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From State to Individual: Evolution and Future Challenges of the Transposition of International Humanitarian Law into International Criminal Trials Against Individuals

Philipp Ambach[*]

11.1. Introduction

One of the core crimes common to all statutes of modern international criminal courts and tribunals is war crimes. This crime, intrinsically linked to the parties' conduct during wartime, has its origin in most relevant part in legal texts and conventions of the twentieth century. The Convention respecting the Laws and Customs of War on Land and its Annex, the Regulations concerning the Laws and Customs of War on Land of 18 October 1907 ('Hague Regulations'), the four Geneva Conventions of 1949 and their 1977 Additional Protocols contain the constitutive elements of modern war crimes provisions in the statutes of, most prominently, the United Nation's ('UN') international *ad hoc* tribunals for the former Yugoslavia and for Rwanda, the Special Court for Sierra Leone ('SCSL'), the Extraordinary Chambers in the Courts of Cambodia ('ECCC') and, most comprehensively, the International Criminal Court ('ICC').

These international conventions set out the applicable law during armed conflict (*ius in bello*) and more precisely define the permissible means and methods of warfare and the protection of persons not or no longer taking part in hostilities. These treaties were exclusively addressed at states, creating certain obligations and responsibilities upon them alone. However, these conventions also provided the historical and conceptual

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origin for those provisions that describe criminal conduct leading to *individual* criminal responsibility under international law in international and non-international armed conflict.

This chapter analyses how the body of norms in the field of international humanitarian law, as it developed in the late nineteenth and twentieth centuries, has been transposed into the context of individual criminal responsibility before international criminal courts and tribunals for the most serious violations of international humanitarian law. This transposition has demanded – and continues to do so – a great deal of courage and foresight by those who apply the law in order to properly map and define the crimes, mindful of the overarching objective to regulate conduct in war and protect those in armed conflict that need protection most dearly.

The chapter examines how central provisions on serious violations of international humanitarian law, singled out in the Geneva Conventions as well as their Additional Protocol I of 1977 as "grave breaches",[1] have been fitted into the notion of war crimes in the *ad hoc* international courts and tribunals as well as the ICC, alongside a large body of provisions under the law and customs of war, as well as in non-international armed conflict. The discussion outlines the conceptual measures that both the drafters of the statutes and the judges applying these provisions have taken to transpose the foundational elements of grave breaches of international humanitarian law to the strict legal confines of a war crime under international law engendering individual criminal responsibility.

It is argued that it took bold and almost revolutionary steps in judicial law-finding on two main occasions during the twentieth century to first make the law of war crimes a reality and subsequently to extend it to the context of civil war. Having examined these steps, the chapter concludes with a brief assessment of whether, and if so how, the ICC and its jurisprudence can be instrumental in the enforcement of international hu-

[1] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Art. 50 ('Geneva Convention I'); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, Art. 51 ('Geneva Convention II'); Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Art. 130 ('Geneva Convention III'); Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Art. 147 ('Geneva Convention IV'); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Arts. 11 and 85 ('Additional Protocol I').

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manitarian law in our times, where the rapid change of symmetries, methods and means of warfare poses a constant threat to the guarantee of the rule of law in armed conflict.

11.2. Brief History of International Humanitarian Law

11.2.1. General Origins

War crimes are inseparably linked to international humanitarian law.[2] While most of the underlying offences are also covered as ordinary criminal offences under national law, it is the link to an armed conflict that elevates them to international crimes. Prohibitions under international humanitarian law provide the exclusive substantive source for a war crime since only a violation of the law applicable in armed conflict can constitute such a crime.[3] This nexus to armed conflict also provides the essential difference to other international crimes such as the crime of genocide and crimes against humanity – these being independent crimes under international law not requiring a nexus to armed conflict.[4]

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[2] International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 87 ('Tadić case') (https://www.legal-tools.org/doc/866e17/); Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2014, para. 1030, p. 392.

[3] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, pp. 572–73; Tadić case, Decision on Jurisdiction, paras. 94, 143, *ibid.*

[4] See Michael Bothe, "War Crimes", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, Oxford University Press, Oxford, 2002, p. 387. While crimes against humanity originally could only be committed "in execution of or in connection with" a war crime or crime against peace, see Art. 6(c) of the 1946 Charter of the International Military Tribunal at Nuremberg ('IMT Charter') (https://www.legal-tools.org/doc/64ffdd/), international customary law does no longer require a nexus to armed conflict; Extraordinary Chambers in the Courts of Cambodia ('ECCC'), *Co-Prosecutors v. Nuon Chea and Khieu Samphan*, Trial Chamber, Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement From the Definition of Crimes Against Humanity, 002/19-09-2007/ECCC/TC, 26 October 2011, para. 10 ff., holding that the nexus requirement was no longer part of the material elements of the crime in 1975, *id.*, para. 33 ('Nuon and Khieu case') (https://www.legal-tools.org/doc/01ab87/); Tadić case, Decision on Jurisdiction, para. 140, see *supra* note 2. The nexus requirement in the ICTY Statute is a mere jurisdictional element of the crime; see United Nations Security Council resolution 808 (1993), adopted on 22 February 1993, UN doc. S/RES/808 (1993), Art. 5 ('ICTY Statute'); ICTY, *Prosecutor v. Duško Tadić,* Appeals Chamber, Judgment, IT-94-1-A, 15 July 1999, para.

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Essentially, for an individual's conduct to amount to a war crime, two prongs need to be established:

(a) the conduct needs to be a violation of international humanitarian law; and

(b) the violation needs to generate individual criminal responsibility under international treaty or customary law.[5]

International humanitarian law refers to a set of rules that seek to limit the effects of armed conflict by protecting persons who are not or no longer participating in hostilities, on the one hand, and by restricting and regulating the means and methods of warfare available to the warring parties, on the other.[6]

Certain conduct in armed hostilities was already forbidden in ancient times. The Old Testament contained a prohibition on killing prisoners of war.[7] Laws in ancient India outlawed the use of certain weapons and the killing of civilians and combatants who have surrendered themselves or who are *hors de combat*.[8] Islamic law contained provisions protecting civilians during armed conflict and prohibiting excessive and wanton destruction of property. In ancient Greece and under the Roman Empire there were a number of rules regulating armed hostilities.[9] Also

249 ('Tadić case') (https://www.legal-tools.org/doc/8efc3a/); ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Appeals Chamber, Judgment, IT-96-23 and IT-96-23/1-A, 12 June 2002, para. 83 ('Kunarac case') (https://www.legal-tools.org/doc/029a09/); International Criminal Tribunal for Rwanda ('ICTR'), *Prosecutor v. Laurent Semanza*, Appeals Chamber, Judgment, ICTR-97-20-A, 20 May 2005, para. 269 (https://www.legal-tools.org/doc/a686fd/).

5 Henckaerts and Doswald-Beck, 2005, p. 572–73, see *supra* note 3; Tadić case, Decision on Jurisdiction, paras. 94, 143, see *supra* note 2. See also Michael Cottier, "Article 8(2)(b)(viii)", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., C.H. Beck, Hart, Nomos, Munich, 2008, p. 275.

6 Mary Ellen O'Connell, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, paras. 115 ff.

7 2 Kings 6: 21–23 (King James' version).

8 Patrick Olivelle, *Manu's Code of Law: A Critical Edition and Translation of the Mānava-Dharmaśāstra*, Oxford University Press, Oxford, 2005, ch. 7, verses 90–92; Nagendra Singh, "Armed Conflicts and Humanitarian Laws of Ancient India", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles*, Kluwer Law International, The Hague, 1985, pp. 531–36.

9 O'Connell, 2013, para. 107, see *supra* note 6; see also Werle and Jessberger, 2014, paras. 1032–34, see *supra* note 2.

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through the Middle Ages, with Europe being an example, certain means and methods of warfare were prohibited. Codes of conduct in hostilities among knights applied to various forms of conflict.[10] There are many examples of similar rules in other cultures around the world.[11]

The Age of Enlightenment formalised warfare to the extent that war became an official matter between states and their armies,[12] but it was not until the second half of the nineteenth century that the first significant steps towards a more comprehensive codification of law governing armed conflict were taken. A national, albeit historically significant document in this regard was the so-called Lieber Code of 1863. Drafted by the German-American law professor Francis Lieber on the order of President Abraham Lincoln and intended for the armed forces of the United States during the American Civil War, the Lieber Code contained rules governing how soldiers should conduct themselves in wartime and prohibited certain means and methods of warfare. In particular, it required the humane treatment of civilians in the areas in which armed conflict was taking place, and generally forbade the execution of prisoners of war ("no quarter").[13] While the Lieber Code's applicability was confined to the territory of the United States, it had an inspirational effect beyond its borders, strongly influencing the further codification of the laws of war and the adoption of similar national codes by other states. In addition, it sparked initiatives at the international level: in 1868, a number of mostly European states, Russia and the Ottoman Empire issued the Saint Petersburg Declaration,[14] marking the first formal international agreement pro-

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[10] *Ibid.*, Werle and Jessberger, para. 1034, see *supra* note 2.

[11] O'Connell, 2013, paras. 107 ff., see *supra* note 6.

[12] Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed., Manchester University Press, Manchester, 2008, pp. 35 ff.

[13] General Orders No. 100: Instructions for the Government of Armies of the United States in the Field, promulgated on 24 April 1863 ('Lieber Code'), printed in Dietrich Schindler and Jiří Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff, Dordrecht, 1988, pp. 3–23. See, however, Art. 60, second sentence, containing an exception to the rule: "No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners". This exception was subsequently dropped in more modern codifications of the rule.

[14] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November/11 December 1868 ('Saint Petersburg Declaration'), reprinted in Schindler and Toman, 1988, pp. 102 ff., see *supra* note 13.

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hibiting the use of certain weapons in war.[15] Of note is the fact that states for the first time formally agreed "that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy" and that the employment of arms "which uselessly aggravate the sufferings of disabled men, or render their death inevitable" would exceed this purpose and "be contrary to the laws of humanity".[16]

11.2.2. The Birth of Geneva and Hague Law

Today's war crimes can be subdivided along two main axes: the first distinguishes between international and non-international armed conflict;[17] the second distinguishes between law protecting persons not or no longer taking active part in hostilities, on the one hand, and rules prohibiting certain methods and means of warfare, on the other. The development and sources of these latter strands of law are briefly outlined, followed by a discussion of their application in light of the character of the armed conflict.

11.2.2.1. The Law of The Hague

Following earlier efforts to find common elements for an international convention on the laws of war in Saint Petersburg in 1868 as well as during the Brussels Conference in 1874,[18] both greatly inspired by the provisions of the Lieber Code, the conferences in The Hague in 1899 and 1907

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[15] The Declaration confirms the customary rule according to which the use of arms, projectiles and material of a nature to cause unnecessary suffering is prohibited; International Committee of the Red Cross ('ICRC'), Treaties and States Parties to Such Treaties: Introduction to the Saint Petersburg Declaration.

[16] Saint Petersburg Declaration, see *supra* note 14.

[17] See ICC Statute, Art. 8; while Art. 8(2)(a) and (b) covers crimes committed in international armed conflicts, the less detailed sections (c) and (e) list war crimes applicable in non-international armed conflict; Rome Statute of the International Criminal Court, Entered into Force 1 July 2002 ('ICC Statute'). This distinction would, however, appear to be losing significance due to an increasing convergence in the bodies of law applicable in each conflict. See Cottier, 2008, para. 2, *supra* note 5; Werle and Jessberger, 2014, paras. 1071, 1076, *supra* note 2.

[18] The Project of an International Declaration concerning the Laws and Customs of War of 27 August 1874 was, however, never ratified since not all the 15 European states participating in the Brussels Conference were willing to accept it as a binding convention. See the text in Schindler and Toman, 1988, pp. 22–34, *supra* note 13.

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brought those initiatives to a historic conclusion. At these conferences, states set a new international standard for the protection of soldiers and the general conduct in war, laid down in the Regulations concerning the Laws and Customs of War on Land ('Hague Regulations'). These legal texts were attached to the Hague Conventions on war on land of 1899 and 1907.[19] The Hague Regulations comprehensively set out minimum rights of prisoners of war. They also established the fundamental principle that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited".[20] In elaboration of this principle, the Hague Regulations also prohibited weapons "of a nature to cause superfluous injury" or "calculated to cause unnecessary suffering".[21] The provisions of the Hague Regulations constitute the so-called Hague law on the means and methods of warfare[22] and are considered as embodying rules of customary international law.[23]

Since these treaties were adopted at a time when international law was considered to apply only between states, even humanitarian texts such as the Hague Regulations did not contain any provisions explicitly criminalising violations of the treaty, let alone establishing individual criminal responsibility. Seen from today's perspective, the exclusion of the individual from these international legal instruments represented the main obstacle for criminalisation of individuals responsible for state-led policies of illegal military activities.

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19 Convention (II) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899 ('Hague Regulations 1899'); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 ('Hague Regulations 1907'). The 1899 Convention and the Regulations were revised at the Second International Peace Conference in 1907. See the text in Schindler and Toman, 1988, pp. 69–93, *supra* note 13.

20 Hague Regulations 1899 and Hague Regulations 1907, Art. 23, see *supra* note 19. This principle is repeated in Additional Protocol I to the 1949 Geneva Conventions, Art. 35(1), see *supra* note 1.

21 Hague Regulations 1899 and Hague Regulations 1907, Article 23(e), see *supra* note 19. See also Additional Protocol I, Art. 35(2), see *supra* note 1.

22 Cottier, 2008, para. 2, *supra* note 5; Werle and Jessberger, 2014, para. 1042, *supra* note 2.

23 International Military Tribunal ('IMT'), Prosecutor v. Hermann Wilhelm Göring et al., Judgment, 1 October 1946, in The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, 22 August –1 October 1946, pp. 445 ff. ('IMT Judgment') (https://www.legal-tools.org/doc/f41e8b/); Cottier, 2008, para. 2, see supra note 5.

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The inexhaustible inventiveness of human minds when it comes to cruelty in war has continued to manifest itself ever since, despite the existence and general acceptance of the Hague Regulations. Efforts of lawmakers to keep pace are evident in the various additions that have been made to Hague law through international treaties, in particular regarding the prohibition of certain weapons. The atrocities committed during the First World War provide a sad example of this: the protracted use of poisonous gas during the war triggered the adoption of the 1925 Geneva Protocol prohibiting the use of chemical and biological weapons in international armed conflicts.[24] Two more recent examples are the Chemical Weapons Convention[25] and the Mine-Ban Convention [26]

11.2.2.2. The Early Law of Geneva

Contemporaneous to the events leading to the Hague conferences, international efforts on the protection of persons affected by war were triggered through the Battle of Solferino in Italy between Austrian and French-Sardinian military in 1859. Horrified by the suffering of soldiers wounded and left to die on the battlefields, the Swiss businessman Henry Dunant wrote a book titled *A Memory of Solferino* in which he described his gruesome observations. His continued activism led to the founding of the International Committee of the Red Cross ('ICRC') in 1863 and eventually to the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field ('1864 Geneva Convention').[27] This convention seeks to protect persons not or no longer partaking in armed conflict and provides the legal basis for humanitarian assistance in conflict zones carried out by humanitarian organisations such as the ICRC, as

[24] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925, League of Nations Treaty Series, vol. 94, pp. 66–74. The 1925 Geneva Protocol is a protocol to the Hague Conventions of 1899 and 1907.

[25] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993, No. 33757, United Nations Treaty Series, vol. 1974, p. 45.

[26] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, 18 September 1997 No. 35597, United Nations Treaty Series, vol. 2056, p. 211.

[27] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864 ('1864 Geneva Convention').

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well as their protection.[28] The 1864 Geneva Convention was replaced by the Geneva Conventions of 1906,[29] 1929[30] and 1949[31] on the same subject and marks the birth of so-called Geneva law which in turn represents a fundamental source of modern war crimes law.

11.3. Conceptual Revolution in Criminalising International Humanitarian Law Violations

The then unimaginable atrocities of the First World War triggered an international impetus to draw from international humanitarian law its most serious violations and to prosecute individuals for their commission.

11.3.1. War Crimes Prosecutions After the First World War

On 29 March 1919 the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties ('Commission on Responsibility'), convened by the victorious Allied powers, issued its report submitted to the Preliminary Peace Conference,[32] in which it elaborated a list of violations of international humanitarian law for which it sought the prosecution of individual perpetrators in war crimes trials before national courts. The Commission on Responsibility enumerated altogether 32 individual crimes committed in connection with the war, including, *inter alia*, murder, terror, cruel treatment of the civilian population including their use as human shields, deportation of civilians, execution of hostages and prisoners of war, intentional shelling of open towns and hospital ships, arbitrary destruction of property and pillage – all crimes within the repertoire of modern war crimes law.[33] In a similar vein, Article 228 of the Versailles Treaty acknowledged the right of the Allied and Associated Powers to bring before military tribunals persons accused of having

[28] *Ibid*., Arts. 1–3, 7.

[29] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906.

[30] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929.

[31] Geneva Convention I, see *supra* note 1.

[32] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Submitted to the Preliminary Peace Conference, 29 March 1919, re-printed in *American Journal of International Law*, 1920, vol. 14, nos. 1/2, pp. 95–154.

[33] *Ibid.*, pp. 113 ff. and Annex I. For a contemporaneous list of war crimes see ICC Statute, Art. 8(2), *supra* note 17; see also Werle and Jessberger, 2014, para. 8, *supra* note 2.

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committed "acts in violation of the laws and customs of war" and even contemplated setting up a special international tribunal to try the former German Kaiser, Wilhelm II.[34] However, neither proper war crimes prosecutions nor the international tribunal ever materialised, and the list of crimes drawn up by the Commission on Responsibility was never made operational in a courtroom. A number of national trials held before the German *Reichsgericht* in Leipzig, conducted largely to appease the Allied powers, ended as ineffective show trials.[35] One of the first attempts to transpose provisions from the Hague Regulations and the 1864 Geneva Convention (including accepted rules of sea warfare) to the context of individual criminal liability thus resulted in failure.

11.3.2. War Crimes Prosecutions After the Second World War

11.3.2.1. The First Revolution: Article 6(b) of the Charter of the International Military Tribunal

At the end of the Second World War, the four victorious powers over the Nazi regime came together in London and adopted the London Agreement,[36] establishing the International Military Tribunal ('IMT') at Nuremberg to try those most responsible for the atrocities committed under the auspices of the Nazi regime. The Statute of the IMT ('IMT Charter') contained the first war crimes provision of an international judicial body

[34] Treaty of Peace between the Allied and Associated Powers and Germany, and Protocol, Versailles, 28 June 1919 ('Versailles Treaty'). Art. 227 of the treaty accused Wilhelm II of a "supreme offence against international morality and the sanctity of treaties" before a special internationally staffed tribunal. This tribunal, however, never came to existence since William II remained in the Netherlands which never extradited him.

[35] See also Heiko Ahlbrecht, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert*, Nomos, Baden-Baden, 1999, pp. 42 ff. In addition, the applicable law before the *Reichsgericht* was German national criminal law and was thus of little or no significance for the codification of war crimes as crimes under international law.

[36] Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, His Majesty's Stationery Office, London, 1945, reprinted in *American Journal of International Law*, 1945, vol. 39, suppl. 257 ('London Agreement').

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creating individual criminal liability. Article 6(b) of the IMT Charter[37] established the Tribunal's jurisdiction over

> violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[38]

The Charter of the International Military Tribunal for the Far East ('IMTFE Charter') contained a similar, albeit less comprehensive war crimes provision.[39]

Article 6(b) of the IMT Charter marked a revolutionary step by its drafters: for the first time, war crimes were clearly identified and were made punishable as a crime generating individual criminal responsibility under international law. In fact, the IMT Charter, as well as its application in the *Göring et al.* trial, in which 21 of the most responsible Nazi perpetrators were tried, has often been invoked as the birth of international criminal law.[40] Article 6(b) established, for the first time, the direct link from a prohibition of certain conduct under international humanitarian law to its criminalisation, generating criminal liability of the individual. Numerous subsequent trials of individuals by the occupying powers in post-war Germany adopted this and other provisions of the IMT Charter.[41]

[37] Although it was Art. 228 of the Versailles Treaty that introduced the term "acts in violation of the laws and customs of war" as a criminal offence into international treaty law, it merely referred to punishment by national (military) courts under national law. However, the statement that those violations and individual punishment thereof was a matter of international concern represented a novelty; Bothe, 2002, p. 382, see *supra* note 4.

[38] IMT Charter, Art. 6(b), see *supra* note 4.

[39] Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, Art. 5, establishing the Tribunal's jurisdiction over "Conventional War Crimes: Namely, violations of the laws or customs of war" ('IMTFE Charter') (https://www.legal-tools.org/doc/a3c41c/).

[40] Werle and Jessberger, 2014, para. 15, see *supra* note 2.

[41] These trials were held pursuant to Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50–55, 1946 ('CCL No. 10') (https://www.legal-tools.org/doc/ffda62/). See Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950, doc. A/1316.

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The final content of Article 6(b) had been inspired by the preparatory works of the United Nations War Crimes Commission ('UNWCC'), which had been established in 1942 to collect evidence regarding war crimes committed in over 30,000 international criminal cases.[42]

As for the individual crimes listed in the provision, a rather cautious approach of the IMT drafters can be observed in criminalising a select number of prohibitions contained in national military manuals, previous international conventions such as the Lieber Code,[43] and the 1907 Hague Regulations.[44] These represented war crimes provisions that the IMT considered had crystallised into customary law by the time of the Second World War.[45] The list of war crimes is significantly less extensive than the findings of the Commission on Responsibility after the First World War. However, this restrictive approach had the benefit that war crimes in the IMT Charter were on solid grounds as to their existence under customary international law in 1939 (that is, at the beginning of the Second World War), and of being manifestly reflected in *opinio juris* through numerous national and international legal instruments and in state practice before national (military) courts.[46] Hence, with a view to the non-retroactivity principle (*nullum crimen sine lege scripta*), the existence of crimes codified in Article 6(b) was firmly founded in international texts and national laws providing for individual criminal responsibility for these crimes.[47]

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[42] The UNWCC was composed of 17 nations. M. Cherif Bassiouni, *Introduction to International Criminal Law*, rev. 2nd ed., Brill, Leiden, 2013, p. 549; see also Dan Plesch and Shanti Sattler, "Changing the Paradigm of International Criminal Law: Considering the Work of the United Nations War Crimes Commission of 1943–1948", in *International Community Law Review*, 2013, vol. 15, no. 2, pp. 203–23; Richard J. Goldstone, "Foreword: The United Nations War Crimes Commission Symposium", in *Criminal Law Forum*, 2014, vol. 25, nos. 1/2, pp. 9–15. The public archive of the UNWCC is available in the ICC Legal Tools Database.

[43] See, for instance, the provision on murder and ill-treatment. Henckaerts and Doswald-Beck, 2005, rules 89, 90, pp. 311ff., see *supra* note 3.

[44] Hague Regulations 1907, Arts. 23–28, 47, 56, see *supra* note 19.

[45] IMT Judgment, see *supra* note 23.

[46] See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN doc. S/25704, 3 May 1993, para. 42 ('Secretary-General's Report on Resolution 808').

[47] Werle and Jessberger, 2014, para. 26, see *supra* note 2.

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11.3.2.2. Part Two of the Revolution: The Grave Breaches Provisions of the Geneva Conventions

In the wake of the Second World War, states were urgently aware of the fact that the international legal framework addressing atrocities committed during times of war was far from complete. International treaties and conventions addressing international humanitarian law merely spelled out conduct that was considered a violation of the applicable legal regime but did not (yet) criminalise such violations. Other atrocity crimes had not even been codified in international conventions, such as the crime of genocide.[48] Further, a comprehensive framework protecting civilians in armed conflict was missing despite general agreement that civilians need protection in armed hostilities and may not be a legitimate military target.

As a first comprehensive response to the identified lacunae in 1949 the four Geneva Conventions came into force, revising and adapting previous relevant conventions.[49] All four Conventions contain rules that apply in times of armed conflict[50] and seek to protect persons who are not or no longer taking part in hostilities: the wounded and sick in armed forces in the field and at sea, prisoners of war and civilians. Geneva Convention IV in particular was a direct response to the horrendous crimes committed against the civilian population during the Second World War, and for the first time comprehensively codified the protection of civilians in international armed conflict.[51]

The revolutionary aspect of these conventions is the grave breaches provision in each of the four Conventions, sanctioning the most severe infractions of the Conventions committed against persons or values protected therein. The following grave breaches are similar to all four conventions:

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[48] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948, UN Treaty Series No. 1021 (1951), pp. 278 ff.

[49] Geneva Convention I; Geneva Convention II; Geneva Convention III; Geneva Convention IV, see *supra* note 1.

[50] The Geneva Conventions' Common Article 2 stipulates that they apply wherever there objectively exists an armed conflict: "even if the state of war is not recognized by one of the [belligerent parties]". See also ICTR, *Prosecutor v. Jean Paul Akayesu*, Trial Chamber, Judgment, ICTR-96-4-T, 2 September 1998, paras. 602–10 ('Akayesu case') (https://www.legal-tools.org/doc/b8d7bd/).

[51] Werle and Jessberger, 2014, para. 1039, *supra* note 2.

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> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[52]

Geneva Convention III[53] and Geneva Convention IV[54] contain further specific prohibitions.

All grave breaches prohibitions are linked to a legal regime laid down in all four Geneva Conventions, obliging member states either to prosecute perpetrators of these crimes or to extradite the suspect(s) to third countries willing to undertake such a prosecution.[55] In other words, the Conventions explicitly link certain prohibitions under international humanitarian law to a mandatory regime of individual criminal accountability – "to provide effective penal sanctions for persons committing [grave breaches]". In doing so, the drafters of the Conventions followed a trend set by the IMT Charter in identifying key provisions that not only merit follow-up through judicial proceedings but also confer a legal obligation on states, and thus the international community, to act. At the same time, the grave breaches provisions clarified that not every violation of international humanitarian law incurs individual criminal liability. Today, the Geneva Conventions are ratified by all states and form part of the body of customary international law.[56]

However, the Geneva Conventions failed to take the further step of contemplating the possibility of an international criminal tribunal competent to try individuals for such crimes – despite the fact that such an idea

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[52] Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147, see *supra* note 1.

[53] Geneva Convention III, Art. 130 prohibits in addition "compelling a prisoner of war to serve in the forces of the hostile Power", see *supra* note 1.

[54] Geneva Convention IV, Art. 147 prohibits in addition "unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages", see *supra* note 1.

[55] For Geneva Convention I, see Arts. 50 (grave breaches) and 49 (penal sanction regime); for Geneva Convention II, see Arts. 51 (grave breaches) and 50 (penal sanction regime); for Geneva Convention III, see Arts. 130 (grave breaches) and 129 (penal sanction regime); and for Geneva Convention IV, see Arts. 147 (grave breaches) and 146 (penal sanction regime), see *supra* note 1.

[56] Secretary-General's Report on Resolution 808, para. 37, see *supra* note 46.

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had already been considered by the General Assembly of the newly established United Nations for the crime of genocide in reaction to the work of the IMT.[57] Also, the term 'war crimes' was not used in any of the conventions.

11.3.2.3. The 1977 Additional Protocols

While the grave breaches provisions represented a cornerstone for the transposition of certain violations of international humanitarian law to war crimes law, the dynamics and rapidly diversifying geometry of modern warfare made a number of remaining gaps plainly visible. One of the important gaps arose from the fact that armed conflicts were moving steadily away from traditional interstate wars and into more complex patterns; internal armed conflicts became more frequent with limited or concealed involvement of other (state) actors.

The 1977 Additional Protocols were meant to modify and amplify the Geneva Conventions in response to these new forms of armed conflict. Additional Protocol I contains further provisions on the protection of victims of international armed conflicts.[58] Of relevance, it stipulates that armed resistance against colonial domination, foreign occupation and "racist regimes" also qualifies as international armed conflict, thereby applying the framework of the Geneva Conventions to armed conflicts between state authorities and armed groups fighting for their right of self-determination on the territory of that state.[59] Additional Protocol I also contains a number of additional provisions on means and methods of warfare, elaborating on general principles from the Hague Conventions[60] and thus incorporating Geneva law and Hague law together in a single legal document. Furthermore, Additional Protocol I reiterates fundamental

[57] Of note, the 1948 Genocide Convention, Art. 6 provided for such an "international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". See UN doc. A/RES3/260 (1948), where the General Assembly tasks the International Law Commission to study the "desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide". See also M. Cherif Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary* History, Transnational Publishers, Ardsley, NY, 1998, p. 741 ff.; Werle and Jessberger, 2014, para. 58, *supra* note 2.

[58] Additional Protocol I, see *supra* note 1.

[59] *Ibid.*, Art. 1(4).

[60] See *ibid.*, Art. 35, reiterating basic principles laid down in Arts. 22, 23 of the Hague Regulations 1907.

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principles of *ius in bello* such as the principles of distinction, military necessity and proportionality.[61] Finally, Additional Protocol I provides some important additions to the Geneva Conventions' grave breaches provisions in its Articles 11 and, most importantly, 85, spelling out a number of crimes that had not been explicitly covered by either the IMT Charter or the Geneva Conventions' grave breaches provisions.[62] As an important clarifying note, Article 85(5) of Additional Protocol I stipulates that "grave breaches of the [Conventions and Additional Protocol I] shall be regarded as war crimes", thus incorporating the prohibitions into the context of individual criminal responsibility.

Additional Protocol II of 1977[63] addresses an ambit of application of international humanitarian law that had hitherto received only marginal attention, namely the field of non-international armed conflict. The Geneva Conventions had already laid the foundation for the architecture of international humanitarian law in non-international armed conflict: Article 3 common to the four Geneva Conventions ('Common Article 3') extended many of the fundamental principles and prohibitions in the Geneva Conventions to non-international armed conflicts, overriding obstacles of national sovereignty that had previously prevented international humanitarian law from applying to intrastate conflicts. Internal or civil wars were traditionally considered as internal matters of states, covered by state sovereignty and preventing any intervention by other states in the often bloody countering of intrastate insurgencies.[64] The basic premise underlying Common Article 3 was therefore truly revolutionary in nature.

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[61] For example, Additional Protocol I, Arts. 35 (military necessity); 48, 52(2) (distinction); 51(5)(b), 57 (proportionality), see *supra* note 1. See, on these principles, Henckaerts and Doswald-Beck, 2005, part I, *supra* note 3; Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge Univesity Press, Cambridge, 2014, section 12.1.3.

[62] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Geneva, 1987, para. 3472.

[63] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 ('Additional Protocol II').

[64] See, on the non-intervention principle, International Court of Justice ('ICJ'), Case Concerning Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v. United States* (Merits), 27 June 1986, ICJ Reports 1986, p. 106, para. 202 ('Nicaragua case'); ICJ, Armed Activities on the Territory of the Congo, *Democratic Republic of the Congo v.*

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Despite being the only provision in the Geneva Conventions applicable to non-international armed conflict, Common Article 3 contains several fundamental rules, including the humane treatment of persons taking no active part in hostilities[65]; care for the wounded, sick and shipwrecked; and the ICRC's right to offer its services to the parties to the conflict.[66] The International Court of Justice held that Common Article 3 provides a "minimum yardstick" for all armed conflicts and reflects "elementary considerations of humanity".[67] However, Common Article 3 has one essential weakness which impeded the transposition of this provision to the criminal law context: it was excluded from the regime criminalising grave breaches and obliging states to prosecute those infractions nationally.

Additional Protocol II develops and supplements Common Article 3 by spelling out a comprehensive list of prohibited acts against persons taking no direct part in hostilities, which are already covered for international armed conflict by the 1907 Hague Regulations, the Geneva Conventions and Additional Protocol I.[68] It therefore extends some fundamental international humanitarian law guarantees into the ambit of non-international armed conflict.[69] In determining its scope of applicability,[70] Additional Protocol II gave further contours to the definition of non-international armed conflict such as the requirement of a certain belliger-

Uganda (Merits), 19 December 2005, ICJ Reports 2005, p. 168. See also Cryer *et al.*, 2014, section 12.1.7., *supra* note 61.

65 This includes, *inter alia*, the prohibition of violence to life and person, cruel treatment, torture, taking of hostages, humiliating treatment and extrajudicial executions. See Geneva Conventions I–IV, Common Art. 3(1)(a)–(d), *supra* note 1.

66 The ICRC's involvement entails a level of monitoring of such internal crisis situations, which may have had the effect of reminding the belligerent parties of certain minimal rules and protections applicable in *any* armed conflict.

67 Nicaragua case, p. 114, para. 218, see *supra* note 64.

68 Additional Protocol II, Art. 4, see *supra* note 63.

69 *Ibid*.

70 *Ibid.*, Art. 1(1), finding that it applies to all armed conflicts between a member state's armed forces and "dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". The territorial control requirement, is however not part of international customary law and thus establishes a rather unfortunate jurisdictional limitation of Additional Protocol II.

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ent intensity[71] – a threshold requirement which has since been accepted by the UN *ad hoc* tribunals and the ICC.[72] However, Additional Protocol II stopped short of elevating the enumerated prohibitions in its Article 4 to grave breaches or establishing a duty on states to prosecute (or extradite), thus perpetuating what has been described as a "glaring and preposterous"[73] disparity between the law applicable in international armed conflict and that which applies to internal armed conflict.

The Additional Protocols represented important progress in the further conceptional development of international humanitarian law and the extension of its protective reach, in particular to non-international armed conflict. However, with the Cold War in full swing, geopolitical realities at the time did not allow for an advancement of the transposition of relevant prohibitions to the international criminal law context.

11.4. Conceptual Revolution in Criminalising International Humanitarian Law Violations in Non-International Armed Conflict

11.4.1. The Statutes of the ICTY and ICTR

The establishment of the UN *ad hoc* tribunals just after the end of the Cold War – the International Criminal Tribunal for the former Yugoslavia ('ICTY') in 1994 and International Criminal Tribunal for Rwanda

[71] *Ibid.*, Art. 1(2): "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".

[72] ICC Statute, Art. 8(2)(d) and (f), see *supra* note 17; and ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyiolo*, Trial Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paras. 534 ff. (https://www.legal-tools.org/doc/677866/); ICTY, *Prosecutor v. Limaj et al.*, Trial Judgment, IT-03-66-T, 30 November 2005, para. 90 (https://www.legal-tools.org/doc/4e469a/); ICTY, *Prosecutor v. Haradinaj et al.*, Trial Judgment, IT-04-84-T, 3 April 2008, para. 60 (https://www.legal-tools.org/doc/025913/); ICTY, *Prosecutor v. Ljube Boškoski et al.*, Trial Judgment, IT-04-82-T, 10 July 2008, paras. 199–203 (https://www.legal-tools.org/doc/939486/); Tadić case, Decision on Jurisdiction, paras. 70 ff., see *supra* note 2; ICTR, *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Trial Judgment, ICTR-95-1, 21 May 1999, para. 171 (https://www.legal-tools.org/doc/0811c9/); ICTR, *Prosecutor v. Alfred Musema*, Trial Judgment, ICTR-96-13, 27 January 2000, para. 248 (https://www.legal-tools.org/doc/1fc6ed/).

[73] Antonio Cassese and Paola Gaeta (rev.), *Cassese's International Criminal Law*, 3rd ed., Oxford Univesity Press, Oxford, 2013, p. 71.

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('ICTR') in 1995 – in and of itself can be called a 'revolutionary' development. They represent the first truly international criminal tribunals ever established; in contrast, the IMT represented a creation of only the four victorious Allied powers and was therefore not truly international. Furthermore, the *ad hoc* tribunals' statutes contain provisions not only for war crimes but also for crimes against humanity and genocide. The notion of 'international core crimes' gained shape and content. In addition, both tribunals and their jurisdictions contributed substantially to filling the legal vacuum in non-international armed conflict[74] and ultimately to the transposition of crimes accepted in interstate conflict to the context of civil wars.

The ICTR was established by the UN Security Council in response to the Rwandan genocide, which was in overwhelming part an internal armed conflict.[75] Article 4 of the ICTR Statute established individual criminal jurisdiction over prohibitions under Common Article 3 of the Geneva Conventions as well as Article 4 of Additional Protocol II,[76] thereby for the first time in history extending the legal regime of war crimes into non-international armed conflict. The Statute of the ICTY, established by the UN Security Council a year earlier, did not contain such a provision. While the Secretary-General of the UN had clarified that the ICTY would "have the task of applying existing international humanitarian law",[77] the Security Council decided to take a "more expansive approach to the choice of the applicable law" for the ICTR than for the ICTY in that it included war crimes provisions applicable in non-international armed conflict in Article 4 of the ICTR Statute "regardless whether they were considered part of customary international law or

[74] Akayesu case, Trial Judgment, paras. 602–10, see *supra* note 50.

[75] See Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), annexed to Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council, UN doc. S/1994/1125, 4 October 1994, paras. 91–94; see also Secretary-General's Report on Practical Arrangements for the Effective Functioning of the International Tribunal for Rwanda, UN doc. S/1995/134, 13 February 1995, paras. 11–12 ('Secretary-General's Report on ICTR').

[76] Additional Protocol II, Art. 4(2) has been almost entirely been taken over into ICTR Statute, Art. 4 excluding only the prohibition of "slavery and the slave trade in all their forms" of Additional Protocol II, Art. 4(2)(f), see *supra* note 63; see United Nations Security Council resolution 955 (1994), adopted on 8 November 1994, UN doc. S/RES/955 (1994) ('ICTR Statute').

[77] Secretary-General's Report on Resolution 808, para. 34, see *supra* note 46.

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whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime".[78] Both UN *ad hoc* tribunals have since confirmed repeatedly that the criminalisation of acts in Article 4 of the ICTR Statute represents international customary law.[79]

The ICTY war crimes provision represents the logical next step from the IMT Charter in that it contains two provisions: the first is Article 2, which transposes the Geneva Conventions' grave breaches to the ambit of international criminal law by establishing individual criminal responsibility for their commission.[80] The second provision, encapsulated in Article 3, is akin to Article 6(b) of the IMT Charter in that it reflects in relevant part the 1907 Hague Regulations on prohibited means and methods of warfare. However, neither the ICTY Statute nor the Secretary-General's report on the establishment of the ICTY determines the applicability of the ICTY's war crimes provision in non-international armed conflict.[81] Such determination has therefore been left to the Tribunal's jurisprudence.

Not long after the Tribunal's inception, the scope of war crimes applicable in non-international armed conflict under the ICTY Statute was clarified by the Appeals Chamber in its interlocutory decision on jurisdiction in the *Tadić* case.[82] The Appeals Chamber determined that general rules and principles protecting civilians or civilian objects from the hostilities (Geneva law) as well as rules regarding means and methods of warfare (Hague law) have gradually been extended to non-international armed conflict.[83] It held that "[w]hat is inhumane, and consequently pro-

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78 Secretary-General's Report on ICTR, para. 12, see *supra* note 75.

79 Akayesu case, Trial Judgment, paras. 608–9, 616, see *supra* note 50; ICTR, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Trial Judgment, ICTR-96-3, 6 December 1999, paras. 86–90 (https://www.legal-tools.org/doc/f0dbbb/); ICTR, *Prosecutor v. Laurent Semanza*, Trial Judgment, ICTR-97-20, 15 May 2003, para. 353 (https://www.legal-tools.org/doc/7e668a/); ICTY, *Prosecutor v. Duško Tadić*, Trial Judgment, IT-94-1, 7 May 1997, para. 609 ('Tadić case') (https://www.legal-tools.org/doc/0a90ae/); Tadić case, Decision on Jurisdiction, paras. 116, 134, see *supra* note 2.

80 See Secretary-General's Report on Resolution 808, paras. 37–40, see *supra* note 46.

81 *Ibid.*, paras. 41–44. The Report does, however, make clear that the provisions outlined in the proposed (and later accepted) ICTY Statute, Arts. 2 and 3 represent "without doubt" international customary and/or treaty law; *id.*, paras. 33–36.

82 Tadić case, Decision on Jurisdiction, see *supra* note 2.

83 *Ibid.*, paras. 119, 127. On Hague and Geneva law see Kai Ambos, *Internationales Strafrecht*, 4th ed., 2014, para. 6.

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scribed, in international wars, cannot but be inhumane and inadmissible in civil strife".[84] It then concluded that, while a number of rules applicable in international armed conflict have extended to internal conflicts, there was no "full and mechanical transplant" of those rules into the internal context.[85]

On this basis, the ICTY Appeals Chamber held that serious violations of the customary rules applicable in non-international armed conflict may also generate individual criminal responsibility – a finding embodied by Article 4 of the ICTR Statute and later endorsed by the SCSL.[86] It follows from this finding that the extension of international humanitarian law into internal armed conflict is mirrored by a corresponding extension of individual criminal liability for the violation of these laws wherever state practice and *opinio juris* provide the necessary indicia for it.[87] This is in fact what the ICTY Appeals Chamber established, holding in its *Tadić* jurisdiction decision that Article 3 of the ICTY Statute, listing serious violations of laws and customs of war, is applicable "regardless of whether the [violations] occurred within an internal or an international armed conflict".[88]

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[84] Tadić case, Decision on Jurisdiction, para. 119, see *supra* note 2: "[E]lementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory".

[85] *Ibid*., para. 126: "[R]ather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts"; see also ICTY, *Prosecutor v. Kupreškić et al*., Trial Chamber, Judgment, IT-95-16, 14 January 2000, paras. 521 ff. ('Kupreškić case') (https://www.legal-tools.org/doc/5c6a53/).

[86] Tadić case, Decision on Jurisdiction, para. 134, *supra* note 2; see also SCSL, *Prosecutor v. Augustine Gbao et al*., Trial Chamber, Judgment, SCSL-04-15-T, 2 March 2009, paras. 60–65 ('Gbao case') (https://www.legal-tools.org/doc/7f05b7/); SCSL, *Prosecutor v. Moinina Fofana, Allieu Kondewa and Sam Hinga Norman*, Appeals Chamber, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict, SCSL-2004-14, 25 May 2004, para. 24 ('CDF case') (https://www.legal-tools.org/doc/a36f4a/); ICTR, *Prosecutor v. Joseph Kanyabashi et al.*, Trial Chamber, Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997, para. 35 (https://www.legal-tools.org/doc/a0cb5c/); Akayesu case, Trial Judgment, paras. 610, 616, see *supra* note 50.

[87] Tadić case, Decision on Jurisdiction, paras. 128–35, see *supra* note 2; ICTY, *Prosecutor v. Mučić et al.*, Appeals Chamber, Judgment, IT-96-21, 20 February 2001, paras. 159–74 ('Čelebići case') (https://www.legal-tools.org/doc/051554/). See also Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN doc. S/2000/915, para. 14. See also Werle and Jessberger, 2014, para.1070, see *supra* note 2.

[88] Tadić case, Decision on Jurisdiction, para. 137, see *supra* note 2.

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By virtue of the Appeals Chamber's seminal findings in the *Tadić* decision, the ICTY opened the door for the applicability of Hague law in non-international armed conflict – a set of provisions that Article 4 of the ICTR Statute (based on Geneva law) had not explicitly covered. Taking the statutes of both tribunals together, it can be concluded that they opened the horizon for individual criminal responsibility for international crimes, derived from both Geneva and Hague law, in non-international armed conflict – and did so relatively comprehensively.

11.4.2. A Tool to Fill the Gaps: The *Tadić* Test

The ICTY *Tadić* jurisdiction decision went beyond simply declaring Article 3 of the ICTY Statute applicable in both international and non-international armed conflict. The Appeals Chamber also established a general test determining under which circumstances an offence amounts to a 'serious violation' of international humanitarian law and consequently can be prosecuted as a war crime under Article 3 of the ICTY Statute,[89] regardless of the character of the armed conflict concerned. This test consists of the following four prongs:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met […];[90]
>
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim […];

[89] The Statutes of the ICTY, ICTR and ICC require a violation to be "serious" to amount to a war crime; ICC Statute, Art. 8(2)(b), (c), (e), see *supra* note 17; ICTY Statute, Art. 1, see *supra* note 4; ICTR Statute, Art. 1, see *supra* note 76; United Nations Security Council, Resolution 1315 (2000), Adopted on 14 August 2000, UN doc. S/Res/1315 ('SCSL Statute'), Art. 1(1); Henckaerts and Doswald-Beck, 2005, p. 569, see *supra* note 3: national legislation and state practice shows that violations of international humanitarian law are treated as serious – and therefore as war crimes – if and when they "endanger protected persons or objects or if they breach important values". See also Čelebići case, Appeals Judgment, para. 126, *supra* note 87.

[90] In case of a violation of treaty law, the latter must be 1) unquestionably binding on the parties at the time of the alleged offence; and 2) not in conflict with or derogating from "peremptory norms of international law"; Tadić case, Decision on Jurisdiction, para. 143, see *supra* note 2.

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> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[91]

While the first two prongs underline the fact that war crimes are based on and intrinsically connected to a violation of international humanitarian law, the third prong sets a gravity requirement both in terms of the protected values and regarding the effect of the crime on the victim. This threshold requirement follows from the general assumption that for an infraction of international humanitarian law to generate individual criminal liability it needs to be of a minimum gravity and directed against the most essential values that the violated law seeks to protect.[92] To illustrate the validity of this threshold requirement, the *Tadić* Appeals Chamber explained that

> a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory.[93]

Further, the violation must have had a serious impact ("grave consequences") on the victim, thereby establishing what might be regarded as a result requirement regarding the violation. The Chamber may have been guided in this by the language of Additional Protocol I. Its Article 85(3) establishes a result requirement for a number of grave breaches "when committed wilfully, in violation of the relevant provisions of this Protocol, and *causing death or serious injury to body or health*".[94]

The fourth prong is a reminder that at the outset international humanitarian law consisted of rules applicable among states only.[95] The

[91] *Ibid.*, para. 94.

[92] Theodor Meron, "The Humanization of Humanitarian Law", in *American Journal of International Law*, 2000, vol. 94, no. 2, pp. 239, 260 ff.; Henckaerts and Doswald-Beck, 2005, pp. 569–70, see *supra* note 3.

[93] Tadić case, Decision on Jurisdiction, para. 94, see *supra* note 2.

[94] Additional Protocol I, Art. 85(3), see *supra* note 20 (emphasis added). See also Bothe, 2002, p. 384, see *supra* note 4.

[95] Meron, 2000, pp. 239, 243, see *supra* note 92.

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general acknowledgement that these rules also generate rights and duties for the individual is fairly recent; the existence of an international rule conferring individual rights or duties has to be carefully established by assessing relevant *opinio juris* and state practice in the specific circumstances of the case.[96] In this respect the Appeals Chamber held that individual criminal responsibility pursuant to the fourth *Tadić* prong "can be inferred from, *inter alia*, state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals".[97]

To date, the grave breaches provisions of the Geneva Conventions and of Additional Protocol I are, besides the Rome Statute of the International Criminal Court, the only examples of conventional rules explicitly conferring individual criminal responsibility for serious violations of international humanitarian law.[98] The *Tadić* test therefore represents a means to complement the non-exclusive war crimes provision in the ICTY Statute with further crimes that have attained customary status. Both UN *ad hoc* tribunals and the SCSL have consistently applied the *Tadić* test in their case law, significantly clarifying – and increasing – the ambit of war crimes in international and non-international armed conflict.[99]

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[96] Cassese and Gaeta, 2013, p. 67, see *supra* note 73; Meron, 2000, pp. 239, 243, see *supra* note 92; O'Connell, 2013, paras. 135, 137, see *supra* note 6; Werle and Jessberger, 2014, para. 1066, see *supra* note 2.

[97] ICTY, *Prosecutor v. Stanislav Galić*, Appeals Chamber, Judgment, IT-98-29, 30 November 2006, para. 92 ('Galić case') (https://www.legal-tools.org/doc/c81a32/), citing, *Tadić* case, Decision on Jurisdiction, para. 128, see *supra* note 2.

[98] While the statutes of ICTY and ICTR explicitly refer to relevant prohibitions under humanitarian law (in fact the Geneva Conventions and their Additional Protocols) and attach individual criminal responsibility, these statutes do not represent multilateral treaties but are contained in resolutions of the UN Security Council (ICTY: S/RES/827 (1993), 25 May 1993, para. 2 with reference to the report of the Secretary-General (S/25704 and Add.l) pursuant to paragraph 2 of resolution 808 (1993); ICTR: S/RES/955 (1994), 8 November 1994, para. 1 and Annex). Similarly, the statutes of SCSL, ECCC and STL do not represent multilateral treaties. Only the Rome Statute of the International Criminal Court represents such a treaty document (UN doc. A/CONF.183/9). See also Cassese and Gaeta, 2013, p. 67, see *supra* note 73.

[99] See, for example, Galić case, Appeals Judgment, paras 91 ff., *supra* note 97; Kunarac case, Appeals Judgment, para. 66, see *supra* note 4; ICTY, *Prosecutor v. Kvočka et al.*, Trial Chamber, Judgment, IT-98-30/1, 2 November 2001, para. 123 ('Kvočka case') (https://www.legal-tools.org/doc/34428a/); ICTY, *Prosecutor v. Momčilo Perišić*, Trial Chamber, Judgment, IT-04-81 6 September 2011, para. 75 (https://www.legal-

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The *Tadić* Appeals Chamber decision on jurisdiction, on par with Article 4 of the ICTR Statute, therefore truly revolutionised the law applicable in non-international armed conflict; even the ICRC did not claim that war crimes in non-international armed conflict existed prior to the tribunals' statutes and jurisprudence.[100] Subsequent jurisprudence from other international courts has also shown that there is increasing convergence between the rules applicable in non-international armed conflict and those applicable in international conflict. The SCSL Appeals Chamber, for example, found that regarding Article 3 of the SCSL Statute ("Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II") any distinction "is no longer of great relevance *as these crimes are prohibited in all conflicts*".[101] Reiterating the earlier findings of the ICTY in *Tadić*, it held that crimes committed in the context of an internal armed conflict form part of the broader category of crimes acknowledged during international armed conflict.[102]

tools.org/doc/f3b23d/); ICTY *Prosecutor v. Stanišić and Simatović*, Trial Chamber, Judgment, IT-03-69-T, 30 May 2013, para. 950 (https://www.legal-tools.org/doc/066e67/); SCSL, *Prosecutor v. Moinina Fofana, Allieu Kondewa and Sam Hinga Norman*, Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL-2004-14-AR72(E), 31 May 2004, para. 26 ff. ('CDF case') (https://www.legal-tools.org/doc/27e4fc/). For the ICC with its exhaustive war crimes provision any such extension of the pool of applicable war crimes remains impossible.

[100] Preliminary Remarks by the ICRC on the Setting-up of an International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia, UNSCR res. 808 (1993), 25 March 1993, quoted in Christopher Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia", in *Max Planck Yearbook of United Nations Law*, 1998, vol. 2, p. 131: "international humanitarian law applicable to non-international armed conflicts does not provide for international penal responsibility".

[101] CDF case, Decision on Nature of Armed Conflict, para. 25, see *supra* note 86 (emphasis added). Similarly, the ICTY Appeals Chamber held in Čelebići case, Appeals Judgment, para. 150, see *supra* note 87, that "something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader".

[102] *Ibid.*, CDF case, Decision on Nature of Armed Conflict, citing Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2001, p. 188; Rodney Dixon, Karim A.A. Khan and Richard May (eds.), *Archbold: International Criminal Courts: Practice, Procedure and Evidence*, 3rd ed., Sweet & Maxwell, London, 2003, paras. 11–26.

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11.5. "Judicial Law-Making" of the UN *Ad Hoc* Tribunals?

Both UN *ad hoc* tribunals had, particularly in their earlier years, a multitude of novel and previously unresolved legal problems to tackle with the aim of defining and, where appropriate, enlarging the scope of protection for victims of mass atrocities.[103] The resolution of these problems often demanded a progressive stance towards the status of customary international law in the interpretation of the relevant sources. One example is the Appeals Chamber's finding in *Tadić* extending the scope of application of war crimes to non-international armed conflict.[104] Another example is the ICTY's determination that a test of "overall control" suffices to prove third-party state interference in a conflict that is geographically confined to another state and thus "elevates" the armed conflict to an international level.[105] In doing so, the ICTY diverged from previous International Court of Justice ('ICJ') jurisprudence in the *Nicaragua* case establishing an "effective control" test for third-party state interference for the purpose of State responsibility.[106]

In addition, the broadening of the concept by the ICTY of "protected persons" from the Geneva Conventions to encompass citizens of the

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[103] Robert Heinsch, Die Weiterentwicklung des humanitären Völkerrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda, Berliner Wissenschafts-Verlag, Berlin, 2007, pp. 82–185; J.R.W.D. Jones and Steven Powles, International criminal practice: the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court, the Special Court for Sierra Leone, the East Timor Special Panel for Serious Crimes, War crimes prosecutions in Kosovo, Transnational Publishers, Ardsley, NY, 2003; L.J. van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law, Martinus Nijhoff, Leiden, 2005.

[104] Tadić case, Decision on Jurisdiction, para. 134, see *supra* note 2; Čelebići case, Appeals Judgment, para. 170, see *supra* note 87.

[105] Tadić, Appeals Judgment, paras. 131, 137, see *supra* note 4, confirmed by ICTY, *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber, Judgment, IT-95-14-/1-A, 24 March 2000, para. 145 ('Aleksovski case') (https://www.legal-tools.org/doc/176f05/). For an evaluation of the "overall control" test, see Danesh Sarooshi, "Command Responsibility and the Blaškić case", in *International and Comparative Law Quarterly*, 2001, vol 50, pp. 452–65; Marco Sassòli and Laura M. Olson, "The Judgment of the ICTY Appeals Chamber on the merits in the Tadić Case: New Horizons for International Humanitarian and Criminal Law?", in *International Review of the Red Cross*, 2000, no. 839, pp. 733–69; see also James G. Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict", in *International Review of the Red Cross*, 2003, no. 850, pp. 313–49.

[106] Nicaragua case, Judgment, p. 14, see *supra* note 64.

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state's own nationality by relying on "ethnic allegiance" instead of nationality as the determining criterion can be seen as an illustration of the Tribunal's amplification of the protective shield of international humanitarian law through a dynamic interpretation of the *status quo* of the governing law.[107] This last finding was in contrast even to the ICRC commentary at the time, which still provided that in order to be a protected person under the Geneva Conventions one needed to have the nationality of the enemy state.[108]

Further examples of the Tribunals' progressive jurisprudence can be found in the determination of individual crimes committed in violation of the laws and customs of war. An illustrative case is the crime of rape; although referred to in the definition of crimes against humanity, it was not explicitly listed as a war crime in Articles 2 and 3 of the ICTY Statute.[109] However, the results of investigations in the early years of the ICTY did not justify an indictment for crimes against humanity due to the absence of tangible proof of an attack directed against a civilian population; yet, at the same time, there was ample proof of sexual violence.[110] In the *Furundžija* case the Tribunal held that "the prohibition of rape in armed conflicts has been long recognised in international treaty law as well as in customary international law"[111] and thus added the crime of rape to the

[107] Tadić case, Appeals Judgment, paras. 163–69, see *supra* note 4, confirmed in Aleksovski case, Appeals Judgment, para. 153, see *supra* note 105, and various other decisions. For a discussion of this new standard, see Sassòli and Olson, 2000, p. 744, *supra* note 105.

[108] J.S. Pictet (ed.), Commentary on Geneva Conventions of 12 August 1949, vol. IV, Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (International Committee of the Red Cross, Geneva, 1952, Art. 4, p. 46: "Even when the definition of protected persons is set out in this way, it may seem rather complicated. Nevertheless, disregarding points of detail, it will be seen that there are two main classes of protected person: (1) 'enemy nationals' within the national territory of each of the Parties to the conflict and (2) 'the whole population' of occupied territories (excluding nationals of the Occupying Power)".

[109] ICTY Statute, Art. 5(g), see *supra* note 4.

[110] Richard J. Goldstone, "Prosecuting Rape as a War Crime", in *Case Western Reserve Journal of International Law*, 2002, vol. 34, no. 3, pp. 277, 285; Goldstone, 2014, p. 13, see *supra* note 42.

[111] ICTY, *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgment, IT-95-17/1, 10 December 1998, para. 168 ('Furundžija case') (https://www.legal-tools.org/doc/e6081b/); ICTY, *Prosecutor v. Mučić et al.*, Trial Chamber, Judgment, IT-96-21, 20 February 2001, paras. 476–79 ('Čelebići case') (https://www.legal-tools.org/doc/6b4a33/); ICTY, *Prosecutor v. Anto Furundžija*, Appeals Chamber, Judgment, IT-95-17/1, 27 July 2000, para. 210 ('Furundžija case') (https://www.legal-tools.org/doc/660d3f/); ICTY *Kvočka et al.*, Appeals

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list of war crimes under Article 3 of the ICTY Statute.[112] Also, the Trial Chamber categorised forced oral penetration as rape rather than as sexual assault, thereby further developing the definition of rape as a crime under international law.[113] The *Furundžija* Trial Chamber also broadened the definition of torture under international (customary) law.[114]

In a similar vein, the ICTR jurisprudence has expanded the scope of protection for victims of mass atrocities. Thus, regarding the scope and definition of the crime of genocide, the ICTR held in in the *Akayesu* and *Gacumbitsi* cases, among others, that rape and sexual violence could constitute genocide when the specific conditions of genocide were fulfilled − that is, specific intent to destroy a group in whole or in part – despite Article 2 of the ICTR Statute and the Genocide Convention being devoid of any language expressly supporting such a finding.[115] Furthermore, the progressive definition of rape in *Akayesu*[116] has been hailed as one of the ICTR's greatest achievements.[117]

A more recent example relevant to war crimes law before the ICTY concerns the crime of terror. On the basis of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, the *Galić* Appeals Chamber held that the crime of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population" constitutes a serious violation of the laws or customs of war under its Article 3.[118] In applying the *Tadić* test, it found that customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population as outlined in Article 51(2) of Addi-

Chamber, IT-98-30/1-A, February 2005, para. 395. In addition, in the Čelebići case the ICTY Trial Chamber held that rape could constitute the war crime of torture when the specific conditions of torture were fulfilled: *id.*, paras. 475–94.

[112] Of note, rape, enforced prostitution and any form of indecent assault are war crimes under the Statutes of the ICTR, Art. 4(e), see *supra* note 76 and of the SCSL, Art. 3(e), see *supra* note 89.

[113] Furundžija case, Trial Judgment, para. 178, see *supra* note 111.

[114] *Ibid.*, paras. 162, 253.

[115] Akayesu case, Trial Judgment, paras. 732–34, see *supra* note 50; ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, Trial Chamber, Judgment, ICTR-2001-64-T, 17 June 2004, paras. 291–93 (https://www.legal-tools.org/doc/b4e8aa/).

[116] Akayesu case, Trial Judgment, para. 598, see *supra* note 50.

[117] Catharine A. MacKinnon, "The ICTR's Legacy on Sexual Violence", in *New England Journal of International and Comparative Law*, 2008, vol. 14, no. 2, p. 101.

[118] Galić case, Appeals Judgment, para. 69, see *supra* note 97.

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tional Protocol I and Article 13(2) of Additional Protocol II.[119] It added that the crime "encompasses the intent to spread terror when committed by combatants in a period of armed conflict".[120] In *Dragomir Milošević* the Appeals Chamber reiterated that the *Tadić* gravity threshold (seriousness of the violation on the victim) may be physical but could also be of a psychological nature, for instance imputed through threats of violence and a corresponding psychological impact on the victim (community).[121] In essence, with the 'crime of terror' the ICTY added a 'new' crime to its statutory repertoire of war crimes, referring in particular to international humanitarian law provisions stating the prohibition on the one side, and national military manuals on the other, to establish the customary existence of the crime.[122] Reflecting its dynamic understanding of its statutory war crimes provision, the *Kunarac* Appeals Chamber recalled the judgment of the IMT, holding that the laws of war "are not static, but by continual adaptation follow the needs of a changing world".[123]

Finally, although the present section has focused on the jurisprudence of the ICTY and ICTR, it has not been these tribunals alone that have continued to delineate and shape international crimes with the available sources in international law. Other international tribunals have similarly contributed to such progress. The Appeals Chamber of the SCSL held in the *Brima et al.* case that the specific harm inflicted upon a "bush wife" by way of a blend of sexual slavery, rape, torture and deprivation of liberty cannot be captured in just one or more specific (sexual) crimes listed under the SCSL Statute's crimes against humanity provision.[124] It therefore found that the holding of "bush wives" by way of forced marriage was a distinct stand-alone crime against humanity under "other in-

[119] *Ibid.*, paras. 91–98.

[120] *Ibid.*, paras. 69, 102–4 (elements of the crime).

[121] ICTY, *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Judgment, IT-98-29/1-A, 12 November 2009, paras. 32–35 (https://www.legal-tools.org/doc/44327f/).

[122] Galić case, Appeals Judgment, para. 88, see *supra* note 97.

[123] Kunarac, Appeals Judgment, para. 67, see supra note 4, citing Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 to 1 October 1946, vol. 1, Nuremberg, p 221. It went on to find that acts such as rape, torture and outrages upon personal dignity "are prohibited and regarded as criminal under the laws of war and that they were already regarded as such at the time relevant to [the indictment in the relevant case]".

[124] SCSL, *Prosecutor v. Alex Tamba Brima et al.*, Appeals Chamber, Judgment, SCSL-04-16-A, 22 February 2008, para. 195 ('Brima case') (https://www.legal-tools.org/doc/4420ef/).

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humane acts".[125] More relevant to war crimes, the SCSL Appeals Chamber in *CDF* confirmed that the prohibition of child recruitment has crystallised as a war crime under international customary law.[126] The ECCC held that at the time relevant to the indictments before the chambers − the mid-1970s − there was no longer a requirement that crimes against humanity be committed in connection to an armed conflict.[127]

The international courts' and tribunals' progressive approach in applying and interpreting relevant international law has triggered a debate among scholars and practitioners alike, often reflected in the terms "judicial law-making" and "creative jurisprudence", as to whether judges at the UN *ad hoc* tribunals might have gone beyond simply applying the law and in fact proceeded to creating new law.[128] Article 38(1) of the ICJ Statute – a provision not paralleled in the UN *ad hoc* tribunals' Statutes but with authoritative value in international law – contains the traditional trio of sources of international law: international conventions, customary international law and general principles of international law.[129] According to this provision, judicial decisions of international courts and tribunals can only be seen as "subsidiary" sources of international law, meaning that they can only *state* the law, not *make* the law (*iudicis est ius dicere*

[125] *Ibid.*, para. 195; Gbao case, Trial Judgment, paras. 1465–73, see *supra* note 86.

[126] CDF case, Decision on Child Recruitment, paras. 26–53, see *supra* note 99.

[127] Nuon and Khieu case, Decision on Definition of Crimes Against Humanity, para. 10 ff., see *supra* note 4, holding that the nexus requirement was no longer part of the material elements of the crime in 1975, *id.*, para. 33; see also *supra* note 5.

[128] Shane Darcy and Joseph Powderly, *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, Oxford, 2010; William Schabas, "Customary Law or Judge-made Law: Judicial Creativity at the UN Criminal Tribunals", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff, Leiden, 2009, pp. 77–101; Mia Swart, "Judicial Lawmaking at the *ad hoc* Tribunals: The Creative Use of the Sources of International Law and 'Adventurous Interpretation'", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2010, vol. 70, p. 459. See also Joseph Powderly, "Distinguishing Creativity from Activism: International Criminal Law and the 'Legitimacy' of a Judicial Development of the Law", in William A. Schabas, Yvonne McDermott and Naimh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical* Perspectives, Ashgate, Farnham, 2013.

[129] Statute of the International Court of Justice, 26 June 1945, Art. 38(1)(d) is generally regarded as declaratory of customary international law; Kupreškić case, Trial Judgment, para. 540, see *supra* note 85.

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sed non dare).[130] This provision is reflective of the traditional view that states are the sole entities under international law with a law-making capacity – and that they cannot be obliged to accept more law as binding on them than they have explicitly agreed to. The subsidiary character of judicial decisions prevents them from becoming independent formal sources of international law.[131]

The tribunals themselves have consistently regarded their jurisprudence as mere interpretation and application of *existing* customary international law,[132] rather than a new and, following the model of Article 38(1) of the ICJ Statute, the fourth formal source of public international law. The main argument drawn from Article 59 of the ICJ Statute – at least with regard to the jurisprudence of the ICJ – is that the common law principle of binding precedent (*stare decisis*) should not apply to decisions of international bodies.[133] This position has been reflected by both ICTY and ICTR in their jurisprudence:

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[130] Charles de Montesquieu, *The Spirits of the Law*, vol. 1, New York, Macmillan 1949 [1748], p. 152, quoted by Mohamed Shahabuddeen, *Precedent in the World Court*, Cambridge University Press, Cambridge, 1996, p. 234; see also Robert Heinsch, "Judicial 'Law-Making' in the Jurisprudence of the ICTY and ICTR in Relation to Protecting Civilians from Mass Violence: How Can Judge-made Law Be Brought into Coherence with the Doctrine of the Formal Sources of International Law", in Philipp Ambach, Frédéric Bostedt, Grant Dawson and Steve Kostas (eds.), *The Protection of Non-Combatants during Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society: Essays in Honour of the Life and Work of Joakim Dungel*, Brill, Leiden, 2015, pp. 247, 251.

[131] Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford University Press, Oxford, 2003, p. 19; Georg Dahm, Jost Delbrück and Rüdiger Wolfrum, *Völkerrecht*, 1989, vol. 1, no. 1, p. 77; Knut Ipsen, *Völkerrecht*, Beck, 2004, § 21, margin number 1; Hersch Lauterpacht, *The Development of International Law by the International Court*, Stevens and Sons, London, 1958, pp. 20 ff.; Riccardo Monaco, "Sources of International Law", in Rudolf Bernhard (ed.), *Encyclopedia of Public International Law*, vol. IV, North Holland, Amsterdam, 2000, p. 474.

[132] ICTY, *Prosecutor v. Enver Hadžihasanović*, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-47, 16 July 2003, para. 55 (https://www.legal-tools.org/doc/608f09/); ICTY, *Prosecutor v. Tihomir Blaškić*, Appeals Chamber, Judgment, IT-95-14, 29 July 2004, para. 113 (https://www.legal-tools.org/doc/88d8e6/); see also ICTY, *Prosecutor v. Šainović et al.*, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2003, para. 9 (https://www.legal-tools.org/doc/d51c63/), holding that the ICTY's power to convict an individual for a crime under the ICTY Statute "depends on its existence *qua* customary law". Indicative of this see *supra* section 11.2.4.2.

[133] Heinsch**,** 2015, pp. 297, 308 ff., see *supra* note 130.

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> [T]he authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law.[134]

However, a restrictive view ascribing to international jurisprudence a mere "evidence" function for existing international (criminal) law and thus confining the judges' role to one of merely stating universally accepted law does not accurately reflect the true value of decisions of these courts and tribunals with regard to the development and definition of international norms.[135] While the tribunals may have at times been satisfied with "extremely limited case law"[136] − and therefore state practice − to confirm a rule under international customary law, it must be appreciated that the role of judges also contains interpretative elements and involves the exercise of discretion. In particular where state practice has not developed in a coherent way or is even contradictory, there is a legitimate role for a judge of an international tribunal to assess the case at hand and bring it to a conclusion in a way that the judge finds to be in accordance with international law – even if that conclusion describes what could be regarded as (an element of) a new provision under international law. Judges are not unconstrained by international law: at a minimum, the decision "must be seen to emanate reasonably and logically from existing and previously ascertainable law".[137] An international court or tribunal cannot elaborate a new rule that is in contradiction to existing international

[134] Kupreškić case, Trial Judgment, para. 540 see *supra* note 85.

[135] Heinsch, 2015, pp. 297, 309, see *supra* note 130; K. Ipsen, *Völkerrecht* (2004), § 21, margin number 1.

[136] André Nollkaemper, "The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia", in Thomas A.J.A. Vandamme and Jan Herman Reestman (eds.), *Ambiguity In the Rule of Law: The Interface between National and International Legal Systems*, Europa Law Publishing, Groningen, 2001, p. 17.

[137] Robert Jennings, "The Judicial Function and the Rule of Law in International Relations", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vol. 3, A. Giuffrè, Milan, 1987, p. 145, quoted in Heinsch, 2015, p. 312, see *supra* note 130.

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law.[138] However, in resolving potential conflicts or filling important lacunae, the value of judicial decisions goes beyond one of a mere "subsidiary means", especially with regard to their practical importance for future comparable situations and cases.[139] The jurisprudence of the ICTY and ICTR, and also of other international(ised) courts, in the last two decades has confirmed this observation.

The dynamism of international courts to become the proponents of new international legal rules, which have in turn been verified and validated by ensuing state practice or even treaty codification,[140] has doubtlessly had a beneficial effect for protection of victims of mass atrocities. That result alone would speak for the legitimacy of the means. However, further confirmation for a more conceptual legal validity can be found in the fact that much of the tribunals' 'dynamic' interpretation of the applicable law corresponds to Article 8 of the ICC Statute, demonstrating that decisions and judgments of international courts and tribunals do represent a material source of law – even if not formally acknowledged as such in traditional texts.[141]

In conclusion, the international courts' and tribunals' jurisprudence over the past 20 years has greatly contributed to the codification and definition of international criminal law, transposing a number of key principles from the rules of international humanitarian law into the context of

[138] For the ICTY, this flows from the Secretary-General's indication that the ICTY is "applying existing international humanitarian law", Secretary-General's Report on res. 808, paras. 29, 34, see *supra* note 46. This is in particular so for war crimes, *id.*, para. 35. For the ICC this follows from the ICC Statute, Art. 21(1)(b), see *supra* note 17.

[139] See Aleksovski case, Appeals Judgment, para. 107, *supra* note 105, there the ICTY held that in similar cases or legal problems "the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice". See also Heinsch, 2015, p. 308, see *supra* note 130.

[140] By way of example the Geneva Conventions' grave breaches provisions were inspired by provisions in Art. 6(b) of the IMT Charter which, in turn, had *no* direct precedent in international treaty law, see *supra* note 4. Similarly, Art. 8 of the ICC Statute was heavily inspired by the Tribunals' jurisprudence, as witnessed for example by the sections of crimes in non-international armed conflict, the gender crimes provisions as well as the provision on child soldiers, see *supra* note 17.

[141] See also Heinsch, 2015, p. 312 ff., *supra* note 130, proposing to categorise international judicial decisions in a general graduation of in-between steps of the traditional sources under international law, as a "quasi-formal" source in that "that while judicial decisions are not on the same level as international conventions and customary international law, on a factual level they have almost the same impact" (p. 313).

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individual criminal responsibility under international law. This process can be brought into conformity with general rules under international law if one accepts that these judicial decisions 'concretise' existing law by adding details to a certain body of law (for example, the definition of rape to the body of sexual offences in international law), elaborate law which has already been in the process of (trans)formation (for example, the acknowledgement of war crimes in non-international armed conflict) and at times even unify divergent views and practices into a new approach.[142]

11.6. Article 8 of the ICC Statute: The Next Revolution?

Article 8 of the ICC Statute represents the most complete war crimes provision of an international court to date. It comprehensively lists a large number of war crimes which exist under customary international law in both international and non-international armed conflict. In addition, as a number of the crimes encompassed in Article 8 do not find a direct equivalent in previous statutes of international courts, the provision doubtlessly represents a step forward in the codification of substantive international criminal law. Many prohibitions that had developed and concretised itself under international humanitarian law are being defined as crimes − in particular through the Elements of Crimes, for example for some means of warfare in internal conflict in Article 8(2)(e)(xiii)–(xv).[143] Some commentators hold that in this respect the ICC Statute itself represents a dynamic interpretation of customary international law,[144] much like some of the UN *ad hoc* tribunals' jurisprudence. However, while representing an important step, each provision of Article 8 still needs to be read and inter-

[142] Heinsch speaks of "of 'crystallizing' (customary) international law", *ibid.*, p. 312, referring in analogy to ICJ, North Sea Continental Shelf cases, *Germany v. Denmark/Netherlands*, Judgment, 20 February 1969, ICJ Reports 1969.

[143] The statutory provisions agreed upon in 1998 did not yet contain any explicit provision of the above war crimes regarding certain means of warfare for non-international armed conflict. It was only during the Review Conference of the Assembly of States Parties pursuant to Article 123(1) of the ICC Statute that some relevant provisions were added; Resolution ICC-ASP/8/Res.6, Review Conference, 26 November 2009, Annex III. On the proposals previous to the Kampala Review Conference see Assembly of State Parties, 8th Session, Report of the Bureau on the Review Conference, ICC-ASP/8/43/Add.1, 10 November 2009.

[144] See Michael Cottier, "Rome Statute and War Crimes", in ELSA International (ed.), *International Law as We Enter the 21st Century: International Focus Programme 1997–1999*, Spitz, Berlin, 2001, p. 179.

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preted in light of international humanitarian law from which all provisions of Article 8 originate.[145] This is particularly so since the ICC Elements of the Crimes are at times of limited assistance as they merely provide some interpretative guidance for a number of elements of each offence while also leaving some lacunae.[146]

Article 8 contains in its first paragraph a jurisdictional threshold requirement in the form of a "policy element" of the crime under the ICC Statute.[147] While this requirement is not of a mandatory nature – as the term "in particular" implies[148]– it expresses the drafters' conviction that only war crimes of a sufficient gravity and scale should be adjudicated by the ICC and thus provides the prosecutor with a "practical guideline".[149] Article 8(2) addresses the material law and is organised along the distinction between international and non-international armed conflict. Along a second axis, Article 8 distinguishes broadly between law derived from the Geneva Conventions, on the one hand, and provisions related to the Hague law system, determining prohibited means and methods of warfare. This subdivides Article 8 into quadrants regarding the material crimes, the first two covering international armed conflicts and the latter two non-international armed conflicts. Article 8(2)(a) covers grave breaches of the Geneva Conventions, much like Article 2 of the ICTY Statute. Article

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145 This is stipulated in the Elements themselves: ICC Statute, Art. 8, Introduction, para. 2, see *supra* note 17. In addition, Art. 8(2)(b) and (e) stipulates that the serious violations of international humanitarian law listed under the respective sub-paragraphs need to be "within the established framework of international law" which suggests that the outer limit of interpretation of these rules is where a provision would be in contravention of existing humanitarian law.

146 See also Cottier, 2008, para. 7, see *supra* note 5.

147 ICC Statute, Art. 8(1), see *supra* note 17: "[…] in particular when committed as part of a plan or policy or as part of a large-scale commission".

148 ICC, Situation in the Democratic Republic of the Congo, Appeals Chamber, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrant of Arrest, Article 58", ICC-01/04, 13 July 2006, para. 70 ('Situation in DRC, Judgment on Arrest Warrant Appeal') (http://www.legal-tools.org/doc/8c20eb/).

149 ICC, Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, para. 211 (https://www.legal-tools.org/doc/07965c/); Situation in DRC, Judgment on Arrest Warrant Appeal, para. 70, see *supra* note 148; Cottier, 2008, para. 9 ff., see *supra* note 5; William A. Schabas, *An Introduction to the International Criminal Court,* 3rd ed., Cambridge University Press, Cambridge, 2007, p. 115.

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8(2)(b) contains a long list of other serious violations of the laws and customs applicable in international armed conflict, including elements of Additional Protocol I, the 1907 Hague Regulations and other relevant international texts. Article 8(2)(c) applies in non-international armed conflict and lists the prohibitions encompassed by Common Article 3 of the Geneva Conventions. Finally, Article 8(2)(e) enumerates a number of other serious violations under international humanitarian law applicable in non-international conflict, in most relevant part the law on the protection of persons and property, means and methods of warfare, and elements from Additional Protocol II.[150]

The ICC Statute has decisively enhanced the level of protection for victims in armed conflict. Examples include the extensive provisions on gender crimes in both international and non-international armed conflict,[151] and the provision on child soldiers, which mirror the relevant SCSL provision and jurisprudence in this field.[152] Furthermore, the ICC provisions on crimes committed in non-international conflict go a long way to solidifying the emerging consensus in this field.

However, the ICC Statute is also marked by a rigidity that stands in contrast to the *ad hoc* tribunals, whose war crimes provisions provide for the possibility that existing crimes under customary international law that have not been explicitly listed be nevertheless brought within the tribunals' jurisdiction.[153] The *Tadić* Appeals Chamber clarified that the war

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[150] For an overview, see Cottier, 2008, para. 8, *supra* note 5.

[151] ICC Statute, Art. 8(2)(b)(xxii) and (e)(vi), see *supra* note 17; see also Office of the Prosecutor of the International Criminal Court, Policy Paper on Sexual and Gender-Based Crimes, June 2014.

[152] ICC Statute, Art. 8(2)(b)(xxvi) and (e)(vii), see *supra* note 17; SCSL, *Prosecutor v. Moinina Fofana, Allieu Kondewa and Sam Hinga Norman*, Appeals Chamber, Judgment, SCSL-2004-14, 28 May 2008, para. 139 ('CDF case') (https://www.legal-tools.org/doc/b31512/); SCSL, *Prosecutor v. Alex Tamba Brima et al.*, Trial Chamber, Judgment, SCSL-2004-16, 20 June 2007, para. 731 (https://www.legal-tools.org/doc/87ef08/); CDF case, Decision on Child Recruitment, paras. 18–29, 53, see *supra* note 99; SCSL, *Prosecutor v. Charles Ghankay Taylor*, Trial Chamber, Judgment, SCSL-03-01-T, 18 May 2012, para. 438 and fn. 1052 (https://www.legal-tools.org/doc/8075e7/); Henckaerts and Doswald-Beck, 2005, pp. 508, 593, see *supra* note 3.

[153] See ICTY Statute, Art. 3, *supra* note 4, and ICTR Statute, Art. 4, *supra* note 76: "Such violations shall include, but [shall] not be limited to: […]". In the *Čelebići* case, the ICTY Appeals Chamber stated that the expression in its Art. 3 "laws and customs of

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crime provision in Article 3 of the ICTY Statute may be taken to cover "all violations of international humanitarian law other than the 'grave breaches' of the four Geneva Conventions falling under Article 2".[154] In contrast, Article 8 of the ICC Statute is formulated in an exhaustive manner. Any serious violation of international humanitarian law not within the ICC's explicit jurisdictional confines in Article 8 will have to be added by way of an amendment of the ICC Statute. At the same time, the ICC Statute makes clear that the body of offences generating individual criminal liability under international (customary) law may be larger than what is expressly codified in the ICC Statute.[155] The absence of an explicit provision on the crime of terror, indiscriminate attacks as a method of war, or the use of chemical or biological weapons as a means of war illustrates this.[156] In addition, it can be argued that the list of ICC crimes applicable in non-international armed conflict was incomplete from its very inception[157] – as illustrated by the multiple amendments of Article 8(2)(e) during the 2010 Review Conference, criminalising the use of poison or poisoned weapons (lit. (e)(xiii)) and of asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices (lit. (e)(xiv)) as well as the use of bullets which expand or flatten easily in the human body (lit. (e)(xv)) in non-international armed conflict.[158]

war" includes *all* laws and customs of war in addition to those explicitly listed in the Article. Čelebići case, Appeal Judgment, para. 111, see *supra* note 111.

154 Tadić case, Decision on Jurisdiction, paras. 87, 89, see *supra* note 2. "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", *id.*, para. 91.

155 ICC Statute, Arts. 10, 22(3). See Bruce Broomhall, "Article 22", in Triffterer, 2008, see *supra* note 5.

156 However, the use of such weapons will in most cases also be indiscriminate in application and thus a war crime. In addition, it is argued that lit. (b)(xvii) and (xviii) cover these crimes for international armed conflict and lit. (e)(xiii) and (xiv) for non-international armed conflict. See Dapo Akande, "Can the ICC Prosecute for Use of Chemical Weapons in Syria?", in *EJIL: Talk!*, 23 August 2013 (http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/).

157 But see Alain Pellet, "Applicable Law", in Cassese *et al.*, 2002, p. 1056, *supra* note 4, who sees the definitions of crimes as laid down in Arts. 6 to 8 of the ICC Statute "in some respects" as a "step backwards compared with the case law and customary law itself".

158 Assembly of State Parties resolution RC/Res.5, Amendments to article 8 of the Rome Statute, RC/11, 10 June 2010, para. 1 and Annex I.

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The ICC Statute's rigidity and its cumbersome amendment procedure in its Article 121 bear the risk that the ICC will, in particular in the future, not or no longer reflect current developments in customary international law, in particular in fields where state practice and international treaties may have helped new law to crystallise, such as regarding the criminalisation of prohibited means and methods of warfare in non-international armed conflict. On the other hand, the ICC Statute's rigidity also prevents it from being influenced by temporary political pressures or being drawn into contentious legal territory, in particular regarding issues of state sovereignty, which have not yet been comprehensively charted by international agreements, courts, academia and civil society.[159] In addition, a reopening of statutory provisions codifying fundamental rules such as the Nuremberg Principles could have a destabilising effect beyond the Rome Statute itself and should therefore be avoided.

In conclusion it can be safely said that the ICC will, by virtue of its rather rigid legal framework, not be able to shape the constantly evolving body of international criminal law in the same manner as the UN and other *ad hoc* tribunals did and continue to do.[160] It will therefore not be a 'revolutionary' body in the current landscape of international criminal law but rather one that guarantees the *status quo*. It remains to be hoped that ICC States Parties will permit it at least in cautious steps to amend its Article 8 following developments in the modern geometry of warfare.

11.7. Conclusion

Even with all four Geneva Conventions and the 1977 Additional Protocols in place, the development of modern armed conflict remains very dynamic and the law as it stands will never comprehensively anticipate and account for all conduct that ought to be prohibited. While in particular Additional Protocols I and II sought to connect Geneva and Hague law and amplify their ambit of protection, both also recognised the need for future evolution by reiterating the validity of the so-called Martens

[159] See Roger S. Clark, "Article 121", in Triffterer, 2008, paras. 1 ff, see *supra* note 5.

[160] See, for example the ruling of the Special Tribunal for Lebanon's Appeals Chamber on the definition of the crime of terrorism as an international crime: Special Tribunal for Lebanon, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I /AC/R176*bis*, 16 February 2011, paras. 42 ff. (https://www.legal-tools.org/doc/4c16e9/).

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Clause,[161] whereby in situations not covered by the applicable international law in force, persons remain under the general protection of the principles of international law derived from established custom, principles of humanity and the dictates of the public conscience. In other words, the fact that an act of war is not covered in the existing law does not render it legal.[162]

The Statutes of the various international *ad hoc* tribunals and the ICC attest to the essential fact that war crimes can only be committed where international humanitarian law – be it treaty law or customary international law – applies and has been violated.[163] This general principle is as valid today as it was a century ago; the challenge now is to define *when* and *where* international humanitarian law applies in the modern geometry of warfare. The war against terror and the fundamental question regarding the geographical scope of armed conflict[164] is a clear example of the fact that modern wars will require constant adjustments to the present regime. Targeted killings, signature strikes, the increased resort to the use of drones in war and cyber warfare pose new challenges to the definition, application and probably even creation of new standards and provisions under international humanitarian law and, in consequence, war crimes law. War crimes law will continue to crystallise and adapt to the new realities of armed conflict.

[161] The Martens Clause goes back to Fyodor Fyodorovich Martens, the Russian delegate at the Hague Conferences of 1899, and has been codified in the preamble of the 1899 and 1907 Hague Conventions. See, for an in-depth discussion of the clause and its significance in the context of modern international humanitarian law, Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", in *American Journal of International Law*, 2000, vol. 94, no. 1, pp. 78–89; Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict", in *International Review of the Red Cross*, 1997, no. 317, pp. 125–34.

[162] Additional Protocol I, Art. 1(2), see *supra* note 1, covering international armed conflict; Additional Protocol II, Preamble, para. 4, see *supra* note 63, covering non-international armed conflict. The Martens Clause therefore has an important residual function preventing legal vacuum for grave violations of international humanitarian law, following a similar logic as ICTY Statute, Art. 5(i), see *supra* note 4, for crimes against humanity.

[163] Henckaerts and Doswald-Beck, 2005, pp. 572–73, see *supra* note 3; Tadić case, Decision on Jurisdiction, paras. 94, 143, see *supra* note 2.

[164] See Noam Lubell and Nathan Derejko, "A Global Battlefield? Drones and the Geographical Scope of Armed Conflict", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 1, pp. 65–88.

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The ICC Statute system will not be the carrier of revolutionary developments in this respect but rather be a solid source of application of war crimes law fostering the *status quo* in a time where we see not only progression of the law applicable in armed conflict but also initiatives seeking its regression; where states attempt to respond to threats to their national security with pragmatic solutions that may stand in conflict with fundamental rules under humanitarian law. In this regard, the existence of the ICC, which as an institution serves to consolidate and solidify the law, is an essential tool in the current and future political reality to secure the protection of victims in armed conflict and to continue the fight against impunity.

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Historical Origins of International Criminal Law: Volume 3

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

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