesty's Stationery Office, 1948) ('The War Crimes Commission'), p. 24. In ex parte Quirin, the law of war was said to include that part of the law of nations which prescribes for the conduct of war the rules, rights and duties of enemy nations and of enemy individuals ('Ex parte Quirin', US Supreme Court, Judgment of 31 July 1942, 317 U.S. 1, 27–28 (also in 17 AILC, 457–485 and 63 S.Ct. 87 L.Ed.3 (1942))).
² IMT Judgment, p. 221.
⁴ In 1942, Professor Lauterpacht as representative of the Commission for Penal Reconstruction and Development, defined war crimes as follows: 'War crimes may properly be defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of