The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia

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I. Introduction

1997 may well have been a turning point for the International Criminal Tribunal for the Former Yugoslavia. For the first three years of its existence, the Tribunal, which was established by the Security Council in 1993,[2] had been surrounded by doubts that it could play an effective part in bringing to justice those responsible for the appalling violations of humanitarian law in the former Yugoslavia, let alone contribute to the maintenance of international peace — the ostensible reason for its creation.[3] Those doubts stemmed, for the most part, from the perceived inability of the Tribunal to enforce its will. Although the Prosecutor had issued indictments against numerous defendants, including the former political and military leaders of the Bosnian Serbs, by the end of the Tribunal's third year of operation, only seven defendants were actually in custody[4] and the Tribunal had spent much of the year to 31 July 1996 holding proceedings, under Rule 61 of its Rules of Procedures, in respect of defendants who were still at liberty.[5] As Judge Sidhwa explained, this procedure was basically an apology for the Tribunal's helplessness in not

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1 The author acknowledges with gratitude the assistance of Mr. Christoph Safferling, LL.M, in undertaking some of the research for this article. The responsibility for any errors remains that of the author alone.

2 See S/RES/827 (1993) of 25 May 1993.

3 See Part II, below.

4 Report of the President to the United Nations General Assembly, Doc. A/51/292; S/1996/665, para. 8.

5 See below, p. 112.

being able to effectively carry out its duties, because of the attitude of certain States that do not want to arrest or surrender accused persons, or even to recognize or cooperate with the Tribunal.[6]

Eighteen months later, the Tribunal was in a markedly better position.[7] Although only one trial had been completed,[8] a total of 22 defendants were in custody, several trials were under way and the President of the Tribunal had appealed to the General Assembly to create another Trial Chamber in order to accelerate progress.[9] Moreover, although the high-ranking defendants named in the Rule 61 proceedings were still at liberty, the trial of one senior officer[10] was under way and a number of middle-ranking defendants were in custody in The Hague. Perhaps the most important development was the arrest of two suspects by units of the multinational Stabilisation Force ("SFOR") in Bosnia-Herzegovina and of another by troops in the United Nations administered area of Croatia. These arrests, which attracted considerable publicity, put an end to complaints that assisting the Tribunal had too low a priority for the various international forces in the former Yugoslavia. These developments have greatly enhanced the Tribunal's reputation.

The increased effectiveness of the Tribunal means that its jurisprudence has become of greater importance. In part that is merely because the rulings given in the early cases will have an effect as precedents in the numerous cases which are now pending.[11] It is likely, however, that the jurisprudence of the Tribunal will now have a lasting impact upon the development of international humanitarian law, which may well turn out to be the most

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6 Separate Opinion in *Prosecutor* v. *Rajic* (IT-95-12-R61), 5 July 1996 and 13 September 1996; *ILR* 108 (1998), 141 et seq., (171).

7 See the address of President Cassese to the United Nations General Assembly, 4 November 1997.

8 *Prosecutor v. Tadic* (IT-94-1-T), Decision of the Trial Chamber of 7 May 1997; to be reported in Vol. 112 of the *International Law Reports*. At the time of writing the Appeals Chamber was due to hear appeals in this case.

9 Address of President McDonald to the United Nations Security Council, 12 February 1998; ICTY Press Release 291-E; 16 February 1998.

10 General Blaskic, former Chief of Staff of the Bosnian Croat army. A senior Bosnian Serb officer, General Djukic, had been arrested and indicted but had died before his trial had commenced.

11 The decisions of the Yugoslav Tribunal may also prove important precedents for the International Criminal Tribunal for Rwanda, established by S/RES/955 (1994) of 8 November 1994. The Rwanda Tribunal has already held in the *Rutaganda* Case (ICTR-96-3-T), 26 September 1996, that it will take account of the jurisprudence of the Yugoslav Tribunal, a development which was inevitable given that the two Tribunals share a common Appeals Chamber.

important legacy of the Tribunal. The purpose of this article is therefore to examine that jurisprudence in so far as it concerns the substantive law to be applied by the Tribunal. No attempt is made here to examine the numerous rulings on evidence and procedure.[12] Nor is it the intention to enter into the debates about the establishment of the Tribunal,[13] except in so far as it is necessary to the discussion of the nature of the Tribunal.

Part II of this article will examine the legal nature of the Tribunal and its relationship with the Security Council and with States, as well as reviewing the extent of the Tribunal's jurisdiction. Part III will consider the nature and extent of the armed conflicts in the former Yugoslavia, a matter of great significance both for the jurisdiction of the Tribunal and the law which it is directed to apply. The jurisprudence of the Tribunal regarding the law applicable in international and non-international conflicts will then be discussed in Parts IV and V respectively. Part VI will consider the case law of the Tribunal on crimes against humanity and genocide, while Part VII will look at the decisions on degrees of culpability. The author's conclusions are set out in Part VIII.

II. The Constitution and Jurisdiction of the Tribunal

An assessment of the jurisprudence of the Tribunal has to begin with a consideration of the manner in which the Tribunal was established and of its position in international law, for these questions go to the legitimacy

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12 On these matters, see J. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1997; V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, 1995 and P. King and L. Rosa, "The Jurisprudence of the Yugoslavia Tribunal 1994–96", *EJIL* 8 (1997), 123 et seq. These works also contain valuable discussions of the substantive law issues. For a particularly important discussion of the jurisprudence on the difficult question of the reluctant witness, see F. Hampson, "The International Criminal Tribunal for Yugoslavia and the Reluctant Witness", *ICLQ* 47 (1998), 50–74.

13 Amongst the extensive literature on this subject, see International Criminal Tribunal for the Former Yugoslavia, *The Path to the Hague*, 1996; C. Greenwood, "The International Tribunal for Former Yugoslavia", *Int'l Aff.* 69 (1993), 641 et seq. and D. Shraga and R. Zacklin, "The International Criminal tribunal for the Former Yugoslavia", *EJIL* 5 (1994), 360. Most of the literature supports the creation of the Tribunal. For a contrary view, see T.D. Mak, "The Case against an International War Crimes Tribunal for the Former Yugoslavia", *International Peacekeeping* 2 (1995), 536.

of the Tribunal and the scope of its authority and thus affect the weight likely to be given to its decisions both now and in the future. While the Tribunal has stressed its unique character[14] and described itself as a "self-contained system",[15] it does not operate in a legal vacuum. In particular, its legal authority is not something which it can itself generate; that authority has to be derived from some act or acts of others, rooted in rules of law.

Although frequently compared with the International Military Tribunal at Nuremberg, the International Criminal Tribunal for the Former Yugoslavia rests on legal foundations which differ in important respects from those of the Nuremberg Tribunal.[16] The Nuremberg Tribunal was established by the four principal allied Powers; it was therefore a multinational, rather than an international, tribunal. It derived its legal authority from the fact that each of the States which was party to its establishment possessed jurisdiction over the defendants for the offences with which they were charged. The Nuremberg process could thus be said to have represented a pooling of independent national jurisdictions.[17]

The International Criminal Tribunal for the Former Yugoslavia, by contrast, was established by the United Nations Security Council acting

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14 Thus, in *Prosecutor* v. *Tadic (Protection of Witnesses)*, 10 August 1995, *ILR* 105 (1997), 599, the Trial Chamber held that the unique character of the Tribunal meant that the decisions of human rights tribunals regarding the standards of a fair trial were of limited relevance, para. 27.

15 See the Decision of the Appeals Chamber in *Prosecutor* v. *Tadic (Jurisdiction)*, 2 October 1995, *ILR* 105 (1997), 419, para.11.

16 The comparison is also misleading in other respects. Whereas the Nuremberg Tribunal was established following the end of hostilities and after the principal Defendants had been arrested and at a time when those which established the Tribunal had complete power in Germany, the International Criminal Tribunal was created during the conflicts in the former Yugoslavia and has always been dependent upon States, particularly the belligerents, to detain and surrender those whom it indicts. In addition, the Nuremberg Tribunal was specifically established to try defendants from one party to World War II, whereas the International Criminal Tribunal has jurisdiction over persons from any of the belligerents and has, indeed, brought to trial Serbs, Croats and Bosnian Muslims.

17 This aspect of Nuremberg could be seen in the subsequent arrangements for the detention of prisoners at Spandau. The Tokyo IMT also exercised a jurisdiction which belonged to the States which had established it, although the manner of its establishment differed from that of the Nuremberg Tribunal.

on behalf of the entire international community.[18] Moreover, the Council established the Tribunal in the exercise of its powers under Chapter VII of the United Nations Charter, not as a result of any agreement between States. That is in marked contrast to the proposals for the creation of a permanent international criminal court, where it has generally been assumed that the court must be established by treaty.[19] There were, of course, sound practical reasons for following the course of employing a Security Council resolution in the case of the Yugoslav Tribunal. As the United Nations Secretary-General explained in his Report submitting the draft Statute of the Tribunal to the Council, the normal approach of proceeding by way of a treaty would have been too slow and would almost certainly have been ineffective, because those States most directly affected would have declined to become parties.[20] The Chapter VII approach, on the other hand, "would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII."[21]

The manner in which the Tribunal was established has several important legal consequences. First, it means that the source of the Tribunal's authority is derived not, as in Nuremberg, from the consent of States which themselves possess jurisdiction over the crimes in question but from the act of an organ of the United Nations which possesses no criminal jurisdiction at all. Secondly, whatever the practical advantages of creating the Tribunal by a resolution under Chapter VII of the Charter, it means that the legal justification for the establishment of the Tribunal rests not on the inherent value of enforcing the law or upholding justice but on the

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18 S/RES/827 (1993) of 25 May 1993. Prior to the adoption of resolution 827, the Council had adopted a number of resolutions regarding violations of humanitarian law in the former Yugoslavia; see resolutions 764 (1992) of 13 July 1992, 771 (1992) of 13 August 1992, 780 (1992) of 6 October 1992 and 808 (1993) of 22 February 1993. Resolution 780 established a Commission of Experts. The first Report of the Commission, Doc. S/25274 (10 February 1993) was influential in leading to the establishment of the Tribunal and gave an indication of the scale of the task with which the Tribunal was to be confronted. The Commission also published two subsequent reports, Docs S/26545 (5 October 1993) and S/1994/674 (27 May 1994).

19 For the difficulties which this approach creates, see J. Dugard, "Obstacles in the Way of an International Criminal Court", *CLJ* 56 (1997), 329. Cf. also A. Zimmermann in this Volume.

20 Doc. S/25704, paras 19–21.

21 *Ibid.*, para. 23.

decision of the Council that the creation of the Tribunal will contribute to the restoration of international peace and security, since that is the purpose for which the Security Council is given its powers under Chapter VII. Finally, although it is the creation of the Security Council, the Tribunal is dependent upon the cooperation of States and its relationship with the States and ability to require their assistance are bound up with the extent of the powers of the Council under Chapter VII.

1. The Security Council and the Legitimacy of the Tribunal

The fact that the Tribunal was established by the Security Council has led some to question its legitimacy.[22] That issue was examined by the Tribunal itself in its first decision, *Tadic (Jurisdiction)*.[23] The Defendant there challenged the validity of the establishment of the Tribunal on a number of grounds, which were considered at some length by the Appeals Chamber.[24] The Defendant argued that the Security Council lacked the power to establish a tribunal possessing criminal jurisdiction. This assertion rested on several different grounds but two are of particular importance for the present study. First, the Defendant argued that the Council had exceeded its powers under Chapter VII, because that Chapter did not authorize the Security Council to create a judicial tribunal as a measure to address a threat to international peace and security. Secondly, he contended that it was a general principle of human rights law that a judicial tribunal had to be "established by law" and that a resolution of the Security Council, even if *intra vires*, did not satisfy this requirement.

With regard to the first argument, the Appeals Chamber held that Chapter VII in general and Article 41 in particular conferred upon the Security Council a broad, although not an unlimited, discretion regarding the measures which were appropriate to address a threat to international

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22 See, e.g., J.M. Sjocrona, "The International Criminal Tribunal for the Former Yugoslavia: Some Introductory Remarks from a Defence Point of View", *LJIL* 8 (1995), 463.

23 *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), 2 October 1995; *ILR* 105 (1997), 419. For a critical discussion of the Tribunal's treatment of this challenge, see J.E. Alvarez, "Nuremberg Revisited: the *Tadic* Case", *EJIL* 7 (1996), 245.

24 *ILR* 105 (1997), 453. The Trial Chamber had earlier ruled that it had no jurisdiction to inquire into the validity of its own establishment, *ILR* 105 (1997), 427. In the Appeals Chamber, however, only Judge Li took that approach.

peace and security. Since the Council had already determined[25] that the violations of humanitarian law in the conflicts in the former Yugoslavia were exacerbating a threat to international peace and security and the concept of individual criminal responsibility has long been seen as one of the means by which international law seeks to deter, or prevent repetition of, war crimes, the establishment of the Tribunal could not be said to have been manifestly outside the scope of the Council's powers under Chapter VII.[26] This part of the decision is plainly correct. While measures designed to stop, or at least contain, the conflicts in the former Yugoslavia were the most important ones for addressing the threat to international peace, measures to curb the atrocities which were occurring were also part of a reasoned strategy to deal with that threat. Moreover, while it was the situation in Yugoslavia with which the Security Council was concerned, the longer term effect of the Tribunal should also be considered. It can reasonably be argued that if the Tribunal is perceived as an effective body, its work could have a deterrent effect on future violations of humanitarian law and thus contribute to limiting future threats to the peace.

A more difficult aspect of the defendant's argument was that the Council could not have the power to establish a subsidiary organ with judicial powers when it had no judicial competence itself. The Appeals Chamber rejected this argument on the ground that it was based on a misunderstanding of the "constitutional set-up of the Charter".[27] Article 29 gave the Council the power to establish "such subsidiary organs as it deems necessary for the performance of its functions". The Appeals Chamber considered that the Defendant's argument confused the function with the means of its performance. While the Council did not have a judicial *means* of operation, it did have clearly established *functions* in respect of peace and security and it was as a means for assisting in the performance of those functions that it had established the Tribunal. The Appeals Chamber relied upon the Advisory Opinion of the International Court of Justice in the *Effect of Awards* Case,[28] in which the Court had upheld the legality of the General Assembly's act of creating a tribunal to hear staff cases and thus to assist in the performance of the Assembly's function of regulating staff relations, notwithstanding that the Assembly had no judicial competence of its own. The two cases are not, however, on a par. The Assembly, in the *Effect of Awards* Case, had dealt with a matter internal to the United Nations and in respect of which no national court would normally have

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25 See above, p. 101.

26 *ILR* 105 (1997), 465–470, paras 28–36.

27 *ILR* 105 (1997), 470, para. 37.

28 ICJ Reports 1954, 47 et seq., (61).

possessed jurisdiction. By contrast, the Council created the Tribunal as an alternative to the exercise of jurisdiction by national courts and conferred primacy upon it. Nevertheless, there seems no reason in principle why the Security Council, if it considers that the creation of a judicial instrument is necessary for it effectively to perform its functions in respect of peace and security, should not create such an instrument.

Tadic's second argument, that the Tribunal was not "established by law", was a more formidable one and the reply by the Appeals Chamber less convincing. The right of an individual to have a criminal charge against him determined by a tribunal established by law is recognized by a wide range of international human rights instruments.[29] The Appeals Chamber considered, however, that this requirement applied to national, not international courts, in part because there was no legislature in international society. Moreover, the Chamber held that in the international context what mattered was that the Tribunal was grounded in the rule of law and offered all the guarantees embodied in the relevant international human rights instruments.[30] That answer confuses the question whether the Tribunal has been established by law with the question whether it functions in accordance with law. A tribunal may function in accordance with all legal guarantees and yet still not have been established by law. A more convincing justification is that the Tribunal was established by a decision of the Council lawfully taken under a legally binding instrument, the Charter, and that it was therefore established "by law".[31]

Although, therefore, some aspects of the reasoning in *Tadic (Jurisdiction)* give rise to misgivings,[32] on the whole the decision of the Appeals Chamber is successful in vindicating the legitimacy of the Tribunal's establishment by the Security Council. Whether the Appeals Chamber should have embarked upon this inquiry at all is a different matter and one which falls outside the scope of the present study.

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29 The Appeals Chamber referred to article 14 para. 1 of the International Covenant on Civil and Political Rights, article 6 para. 1 of the European Convention on Human Rights and article 8 para. 1 of the American Convention on Human Rights.

30 *ILR* 105 (1997), 471–476, paras 41–48.

31 The Chamber referred to this argument at para. 44 of its judgment.

32 For more stringent criticism, see Alvarez, see note 23. It is noticeable that a Trial Chamber of the International Criminal Tribunal for Rwanda has followed *Tadic* in: *Prosecutor v. Kanyabashi* (ICTR-96-15-T), Decision of 18 June 1997, noted at *AJIL* 92 (1998), 66–70.

2. Criminal Justice and the Maintenance of Peace and Security

The fact that the Tribunal was created by a Chapter VII resolution means that it was established in order to contribute to the maintenance of international peace and security by means of the administration of criminal justice, not because the administration of justice was an end in itself. Indeed, as *Tadic (Jurisdiction)* demonstrates, this feature of the Tribunal is essential to its legality, because the powers of the Council under Chapter VII exist only for the purpose of restoring and maintaining international peace and security. As one commentator puts it, entrusting the creation of the Tribunal to the Security Council "amounted to allowing the imperatives of maintaining peace to take precedence over those of law and justice."[33]

In some respects, that may not matter. It is clear from the decision of the Appeals Chamber in *Tadic (Jurisdiction)* that the Tribunal will jealously guard its independence against any attempt by the Security Council to interfere in particular cases and rejects the notion that it is at the mercy of the Council.[34] Indeed, the Council has so far shown no inclination to interfere with the work of the Tribunal. It could be argued that if peace and security were to be restored in the former Yugoslavia, then the justification for the Tribunal would disappear. That argument, however, overlooks the fact that the work of the Tribunal could still be considered necessary for the maintenance of peace and security in the former Yugoslavia or, at least, that the Security Council could legitimately take that view. Moreover, as was suggested in the preceding section, in assessing the contribution of the Tribunal to the achievement of the objectives of Chapter VII of the Charter, it is necessary to look not only at the situation in the former Yugoslavia but also at the likely effect of the Tribunal on wider considerations of peace and security related to other conflicts.

Nevertheless, it would appear to be open to the Security Council to determine that the Tribunal no longer served the purpose for which it was created, or that the maintenance of peace and security was better served

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33 P. Tavernier, "The Experience of the International Criminal Tribunals for the former Yugoslavia and Rwanda", *Int. Rev. of the Red Cross* 37 (1997), 605 et seq., (611).

34 *ILR* 105 (1997), 459–460, paras 16–18. The Report of the Secretary-General containing the Statute of the Court, which was expressly approved by the Council in resolution 827, stated that the Tribunal "would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions" (Doc. S/25704, para. 28).

by putting an end to its work.[35] Even if one accepts the view of the Appeals Chamber in *Tadic (Jurisdiction)* that the powers of the Council under Chapter VII are not unlimited, the Chamber considered that those powers — and the margin of discretion enjoyed by the Council — were very broad. The result is that, as the Trial Chamber in *Tadic (Jurisdiction)* put it, the abolition of the Tribunal before it had completed its work would be within the power of the Security Council.[36]

3. The Powers of the Tribunal and the Security Council to Require Cooperation

The fact that the Tribunal was established by a Chapter VII decision of the Council also affects the duty of States and other parties to cooperate with it in its work. Lacking a police force or other agencies of implementation of its own, the Tribunal is obviously heavily dependent upon the cooperation of States and of entities such as the Bosnian Serb republic ("Republika Srpska") to arrest accused persons and surrender them to the Tribunal as well as to furnish evidence and assist in investigations. The duty of States to cooperate in these ways is clearly established by para. 4 of Security Council resolution 827, which states that the Security Council decides that:

> "... all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the statute, including the obligations of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the statute."

By virtue of Article 25 of the Charter, this decision is binding upon all Member States of the United Nations.[37] In accordance with Article 103 of the Charter, the obligation to comply with this decision takes precedence over other obligations of States. Moreover, the general principle of inter-

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35 This possibility was expressly contemplated in the Secretary-General's Report, para. 28.

36 *ILR* 105 (1997), 434, para. 20.

37 See M. Wood, " The Interpretation of Security Council Resolutions", in this Volume, p. 73–95. For discussion of article 25, see J. Delbrück, "On Article 25", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 1994, 407 et seq.

national law by which a State may not rely upon its own internal law as a justification for its failure to comply with an international obligation means that a State has a duty to comply with an order of the Tribunal or a request for assistance made under article 29 of the Statute even if it has not yet enacted the necessary national legislation or, indeed, if its national law prohibits the compliance sought.[38] The obligation to comply with decisions of the Tribunal also applies to non-State *de facto* entities (in particular "Republica Srpska").[39]

Nevertheless, it is clear that a number of States, including in particular those most closely involved in the conflict and therefore in the Tribunal's work, have persistently refused to comply with this obligation.[40] Since a State which fails to execute a warrant of arrest or to comply with an order or request for assistance from the Security Council is in breach of a binding decision of the Security Council, the Council has the power to take action against it, although such action is unlikely unless the Council considers the breach to be a particularly serious one. The question is whether the Tribunal itself can take action against a recalcitrant State.

This matter was considered by the Tribunal in the case of *Blaskic (Objection to the Issue of subpoenae duces tecum).*[41] The issue there concerned *subpoenae duces tecum* issued in accordance with article 54 of

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38 The Trial Chamber drew attention to this principle in *Tadic (Deferral), ILR* 101 (1995), 1 (8 November 1994). See also the Decision of President Cassese in *Prosecutor v. Blaskic (Application to vary conditions of detention)* Case IT-95-14-T, *ILR* 108 (1998), 69 (3 April 1996), paras 7–9. The fact that the Tribunal has jurisdiction only over individuals does not, of course, preclude the possibility that it can issue binding orders to States; see *Prosecutor v. Blaskic (Objections to the Issue of subponae duces tecum)*, Decision of the Appeals Chamber, 29 October 1997, *ILR* 110 (1998), 607, para. 26.

39 The Security Council has on several occasions treated Republica Srpska as bound by decisions of the Council; see, e.g., S/RES/942 (1994) of 23 September 1994. The obligation for the Bosnian Serbs to cooperate with the tribunal is specifically incorporated into the Dayton Peace Agreement, 1995, article X; *ILM* 35 (1996), 75. See also J. Jones, "The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia", *EJIL* 7 (1996), 226 et seq.

40 See the Address of President Cassese to the United Nations General Assembly, 4 November 1997.

41 Case IT-95-14-T, Decision of Trial Chamber II, 18 July 1997, *ILR* 110 (1998), 607, (616), and Case IT-95-14-AR108 *bis*, Decision of 29 October 1997, *ILR* 110 (1998), 607, (688). The Appeals Chamber had the benefit of a number of briefs from *curiae*, including one from the Max Planck Institute, which is reproduced in: *Max Planck UNYB* 1 (1997), 349 et seq.

the Rules of Procedure of the Tribunal to the Republic of Croatia and to certain senior Croatian Government officials requiring the production of documents. A *subpoena* is, as its name suggests, an order to take specified action on pain of a penalty for non-compliance. Although both the Statute and the English and French versions of the Rules of Procedure envisage that the Tribunal can issue mandatory orders, the term *subpoena* itself appears only in the English version of article 54 of the Rules of Procedure. The Appeals Chamber held that the Tribunal could issue a *subpoena* in the technical sense of the term only to individuals acting in their private capacities. If the Tribunal wanted a State to produce documents, it could issue a binding order to that effect but it had no power itself to impose a penalty for non-compliance.[42] The power to impose sanctions for non-compliance remained vested in the Security Council and the only recourse which the Tribunal possessed in the event of a State disobeying a binding order issued to it was to make a finding of violation and then communicate that finding to the Security Council.[43] Moreover, the Appeals Chamber held that the Tribunal was not empowered to issue binding orders to State officials acting in their official capacity, on the ground that:

> "Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity."[44]

It is submitted that the conclusions of the Appeals Chamber in this respect are correct. While the Security Council clearly manifested an intention to confer upon the Tribunal the power to take decisions binding upon States,

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42 Appeals Chamber Decision, paras 20–21.

43 *Ibid.*, paras 35–36. This is the procedure specifically laid down in relation to the execution of warrants of arrest by Rule 61(E).

44 *Ibid.*, para. 38. A similar approach has been taken by national courts in a number of countries regarding the extension to individual officials of the immunity of the State which they serve; see *Jaffe* v. *Miller*, *ILR* 95 (1994), 446 and *Walker* v. *Bank of New York*, *ILR* 104 (1997), 277 (Canada), *Church of Scientology* v. *Commissioner of the Metropolitan Police*, *ILR* 65 (1984), 193 (Germany), *Propend Finance Limited* v. *Sing*, to be published in Vol. 111 of the *ILR* (1998), (England) and *Herbage* v. *Meese*, *ILR* 98 (1994), 101 (United States).

there is no indication in resolution 827 or in the Statute of the Tribunal that the Council intended to delegate to the Tribunal any part of its power to impose sanctions upon States (if, indeed, it could do so) and the Tribunal could not confer such a power upon itself through the Rules of Procedure which it adopted. Moreover, in practice there is plainly no sanction available to the Tribunal other than that of adverse publicity. Any action would have to be taken by the Council itself in the exercise of its powers under Chapter VII. The decision in *Blaskic* is another indication that the Tribunal, as a creation of the Security Council, is dependent upon the Council to enforce its decisions.[45]

4. The Jurisdiction of the Tribunal

An assessment of the jurisprudence of the Tribunal in relation to humanitarian law also requires a brief analysis of the Tribunal's jurisdiction. The Statute confers jurisdiction in respect of four categories of "serious violations of international humanitarian law" committed by individuals in the territory of the former Yugoslavia since 1991.[46] The four categories of offence are specified in articles 2 to 5 of the Statute as follows:

> "*Article 2: Grave Breaches of the Geneva Conventions of 1949*
> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
> (a) wilful killing;
> (b) torture or inhuman treatment, including biological experiments;
> (c) wilfully causing great suffering or serious injury to body or health;

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45 One surprising feature of the *Blaskic* decision is that the Appeals Chamber considered that a State official who was part of a United Nations force or other United Nations operation could be required to give evidence because he was not acting in his capacity as a *State* official but rather as an official of the United Nations (paras 46–51). This decision has already led to friction with the Government of France which has refused to allow members of the French armed forces to testify; see ICTY Press release 275-E, Statement of Judge Louise Arbour, Prosecutor, 15 December 1997.

46 Statute of the Tribunal, arts. 1, 6 and 8. In contrast to the position at Nuremberg, there is no jurisdiction in respect of organizations; see article 6 and the express rejection of such jurisdiction in the Secretary-General's Report, Doc. S/25704, para. 51.

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3: Violations of the Laws or Customs of War
The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 4: Genocide
1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5: Crimes against Humanity
The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts."

It is important to realize that these provisions determine the scope of the jurisdiction of the Tribunal, they do not define, let alone alter, the substantive law which the Tribunal is required to apply. The Report of the Secretary-General on the establishment of an international criminal tribunal made clear that there was no intention that the Security Council should create or purport to "legislate" the law to be applied but that the Tribunal should apply the existing international humanitarian law.[47] The Statute, therefore, neither renders conduct unlawful which was previously lawful under international law nor creates individual criminal responsibility under international law for acts in respect of which such responsibility did not previously exist. The principle that the Statute does not create new offences or alter the definition of the existing offences under international humanitarian law has been reaffirmed by the Tribunal in the Case of *Delalic*.[48]

Consequently, there are three questions which the Tribunal has to examine in each case. First, is the conduct of which the defendant is accused unlawful under the applicable rules of international humanitarian law (the question of legality)? Secondly, if so, does that conduct involve individual

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47 Doc. S/25704, para. 29. Indeed, the Secretary-General considered that the principle *nullum crimen sine lege* required that the Tribunal should have jurisdiction only in respect of crimes well established in *customary* international law, para. 34.

48 Case IT-96-21-AR72.5, Decision of the bench of the Appeals Chamber, 15 October 1996.

criminal responsibility under international law (the question of criminality)? Thirdly, if so is this offence one in respect of which the Tribunal has jurisdiction (the question of jurisdiction)? Only the third of these questions can be answered by reference to the Statute, the answers to the other two must be sought elsewhere. It is for that reason that the Trial Chamber erred in *Tadic (Jurisdiction)* in holding that the Defendant could be tried on charges of grave breaches of the Geneva Conventions under article 2 of the Statute irrespective of whether his acts had been performed in an internal or an international armed conflict.[49] Although article 2 makes no reference to the type of conflict, the substantive law which it empowers the Tribunal to apply, namely the Geneva Conventions of 1949, is what determines the content of the concept of grave breaches. As the Appeals Chamber held, the Conventions link the concept of grave breaches to that of protected persons, a concept which they define in such a way that it can exist only in an international armed conflict.[50]

One final aspect of the jurisdiction of the tribunal which requires comment is that the Statute specifically provides that an accused person has a right to be tried in his presence,[51] thus specifically excluding the possibility of trials *in absentia*.[52] Nevertheless, the Tribunal devised, in its Rules of Procedure and Evidence, a procedure which has some of the features of a trial *in absentia*. Under Rule 61 of the Rules, where the Tribunal's Prosecutor has issued an indictment against a person but it has proved impossible to serve the indictment and arrest the accused, a Judge can order that the indictment be referred to a Trial Chamber for review. The Trial Chamber will then hear evidence brought by the Prosecutor and determine whether there are reasonable grounds for believing that the defendant has committed (with the requisite state of mind) the acts of which he is accused and whether those acts, if proved, would amount to an offence within the jurisdiction of the Tribunal. If the Trial Chamber

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49 *ILR* 105 (1997), 419 (Decision of 10 August 1995), paras 46–56.

50 Decision of the Appeals Chamber of 2 October 1995, *ILR* 105 (1997), 419, (453), paras 79–85. Judge Abi-Saab dissented on this point, *ILR* 105 (1997), 534–538. For further discussion of this point, see below, p. 126–127. On the relationship between the Statute and the substantive law, see also the discussion of crimes against humanity in Part VI, below.

51 Article 21 para. 4, lit. c.

52 The Secretary-General maintained that trials *in absentia* would be contrary to article 14 of the International Covenant on Civil and Political Rights; Secretary-General's Report, Doc. S/25704, para. 101. The rejection of trials *in absentia* has been criticised by A. Pellet, "Le Tribunal criminel pour l'ex-Yougoslavie. Poudre aux yeux ou avancée décisive?" *RGDIP* 98 (1994), 7 et seq., and Tavernier, see note 33.

concludes that this test is satisfied, it confirms the indictment and issues an international arrest warrant which is then sent to all States and to the SFOR. The Tribunal's Rule 61 decisions contain several important statements about the law of armed conflict. It must, however, be emphasised that these decisions are of a provisional character. A Trial Chamber (and *a fortiori* the Appeals Chamber) remains free to take a different position on the law once it has heard argument from both sides.

III. The Nature and Extent of the Armed Conflicts in the Former Yugoslavia

One of the most important aspects of the jurisprudence of the Tribunal to date is its treatment of the concept of armed conflict and, in particular, its analysis of whether the different conflicts in the former Yugoslavia possessed an internal or international character. Much of the substantive law which the Tribunal is empowered to apply is applicable only in an armed conflict,[53] while article 5 gives jurisdiction over crimes against humanity only if there is a nexus between the crime and an armed conflict.[54] Moreover, the law applicable to internal armed conflicts differs from that which applies in international conflicts, so that the characterisation of the conflict becomes a matter of great importance.

In *Prosecutor v. Tadic (Jurisdiction)*,[55] the Appeals Chamber considered at length whether there was an armed conflict taking place in the Prijedor region of Bosnia-Herzegovina at the time of the alleged offences and, if so, whether that conflict was of an internal or international character. Whereas the defendant's submission to the Trial Chamber was that there had been no international armed conflict, on appeal he sought to argue that there had been no armed conflict of any kind in Prijedor at the relevant time. Instead, he maintained that the Serb inhabitants had assumed authority in the region without active resistance on the part of the Muslim and Croat inhabitants, so that, whatever the position may have been in other parts of Bosnia-Herzegovina, there had been neither an internal nor an international armed conflict in Prijedor.

This argument, which assumes that an armed conflict exists only in those parts of a State (or States) where actual fighting is taking place at the

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53 This is true of the law regarding grave breaches under article 2 of the Statute and war crimes under article 3.

54 See Part VI, below.

55 *ILR* 105 (1997), 419 (453). For comment, see C. Greenwood, "International Humanitarian Law and the *Tadic* case," *EJIL* 7 (1996), 265 et seq.

relevant time, has no basis in international law. There is nothing in the Geneva Conventions or other rules of humanitarian law to justify such an assumption, let alone the conclusion which the defendant apparently sought to draw from it, namely that the conditions of detention of prisoners detained away from the scene of the fighting would not be subject to humanitarian law. On the contrary, many provisions of humanitarian law are expressly intended to apply away from the scene of the fighting or after active hostilities have ceased. The Appeals Chamber rejected the Defendant's argument, although it accepted that there had to be a nexus between the offence charged and the armed conflict. The Appeals Chamber stated that:

> "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."[56]

On this basis, the situation in Bosnia-Herzegovina had clearly reached the level of an armed conflict by May 1992 and the acts alleged in the indictment were sufficiently connected to that conflict to be subject to the rules of humanitarian law, irrespective of whether there was any fighting in the Prijedor region itself.

The definitions of international and internal armed conflicts are of considerable importance. Neither term is defined in the Geneva Conventions or other applicable agreements. Whereas there is an extensive literature on the definition of "war" in international law,[57] armed conflict has always been considered a purely factual notion and there have been few attempts to define or even describe it. The approach taken in the International Red Cross Commentary on the Geneva Conventions is that "any difference arising between two States and leading to the intervention of

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56 Decision of 2 October 1995, *ILR* 105 (1997), 419 (453), para. 70.

57 For a review of that literature and the State practice on the subject, see C. Greenwood, "The Concept of War in Modern International Law", *ICLQ* 36 (1987), 283 et seq.

members of the armed forces is an armed conflict within the meaning of Article 2 [common to the four Geneva Conventions]".[58] This approach has received some support in State practice,[59] although it is open to question whether all States have treated the threshold for armed conflict as being so low. The decision in *Tadic (Jurisdiction)* provides further support for this very expansive approach to the meaning of armed conflict. Even more significant is the attempt to define internal armed conflict, which rejects the notion that isolated or sporadic acts of violence within a State can amount to an armed conflict for the purposes of common article 3 of the Geneva Conventions while avoiding the very high threshold established for the application of Additional Protocol II to those Conventions.[60]

The Appeals Chamber did not accept that the situation in the former Yugoslavia should automatically be regarded as a single armed conflict, which was wholly international in character. Instead, it held that the conflict (or, rather, the conflicts) had both internal and international characteristics.[61] The Appeals Chamber considered that:

> "To the extent that the conflicts had been limited to clashes between the Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia and Montenegro) could be proven."[62]

In this respect, the decision swims against the tide of much of the literature on the conflicts in the former Yugoslavia, which has tended to treat the entirety of the conflicts as a single entity and as international in character.[63] It also departs from the conclusion of the Commission of Experts established by Security Council resolution 780 (1992), which considered that

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58 J. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, 1958, 20.

59 See, e.g., the claim by the United States that the act of Syria in shooting down a US aircraft over Lebanon and taking the pilot prisoner created an armed conflict between Syria and the United States, thus making the pilot a prisoner of war, *Digest of United States Practice in International Law* 1981–88, Vol. III, 3456.

60 See Additional Protocol II, 1977, to the Geneva Conventions, article 1.

61 *ILR* 105 (1997), 419 et seq., para. 77.

62 *Ibid.*, para. 72.

63 See, in particular, the important and highly influential article by T. Meron, "International Criminalization of Internal Atrocities", *AJIL* 89 (1995), 554 et seq., (556).

> "... the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia."[64]

There were, however, good reasons for the Appeals Chamber to adopt the view that it did.

First, the Appeals Chamber was right to reject the argument that the Security Council had, in effect, already determined that the totality of the conflicts in the former Yugoslavia were to be treated as international in character. There is no indication in the text of S/RES/827 (1993) of 25 May 1993, establishing the Tribunal, in the Statute of the Tribunal, which was annexed to that resolution, or in the Report of the Secretary-General,[65] on which the Security Council acted in adopting that resolution, that the character of the conflict had already been determined. Yet since the law applicable to international armed conflicts is markedly different from that which applies to internal conflicts, such a determination would have been of the utmost importance, as it would have played a central role in ascertaining the substantive law against which a particular accused would have been judged and, in some cases, therefore have determined whether or not he was guilty of an offence against international law. In view of the importance attached by the Security Council to the principle that the Tribunal should apply the existing international law and that the Council should not be seen as a legislature, if the Council had intended to determine such an important issue it would have needed to make a very clear statement to that effect.

The approach of the Security Council to the conflicts in the former Yugoslavia is, of course, an important piece of international practice which should be given considerable weight. That practice, especially when contrasted with the Council's treatment of what was clearly an internal conflict in Rwanda,[66] shows that the Council undoubtedly considered that there was an international armed conflict (or conflicts) taking place in the former Yugoslavia. The references in some of those resolutions to provisions of the Geneva Conventions which apply only to international armed con-

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64 1st interim report of the Commission, 10 February 1993; Doc. S/25274, para. 45. The Commission expressed the same view in its final report of May 1994, Doc. S/1994/674, para. 44.

65 Doc. S/25704.

66 See Meron, see note 63.

flicts makes that much clear.[67] That does not amount, however, to saying that the Council viewed the network of conflicts in the former Yugoslavia as being wholly international in character. On the contrary, there are several indications that it treated those conflicts as having both internal and international aspects.[68] The Report of the Secretary-General on the establishment of a tribunal for the former Yugoslavia, for example, states, in its comment on the choice of date for the commencement of the Tribunal's temporal jurisdiction, that 1 January 1991 had been chosen as "a neutral date which is not tied to any specific event and is clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised."[69]

Secondly, there is nothing intrinsically illogical or novel in characterising some aspects of a particular set of hostilities as an international armed conflict while others possess an internal character. Conflicts have been treated as having such a dual aspect where a Government is simultaneously engaged in hostilities with a rebel movement and with another State which backs that movement. The International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* stated that:

> "The conflict between the *contras'* forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts."[70]

A similar view has been taken by the International Committee of the Red Cross and by writers in respect of other armed conflicts.[71]

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67 See especially, resolutions 764 (1992), 771 (1992), 780 (1992) and 787 (1992).

68 See C. Gray, "Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterization and Consequences", *BYIL* 67 (1996), 155 et seq. which, though concerned primarily with considerations of *jus in bello*, offers a penetrating and very thorough analysis.

69 Doc. S/25704, para. 62.

70 ICJ Reports 1986, 14 et seq., (114); *ILR* 76 (1988), 1 et seq., (448).

71 For example, the ICRC Annual Report for 1988 treats the armed conflict in Angola as an international armed conflict in so far as it involved South Africa but as an internal conflict in other respects; pp. 16–17. See also H.P. Gasser, "International Non-International Armed Conflicts", *Am.U.L. Rev.* 31 (1982), 911.

Thirdly, the complexity of the situation in Bosnia-Herzegovina itself since May 1992 suggests that the conflicts taking place there should not be treated as a single, international armed conflict, but must rather be regarded as possessing both internal and international aspects. Thus, the hostilities between the Bosnian Government forces and troops from Croatia and the Federal Republic of Yugoslavia, Serbia/Montenegro, ("the FRY") were clearly international in character, once Bosnia-Herzegovina had become an independent State.[72] At the other end of the spectrum, it is difficult to see how the hostilities between the Bosnian Government forces and dissident Muslim forces in Bihac can be regarded as anything other than an internal conflict. The fighting between the Bosnian Government forces and Bosnian Serb forces after the Federal Yugoslav Army ("the JNA") officially withdrew from Bosnia-Herzegovina in May 1992 is admittedly more difficult to characterise, especially since there is a sharp conflict of views regarding the degree of continuing involvement by the JNA after its formal withdrawal. Nevertheless, as the Appeals Chamber pointed out, the agreement concluded on 22 May 1992, under the auspices of the International Committee of the Red Cross, between the warring parties in Bosnia-Herzegovina suggests that those parties themselves treated that conflict as having an internal character. That agreement, in contrast to an earlier agreement of November 1991 regarding the fighting in Croatia,[73] provided for the application of parts of the Geneva Conventions to the fighting in Bosnia-Herzegovina. Yet if the conflict had been an international one in all its dimensions, such an agreement would have been invalid, since the Conventions would automatically have been applicable in their entirety and the Conventions preclude the parties to a conflict restricting the rights of protected persons by special agreement.[74]

The distinction between internal and international armed conflicts has been the subject of further discussion by the Trial Chambers in a number

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72 The Arbitration Commission of the International Conference on the Former Yugoslavia fixed the date on which Bosnia-Herzegovina became a State as 6 March 1992, the date on which the result of the referendum on independence was announced; *Opinion No. 11*, *ILR* 96 (1994), 719. Possible alternative dates are the date of recognition by the European Community Member States, 6 April 1992, or the date on which Bosnia-Herzegovina became a member of the United Nations, 22 May 1992. The acts alleged to have been committed by the defendant in *Tadic* occurred after all these dates.

73 The November 1991 agreement is summarized in: *Int. Rev. of the Red Cross* 31 (1991), 610.

74 Article 6, Conventions I, II and III; article 7, Convention IV. Appeals Chamber Decision, para. 73.

of subsequent cases. In *Nikolic*, the Trial Chamber made a provisional finding, on the strength of the prosecution evidence, that in the part of Bosnia-Herzegovina in which the offences charged were said to have occurred, the JNA had been directly involved on the side of the Bosnian Serbs and the conflict was accordingly an international one.[75] Similarly, the Trial Chamber in *Mrksic* found that the capture of Vukovar in Croatia in 1991 had been accomplished by JNA and Croatian Serb forces acting together. The decision in this case was not difficult to justify, since the defendants in that case were officers in the JNA.[76] In *Karadzic and Mladic*, however, the Trial Chamber went further and, indeed, came close to repudiating the approach taken by the Appeals Chamber in *Tadic*, holding that JNA involvement on the side of the Bosnian Serbs in the fighting in Bosnia-Herzegovina in general was on such a scale and continued for such a duration that the conflict between Bosnian Serb forces and the Bosnian Government should be regarded in its entirety as an international armed conflict.[77]

A particularly interesting discussion of this issue is to be found in the *Rajic* Case, which concerned the hostilities between the Bosnian Croats, backed by the Republic of Croatia, and the Government of Bosnia-Herzegovina between 1993 and 1994.[78] The Trial Chamber in *Rajic* held that the direct involvement of another State, which would have been necessary in order to internationalize this conflict, could be established either by showing that there was significant and continuous military intervention by the armed forces of Croatia in the fighting in Bosnia-Herzegovina, or by demonstrating that the Republic of Croatia exercised a degree of control over the Bosnian Croat forces ("the HVO") sufficient to make the HVO the agents of the Republic of Croatia. The Trial Chamber concluded that both tests appeared to be satisfied. There was considerable evidence of direct participation in the fighting by the Croatian regular army. In addition, the evidence adduced by the Prosecutor suggested that the HVO and the political machinery of the Bosnian Croats were under the general

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75 Case IT-94-2-R61, *ILR* 108 (1998), 21 (Decision of 20 October 1995), para. 30. For comment on this decision, see R. Maison, "La décision de la Chambre de premiere instance no. 1 du Tribunal pénal international pour l'exYougoslavie dans l'affaire Nikolic", *EJIL* 7 (1996), 284 et seq.

76 Case IT-95-13-R61, *ILR* 108 (1998), 53 (Decision of 3 April 1996), paras 22–25. In 1997, however, a fourth defendant, Dokmanovic, a Croatian Serb, was charged in respect of the same offences.

77 Cases IT-95-5-R61 and IT-95-18-R61, *ILR* 108 (1998), 85 (Decision of 11 July 1996), para. 88.

78 Case IT-95-12-R61, *ILR* 108 (1998),141 (Decision of 5 July 1996). For comment, see O. Swaak-Goldman, *AJIL* 91 (1997), 523 et seq.

control and direction of the Republic of Croatia. The Trial Chamber held that, since it was concerned with the links between the HVO and the Republic of Croatia only for the purposes of determining whether the conflict was an international one and not for the purpose of holding Croatia responsible in international law for specific actions of the HVO, it was not necessary to establish the high degree of control over particular actions which the International Court of Justice had required in the *Nicaragua* Case, where the issue had been whether the United States could be held responsible for individual acts of the *contras* in Nicaragua.

The decision of the Trial Chamber on this latter point, it is submitted, is correct, since the purpose of international humanitarian law is quite different from that of the law attributing responsibility to a State. As the Appeals Chamber held in *Tadic (Jurisdiction)*, most of the provisions of the Geneva Conventions of 1949 apply only in an international armed conflict. It would be wholly undesirable to make the applicability of the protections afforded by those provisions contingent upon a decision regarding the difficult issue of the responsibility of a State for the acts of persons or organizations which are not directly part of the organs of that State. Nor is it necessary to do so. In order to characterise a conflict as an international armed conflict, it is necessary only to show that there are hostilities between two or more States. It is not necessary that all the acts occurring in that conflict should be imputable to one or another of these states.

Nevertheless, the decision in *Rajic* sits somewhat uneasily beside the decision of the same Trial Chamber in *Tadic (Trial)*.[79] The Appeals Chamber in *Tadic (Jurisdiction)* did not determine whether the armed conflict in which Tadic's alleged offences were committed was internal or international in character. That question was left to be decided by the Trial Chamber at the trial. In view of the Appeals Chamber's decision that the charges of grave breaches could not stand unless there had been an international armed conflict, it might be thought that the Trial Chamber would have had to pronounce upon this matter. In the event, the majority of the Trial Chamber (Judges Stephen and Vohrah, with a powerful dissenting opinion from Judge McDonald) held that there was an international conflict between Bosnia and the FRY after 19 May 1992 but dismissed the grave breaches charges[80] on the ground that the acts of the

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79 Case IT-94-1-T, Decision of 7 May 1997. This decision will be reported in Vol. 112 of the *ILR*. Compare also the decision of the Supreme Court of Bavaria in the case of Djajic, 23 May 1997, *NJW* 51 (1998), 392.

80 See Part IV, below.

Bosnian Serbs in the particular case were not imputable to the Federal Republic of Yugoslavia.[81]

The approach of the majority involves a strict application of the principles of State responsibility to the question of determining the character of the conflict and the question whether Tadic's victims could be regarded as protected persons. This approach is open to question on two grounds. First, for the reasons already given, the standards of State responsibility are inappropriate to the determination of these questions. In contrast to the *Nicaragua* Case, which concerned the responsibility of the United States for the acts of the *contra* rebels, the responsibility of the Federal Republic of Yugoslavia was not in issue in the *Tadic* Case. What was at issue was the law applicable to the fighting between Bosnian Serbs and the Bosnian Government in a confused context in which some fighting was still taking place between forces of the Bosnian Government and the Federal Republic of Yugoslavia only a short time after the formal "withdrawal" of the JNA from Bosnia. In a situation of this kind, to make the characterization of the conflict dependent upon a strict application of the principles of State responsibility injects into the law a thoroughly undesirable element of uncertainty, for the exact connection between the outside forces and their internal allies in a conflict of this kind is usually controversial and frequently cannot be determined until long after the fighting has ceased. Secondly, most of the majority's findings of fact regarding the connection between the Bosnian Serb forces and the JNA and the Government of the Federal Republic point to the conclusion that even if the correct test to apply is that identified by the majority, the connection was sufficient to render the acts of the Bosnian Serb forces imputable to the Federal Republic at that stage in the conflict.[82] At the time of writing the Prosecutor had appealed against the decision of the Trial Chamber on this point.

None of the decisions to date have directly addressed the difficult question whether there was an armed conflict between the United Nations (through UNPROFOR), or the NATO States which provided air support, and the Bosnian Serbs. The indictment against Karadzic and Mladic includes charges relating to taking UNPROFOR personnel hostage and

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81 See paras 118–120 and 577–608 of the majority opinion and paras 5–34 of Judge McDonald's Dissenting Opinion.

82 See especially para. 115, where the majority noted that the Government of the FRY provided the supplies for the Bosnian Serb forces which had been formed from units of the JNA. Compare the decision of the European Court of Human Rights in *Loizidou* v. *Turkey (Merits)*, 1996, *ILR* 108 (1998), 443, holding that Turkey was responsible for the acts of the unrecognized "Turkish Republic of Northern Cyprus".

using them as human shields in the aftermath of NATO air attacks on Bosnian Serb positions in May and June 1995. The treatment of the UNPROFOR personnel is charged as grave breaches of the Geneva Conventions and war crimes. If there had been an armed conflict between the United Nations and the Bosnian Serbs, the act of detaining the UNPROFOR personnel could not itself have amounted to a grave breach or a war crime (though their subsequent treatment as "human shields" would have done so). The Trial Chamber in the Rule 61 proceedings, without any detailed discussion of the issue, confirmed the counts of the indictment relating to the UNPROFOR personnel.[83] This approach suggests that at this stage the Trial Chamber did not consider that UNPROFOR was a direct participant in an armed conflict or that its members could be regarded as combatants. It must, however, be remembered that the *ex parte* nature of Rule 61 proceedings means that this point was not fully argued and that, in any event, Rule 61 decisions involve only provisional conclusions. Moreover, the decision does not concern the NATO air personnel but only members of UNPROFOR.[84]

IV. The Law Applicable to the Conduct of Hostilities in International Armed Conflicts

The majority of the cases which have so far come before the Tribunal concern facts (or allegations in the case of the Rule 61 decisions) which involve clear violations of the law of armed conflict whether they occurred in an internal or an international armed conflict.[85] Decisions in such cases are unlikely to contribute much to the development of international humanitarian law. Nevertheless, a number of cases do contain rulings of considerable importance.

An interesting discussion of the law on the conduct of hostilities in an international armed conflict is to be found in *Martic*, where the indictment

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83 *ILR* 108 (1998), 85.

84 On this subject, see C. Greenwood, "International Humanitarian Law and United Nations Military Operations", to be published in Vol. 1 (1998) of the *Yearbook of International Humanitarian Law*.

85 That is true, for example, in *Tadic*, where the Defendant is accused of the torture and ill treatment of detainees and *Erdemovic* (Case IT-96-22-T), Decision of the Trial Chamber of 29 November 1996, *ILR* 108 (1998), 180, and Case IT-96-22- A, Decision of the Appeals Chamber of 7 October 1997, to be published in Vol. 111 of the *ILR* (1998), which concerns the massacre of prisoners following the fall of Srebrenica in eastern Bosnia.

relates to the bombardment of the Croatian capital of Zagreb by the Croatian Serbs in May 1995.[86] The Prosecutor alleged that, following a Croatian Government offensive in the Krajina region of Croatia, an area formerly held by the Croatian Serbs, the Croatian Serbs had bombarded the city with Orkan rockets delivering cluster bombs which killed and injured a number of civilians and that the attack had been deliberately targeted against civilians and civilian objects. Although the Trial Chamber did not determine that the bombardment had occurred during an international conflict,[87] its ruling in the Rule 61 proceedings reviewed the law applicable to bombardment of a population centre in both internal and international conflicts.

The Trial Chamber considered that in the case of an international conflict the prohibition of deliberate attacks upon civilians was well established both in Additional Protocol I and in customary international law. The Trial Chamber also reaffirmed the well-established principle of proportionality, i.e. that even where attacks are directed against legitimate military targets, they will be unlawful if they are conducted using indiscriminate methods or means of warfare or in such a way as to cause disproportionate harm to the civilian population. These principles are, of course, explicitly stated in article 51 of Additional Protocol I. Their acceptance as part of customary international law is also quite clear.[88] The Trial Chamber's ruling on these points is uncontroversial.

The same is not true, however, of the Chamber's comments on the subject of reprisals. This issue is potentially important in *Martic*, because the missile attacks on Zagreb were expressly stated by the Krajina Serb leadership to be in retaliation for the Croatian offensive against the Krajina in May 1995, after a period when there had been very little fighting in Croatia. The Chamber held that attacks upon civilians could never be justified on grounds of reprisals. Attacks on civilians by way of reprisal are, of course, prohibited by article 51 para. 6 of Additional Protocol I.[89] The Trial Chamber did not, however, base its conclusions exclusively on that provision but held that this prohibition is also "an integral part of customary international law". It justified this conclusion partly by reference to article 1 of the Geneva Conventions, under which the High Contracting Parties undertake to "respect and to ensure respect for the [Conventions] in all circumstances." The Trial Chamber held that this provision excluded the application of the principle of reprisals in the case

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86 *ILR* 108 (1998), 39.

87 See above, p. 113 et seq.

88 See, e.g., A.P.V. Rogers, *Law on the Battlefield*, 1996, 9–17.

89 See also arts. 52 para. 1, 53 lit. (c) , 54 para. 4, 55 para. 2 and 56 para. 4.

of fundamental humanitarian norms such as the prohibition of attacks on civilians.[90]

This conclusion is open to criticism on several grounds. First, article 1 of the Geneva Conventions requires the parties to respect and ensure respect only for norms to be found in those conventions. The Fourth Convention (which is the only one relevant for these purposes) does not contain a prohibition of attacks on civilians unless those civilians are protected persons under the Convention, which will be the case only if they are "in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[91] That was not the case with the inhabitants of Zagreb, who could not have been regarded as being "in the hands of" the Croatian Serb forces. Article 1 of the Fourth Convention therefore has nothing to do with the legality of reprisals against civilians who are not protected persons.

Secondly, to infer any kind of prohibition of reprisals from the very general provisions of article 1 is unjustified. As Professor Roberts has shown, in a recent study prepared for the Commission of the European Communities, neither the *travaux préparatoires* nor State practice support the extensive interpretations which have recently been placed upon article 1 by some writers. Article 1 appears to have been intended — and to have been taken by States — as little more than a requirement that States ensure that those subject to their authority comply with the provisions of the Conventions and, more recently, as providing a basis on which a neutral State may make representations to belligerents regarding their conduct.[92] The fact that each of the four Geneva Conventions contains a specific provision on reprisals makes the Trial Chamber's reliance on common article 1 even more difficult to justify, since such provisions would be superfluous if article 1 carried such a broad meaning.

Finally, quite apart from the mistaken reliance upon article 1 of the Geneva Conventions, the conclusion by the Trial Chamber that all reprisals against the civilian population are prohibited by customary international law is unwarranted. No State practice was cited in support (in

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90 For an eloquent argument regarding the significance of article 1, see L. Condorelli and L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des Etats de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances", in: C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles*, 1984, 17 et seq.

91 Article 4 para. 1. See also the discussion of this requirement in *Rajic*.

92 A. Roberts, "The Laws of War: Problems of Implementation", in: European Commission, *Law in Humanitarian Crises*, 1996, Vol. I, p. 13, (30–32).

contrast to the detailed references to State practice in the Appeals Chamber's decision in *Tadic*) and there was only the most general reference to "the majority of legal authorities". Yet the proposition that reprisal attacks on the enemy's civilian population are prohibited in all circumstances is extremely controversial, by no means commands universal acceptance in the literature and was contested in the debates on Additional Protocol I.[93] In the recent proceedings before the International Court of Justice regarding nuclear weapons (where the existence of such a prohibition on reprisals would have been particularly significant), a number of States argued that there were circumstances in which reprisals against the enemy's civilian population were not prohibited by customary or conventional law.[94] The Court, in its Advisory Opinion, did not discuss the question of belligerent reprisals.[95]

Given the fact that these were Rule 61 proceedings, it would have been better for the Trial Chamber to have avoided the question of reprisals altogether and held that this matter would have to be the subject of full argument if the Defendant was ever brought to trial. If comment on reprisals really was necessary, then a clearer distinction should have been drawn between belligerent reprisals, where one party to a conflict retaliates for violations of humanitarian law by its adversary, and reprisals for the very fact of resort to force by the adverse party. The latter concept is universally rejected in international law, while the former is not. The circumstances of the bombardment of Zagreb suggest that it was a retaliation for the resort to force by Croatia rather than for any alleged violation of humanitarian law.

Although a number of the other Rule 61 decisions contain brief discussions of the question of who are protected persons under the various Geneva Conventions, it is *Rajic* which is the most interesting in this regard.[96] The charges in *Rajic* related to the killing of civilians and the

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93 The issue is discussed in greater detail by F. Kalshoven, *Belligerent Reprisals*, 1973. See also C. Greenwood, "The Twilight of the Law of Belligerent Reprisals", *NYIL* 20 (1989), 35 et seq. and Rogers, see note 88, 11 and 14.

94 See, e.g., the written statements on the General Assembly's request by the United Kingdom (at pp. 58–60), the United States (at pp. 30–31) and the Netherlands (at para. 29). While these views were challenged by a number of other States, the differences on this issue undermine the theory that there is a well established principle of customary law prohibiting such reprisals, since the State practice lacks the requisite consistency.

95 Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, ICJ Reports, 1996, 226 et seq. See para. 46 of the Opinion.

96 *ILR* 108 (1998),141.

devastation of civilian property in the Muslim village of Stupni Do when it was attacked by Croat forces in 1993. The Trial Chamber held that the civilian inhabitants of the village were protected persons within the Fourth Geneva Convention. The requirement that persons had to be "in the hands of a Party to the conflict or Occupying Power of which they are not nationals" was given a broad construction. The Chamber found that the area around Stupni Do was controlled by the HVO, which it had already held to be an agent of the Republic of Croatia, and that the inhabitants of the village, which was virtually defenceless, could therefore be regarded as being "constructively" in the hands of Croatia.[97] The Chamber also held that the wanton destruction of the village was a violation of article 53 of the Fourth Convention on the ground that as soon as the village was captured by the HVO it became occupied territory. This approach to the concept of belligerent occupation is certainly a broad one but it makes sense in that it helps to avoid any question of there being a gap between the law relating to combat and the law of occupation.

Once again, however, it is the *Tadic* Case which casts the longest shadow. In its consideration of whether Tadic's victims were protected persons, the Trial Chamber dwelt at length on the requirement in the Fourth Convention that protected persons must be "in the hands of a party to the conflict or Occupying Power of which they are not nationals." Having held that the Bosnian Serbs were allies, not agents, of the Federal Republic of Yugoslavia,[98] the majority concluded that a Bosnian Muslim or Croat held prisoner by Bosnian Serb forces was not in the hands of a party to the conflict of which he or she was not a national, since all were nationals of Bosnia-Herzegovina.[99]

This aspect of the Trial Chamber's decision was clearly foreshadowed by the Appeals Chamber in the Jurisdiction phase of the case. The Appeals Chamber's decision contains some unfortunate and unnecessary comments that the Bosnian Serbs, Bosnian Croats and Bosnian Muslims all became nationals of Bosnia-Herzegovina upon that State achieving inde-

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97 This aspect of the decision has to be seen in the light of its own particular facts and should not be taken as suggesting that the civilian population of a town or village under attack are always to be regarded as protected persons. Stupni Do was surrounded by territory held by the HVO and could be subdued at will. The case of the civilian population of a town bombarded from a distance or defended by a substantial garrison is quite different.

98 Decision of the Trial Chamber of 7 May 1997, para. 606.

99 *Ibid.*, para. 607.

pendence in March 1992.[100] When a State breaks up into a number of new States as a result of the secession of parts of its territory and that secession is opposed by force of arms so that an armed conflict results between the old State and a seceding entity, or between the various successor States to the old State, it should not be assumed, at least for the purposes of humanitarian law, that all residents of one of the seceding territories automatically take the nationality of the State created by that secession, irrespective of their wishes (perhaps violently expressed) to remain part of the old State or to become part of one of the other successors. Did persons of West Pakistan ethnic origin living in the old East Pakistan automatically acquire Bangladesh nationality in 1972, so that they could not be regarded as protected persons *vis-à-vis* the Bangladesh forces while the conflict there lasted? In the case of Bosnia-Herzegovina, before it became an independent State all members of the Bosnian population were citizens of Yugoslavia. It is far from clear that on independence members of the Serb community who opposed that independence should be regarded as having become nationals of Bosnia-Herzegovina, rather than retaining some form of Yugoslav (or perhaps Serbian) citizenship. Such a possibility was, in fact, expressly mooted by the Arbitration Commission of the International Conference for the Former Yugoslavia as early as January 1992.[101] Since the Appeals Chamber has recognized that some aspects of the fighting in Bosnia-Herzegovina were an international armed conflict, it is, to say the least, unfortunate that it has suggested that Bosnian Serb civilians caught up in part of the hostilities which are international in character cannot be protected persons under the Fourth Convention, the more so since this suggestion was not necessary for the decision in the *Tadic* Case and the matter appears not to have been fully argued before the Appeals Chamber.

Moreover, for the reasons given in Part III., above, the present writer considers that the Trial Chamber should have found that the Bosnian Serbs enjoyed so close a relationship at the relevant time with the Federal Republic of Yugoslavia that anyone in the hands of the Bosnian Serb forces should have been regarded as being in the hands of the Federal Republic and thus as a protected person unless they actually possessed the nationality of the Federal Republic.

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100 Appeals Chamber Decision, para. 76; for criticism see *EJIL* 7 (1996), 265 et seq., (272-4).

101 *Opinion No. 2*, *ILR* 92 (1993), 167.

V. The Law Applicable to the Conduct of Hostilities in Internal Armed Conflicts

The treaty law on the conduct of internal armed conflicts is skeletal, to say the least. The Appeals Chamber in *Tadic* therefore conducted an extensive examination of the customary law on this subject. Its decision is of great importance in developing the law in this area. The Appeals Chamber in the Jurisdiction phase of the case discussed at length the evolution of customary international law rules relating to the conduct of hostilities (the sphere of what is traditionally known as "Hague Law") in internal conflicts, notwithstanding that this body of substantive law was not relevant to the *Tadic* case.[102]

This part of the decision examined State practice in a number of cases, including, in particular, the Spanish Civil War, the "Biafra conflict" in Nigeria and the international reaction to the allegations that Iraq used chemical weapons against Kurdish insurgents during the 1980s. It also considered certain General Assembly resolutions, especially A/RES/2444 (XXIII) of 19 December 1968 and A/RES/2675 (XXV) of 9 December 1970, which it regarded as applicable to internal as well as international armed conflicts and as being declaratory of customary law. On the basis of this review, the Chamber concluded that there had developed a body of customary international law regulating the conduct of hostilities in internal armed conflicts, the principal features of which were:

- rules for the protection of civilians and civilian objects against direct attack; i.e. rules requiring the parties to confine their attacks to military objectives;
- a general duty to avoid unnecessary harm to civilians and civilian objects;
- certain rules on the methods and means of warfare, in particular a ban on the use of chemical weapons and perfidious methods of warfare;
- protection for certain objects, such as cultural property.

The Appeals Chamber denied that in identifying the existence of these rules it was effectively holding that internal armed conflicts were subject to the same rules as those applicable to the conduct of hostilities in international armed conflicts.[103] It considered that the law applicable to internal conflicts was more limited in two respects:

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[102] Appeals Chamber Decision, paras 96–127; ILR 105 (1997), 419 et seq., (504–520).

[103] Professor Rowe, in an article coauthored with Professor Warbrick, finds this denial unconvincing, *ICLQ* 45 (1996), 691 et seq., (701).

> "(i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and
> (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."[104]

Nevertheless, the list of principles and rules identified in the decision of the Appeals Chamber, albeit in broad outline rather than in detail, goes beyond the treaty rules contained in Additional Protocol II (many of which have not been regarded as declaratory of customary international law)[105] and begins to resemble the main provisions of Additional Protocol I, together with some of the provisions of the weaponry agreements.

The Appeals Chamber's comments on this subject are, of course, *obiter dicta*, since they were not necessary for the ruling on the issues in the *Tadic* Case. It is open to question whether the Appeals Chamber was wise to raise such an important matter in this way, rather than waiting for a case which actually required a decision on the content of this part of humanitarian law. It is also doubtful whether the practice discussed in this part of the decision really sustains some of the inferences drawn from it. There is likely to be broad agreement that the law of internal conflicts includes principles regarding the protection of the civilian population. On the other hand, the suggestion that feigning civilian status in an internal conflict constitutes perfidy appears to be based solely on the decision of the Nigerian Supreme Court in *Pius Nwaoga* v. *The State*,[106] a decision which does not really sustain such a conclusion since it was a trial for murder under Nigerian law, rather than for a war crime as such, and the consideration of the significance of the defendants' disguise was peripheral to the decision. It is also noteworthy that the Appeals Chamber has gone further than other bodies by determining that there are rules applicable to internal armed conflicts which are not based upon either common article 3 or Additional Protocol II. The Statute of the Rwanda Tribunal, adopted by the Security Council in resolution 955 (1994) of 8 November 1994, to deal with crimes committed in what is clearly an internal armed conflict, confers

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104 *Ibid.* para. 126.

105 On this subject, see A. Cassese, "The Geneva Protocols of 1977 and Customary International Law", *UCLA Pac. Basin L.J.* 3 (1984), 55 and C. Greenwood, "Customary Law Status of the 1977 Additional Protocols", in: A.J.M. Delissen and G. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*, 1991, 93.

106 *ILR* 52 (1979), 494.

jurisdiction over war crimes only in respect of breaches of common article 3 and Additional Protocol II.[107] Similarly, the Commission of Experts appointed to investigate violations of humanitarian law in the former Yugoslavia, suggested in its final report that:

> "The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions".[108]

Nevertheless, the confirmation by the Appeals Chamber of the existence of a body of customary, Hague law regarding internal armed conflicts is of the greatest importance and is likely to be seen in the future as a major contribution to the development of international humanitarian law. While the content of those customary rules will undoubtedly be the subject of much argument in future cases, the *Tadic* decision has established that the International Tribunal will apply principles derived from (though possibly not identical in content to) those applicable to the conduct of hostilities in international armed conflicts. That is a development which is bound to influence any future consideration of the law of internal armed conflicts.

The same is true of the Appeals Chamber's unequivocal affirmation that an individual who violates the law of internal armed conflicts — including both common article 3 and the customary rules outlined by the Chamber — can incur individual criminal responsibility under international law.[109] That proposition had been questioned in two different, yet closely related, respects. First, it has sometimes been argued that violation of those provisions of the Geneva Conventions and Additional Protocols which are not "grave breaches provisions" involves the international responsibility of the State concerned but does not amount to a crime under international law on the part of the individuals committing the violation.[110] Such a view,

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107 Rwanda Statute, article 4.

108 Doc. S/1994/674, para. 52.

109 On this subject, see L.G. Maresca, "Prosecutor v. Tadic: the Appellate Decision of the ICTY and Internal Violations of Humanitarian Law as International Crimes", *LJIL* 9 (1996), 219 et seq.

110 See, e.g., E. Kussbach, "The International Humanitarian Fact-finding Commission", *ICLQ* 43 (1994), 174 et seq., (177) and D. Plattner, "The Penal Repression of Violations of International Humanitarian Law applicable in non-international armed conflicts", *Int. Rev. of the Red Cross* 30 (1990), 409, (410).

however, seems to be based upon a confusion between the question of criminality and the question of jurisdiction. It is true that violations of the Geneva Conventions which are not grave breaches are not subject to the jurisdictional provisions prescribed by the Conventions, in particular the requirement that all States (belligerent or neutral) should either exercise jurisdiction or surrender suspects for trial elsewhere. That does not mean, however, that such violations do not involve individual criminal responsibility. Indeed, there are instances of conduct which would nowadays amount to a violation (but not a grave breach) of the Conventions being prosecuted as a war crime before 1949.[111] The better view, it is submitted, is that set out in the British *Manual of Military Law*, which states that "all other violations of the Conventions, not amounting to 'grave breaches', are also war crimes".[112] This is also the view taken in the International Law Commission's Commentary on the Draft Statute of the International Criminal Court.[113]

Secondly, it has been more widely contended that, whatever may be the position regarding violations of other provisions of the Geneva Conventions, violations of common article 3 have never been treated as crimes under international law, although such conduct may amount to a crime under the criminal law of most States. Thus, Ms Plattner has suggested that "international humanitarian law applicable to non-international armed conflicts does not provide for international penal responsibility".[114] The International Committee of the Red Cross, in its comments on the proposal to establish the International Tribunal, stated that "according to international humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict."[115] A similar view was expressed by the Commission of Experts.[116] It is true that the Rwanda Statute expressly confers jurisdiction over individuals accused of violating

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111 Thus, exposing prisoners of war to humiliation and insults would be a violation of article 13 para. 2 of the Third Convention but would not amount to a grave breach. In T. Maelzer, *AD* 13 (1946), 289 a US Military Commission convicted the German commander of Rome of a war crime for an act of this kind.

112 *Manual of Military Law, Part III*, 1958, para. 626. The United States *Field Manual*, 1956, paras 499 and 506 and the Canadian *Draft Manual of the Law of Armed Conflict*, 1988, para. 1704, take a similar position.

113 Doc. A/49/10, pp. 70–79.

114 See note 110, 414.

115 Preliminary Remarks of the ICRC, 25 March 1993, unpublished.

116 Final Report, see note 108, para. 52.

common article 3 but this was described by the Secretary-General as an innovation, which "for the first time criminalises common Article 3".[117]

Against this view, however, may be set the fact that when the Security Council established the Rwanda Tribunal and adopted its Statute, it considered that it was complying with the principle *nullum crimen sine lege*, which would not have been the case if violations of common article 3 had not been criminal under international law. Similarly, the statement by the United States representative at the time of adoption of Resolution 827, regarding the interpretation of article 3 of the Yugoslav Statute, assumes that violations of common article 3 were criminal under international law. Moreover, as Professor Meron has shown, there are good reasons why this should be so.[118] If violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why, once those laws came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of a clear indication to the contrary.

The *Tadic* decision nevertheless breaks new ground to the extent that the criminality under international law of violations of the laws of internal armed conflict had not previously been asserted by an international tribunal, or, so far as this writer is aware, by an unequivocal decision of a national court in a State other than that in which the conflict has taken place. The International Law Commission appears deliberately to have left open the question whether "serious violations of the laws and customs applicable in armed conflict" in Article 20 of the Draft Statute of the International Criminal Court extends to violations committed in internal armed conflicts,[119] and some States evidently consider that it should not do so.[120] Does the decision, therefore, offend against the principle *nullum crimen sine lege*, on the ground that to comply with that principle, it is not sufficient that conduct should be prohibited under international law, it should be criminal as well? In the opinion of this writer, there is no violation of the *nullum crimen* principle. That principle does not preclude all development of criminal law through the jurisprudence of courts and tribunals, so long as those developments do not criminalise conduct which, at the time it was committed, could reasonably have been regarded as legitimate. That principle is not infringed where the conduct in question would universally be acknowledged as wrongful and there was doubt only

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117 Doc. S/1995/134, para. 12.

118 Meron, see note 63.

119 See note 113.

120 Report of the *ad hoc* Committee on the Establishment of an International Criminal Court, GAOR 50/22, para. 74.

in respect of whether it constituted a crime under a particular system of law.[121] The conduct alleged in the *Tadic* indictment manifestly comes within that category.

The decision in *Tadic* that violations of the law of internal armed conflict can lead to individual criminal responsibility is likely to be of considerable influence. Not only will it clearly have an important effect upon future proceedings in the Tribunal but there are signs that it will be reflected in the debates on the International Law Commission's proposals for an International Criminal Court. The International Committee of the Red Cross, whose statements on this subject have undergone a considerable change since 1993, has already called for the Criminal Court to have jurisdiction over such offences.[122]

Also of importance is the decision of the Trial Chamber in *Martic*.[123] The Trial Chamber having declined to rule on whether the conflict between the Croatian Government and the Croatian Serbs in 1995 was internal or international in character, reached the provisional conclusion that the bombardment of Zagreb with weapons which it classified as indiscriminate would be unlawful whatever the characterization of the conflict. It also concluded that the doctrine of reprisals would offer no defence if the conflict had been of an internal character.

VI. Crimes against Humanity and Genocide

The Tribunal has also given a number of decisions regarding crimes against humanity and genocide. With regard to genocide the cases say very little. Genocide is, of course, a crime of ulterior intent, since the acts in question must be carried out with the "intent to destroy, in whole or in part, a

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121 That was the approach taken by the courts in the United Kingdom when they decided that a husband could be convicted of raping his wife, *Regina* v. *R.* [1992] 1 AC 599 (House of Lords). The European Court of Human Rights rejected a complaint against the United Kingdom in respect of this change in the criminal law, *SW* v. *United Kingdom*, Decision of 27 November 1995, ECHR Reports, Series A, Vol. 335-B. See also Meron, see note 63.

122 Statement to the Sixth Committee of the General Assembly, 1 November 1995, p. 3.

123 *ILR* 108 (1998), 39.

national, ethnical, racial or religious group, as such."[124] The only one of the cases under review in which charges of genocide were brought is *Karadzic and Mladic*, probably because of the difficulty of proving the necessary intention. The Trial Chamber in that case suggested that the Prosecutor widen the scope of the indictment to include acts other than the ill-treatment and killing of detainees. It held that the intent necessary for genocide need not be clearly expressed but could be inferred from surrounding circumstances, stating in the case of the Bosnian Serb leaders that:

> "This intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group. The national Bosnian, Bosnian Croat and, especially, Bosnian Muslim national groups, are the target of those acts."[125]

In *Nikolic* the Trial Chamber invited the Prosecutor to consider amending the indictment to include a charge of genocide on the basis that there was evidence relating to the Defendant's conduct of the camp of which he was the commander from which it might be inferred that he intended to destroy a racial group in whole or in part. In both cases the Trial Chamber commented on "ethnic cleansing" as a practice which could amount to the *actus reus* of genocide.

With regard to crimes against humanity, article 5 of the Statute is drafted in a way which is in some respects more restrictive than customary law but at the same time omits reference to some of the requirements of crimes against humanity. The result is that in dealing with the questions of illegality and criminality,[126] the Tribunal has been required to identify in the customary international law those requirements which limit the scope of the offence. At the same time, in addressing the question of jurisdiction, it has had to concede that article 5 does not give the Tribunal jurisdiction in respect of all crimes against humanity committed within the territory of the former Yugoslavia since 1 January 1991.

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124 Article 4 para. 2. See also the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, article II. For discussion of this requirement of the offence, see the Advisory Opinion of the ICJ in the *Nuclear Weapons* Case, ICJ Reports 1996, 226 et seq., at para. 26.

125 *ILR* 108 (1998), 85, para. 95. It must be emphasised, of course, that this is only a provisional conclusion.

126 See above p. 111–112.

Thus, although there is no mention of such a requirement in article 5,[127] the Tribunal has repeatedly insisted that conduct can amount to a crime against humanity only if it is directed against a civilian population and occurs as part of a widespread or systematic attack upon that population.[128] Thus, the Trial Chamber in *Mrksic* stated that:

> "Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above."[129]

This ruling is particularly important in relation to sexual assaults, where the Trial Chambers have found that individual acts of rape or sexual abuse could and should be seen as part of a systematic pattern of using sexual abuse as a weapon to intimidate and degrade the civilian population of an adversary.

The Trial Chamber in *Tadic (Trial)* also rightly held that an essential element of the substantive law of crimes against humanity was that they had to be committed with discriminatory intent, that is to say "on national, political, ethnic, racial or religious grounds".[130] This requirement, although not mentioned in the Statute, featured in the Report of the Secre-

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127 This is in contrast to the corresponding provision of the Statute of the Rwanda Tribunal, which stipulates that that Tribunal has jurisdiction over crimes against humanity only if they are committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" (Rwanda Statute, article 3). In this respect, the jurisdictional provisions of the Rwanda Statute are closer to the substantive law on crimes against humanity than are those of the Yugoslav Tribunal.

128 The Secretary-General's Report on the establishment of the Tribunal (see note 34, para. 48) recognised this requirement of a widespread and systematic attack but it was not expressly incorporated into article 5 of the Statute. Contrast the express provision in article 3 of the Statute for the International Tribunal on Rwanda, adopted by the Security Council in 1994.

129 *ILR* 108 (1998), 53, para. 30. See also the Decision of the Trial Chamber in *Tadic (Trial)*, decision of 7 May 1997, para. 649.

130 *Ibid.*, para. 652.

tary-General[131] as well as being included in the Statute of the Rwanda Tribunal.

The Trial Chamber in *Mrksic* also recognised that, as the French courts had held in the *Klaus Barbie* Case,[132] there is a degree of overlap between war crimes and crimes against humanity. In particular, the Trial Chamber held that, although combatants could not be victims of crimes against humanity, the mere fact that, at particular points in time, a person or persons "carried out acts of resistance" does not deprive them of their character as members of the civilian population for the purposes of the law on crimes against humanity.[133] The fact that the jurisdictional requirements of the Statute included no reference to the elements of widespread or systematic attack and discrimination did not affect the obligation of the Tribunal to apply them as part of the substantive law.

Conversely, the Statute of the Yugoslav Tribunal is more limiting than the customary law in one respect — it confers jurisdiction over crimes against humanity only if they are committed in the course of an armed conflict, internal or international. Although the Nuremberg Tribunal had interpreted the provision of its Charter regarding crimes against humanity as confined to crimes committed in connection with an international armed conflict, the Appeals Chamber in *Tadic (Jurisdiction)* held that the Tribunal's jurisdiction in respect of crimes against humanity was not so confined.[134] The Appeals Chamber concluded that the limitation on the scope of crimes against humanity which was recognized by the Nuremberg Tribunal did not reflect contemporary international law. No nexus with war crimes or with an armed conflict of any character was required by modern international law as part of the definition of crimes against humanity, although the Tribunal would possess jurisdiction only if there was a nexus with a conflict of some sort. The Chamber's decision on the substantive law point is in accordance with most modern literature on crimes against humanity[135] and with the International Law Commission's proposed Statute for an International Criminal Court, which makes no mention of a nexus between crimes against humanity and armed conflict.[136] The limitation upon the Tribunal's jurisdiction is significant, nonetheless, since it would appear to exclude crimes against humanity which may have been committed in parts of the former Yugoslavia where there

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131 Doc. S/25704, para. 48.

132 *ILR* 78 (1988), 124.

133 *ILR* 108 (1998), 64, para. 29.

134 *ILR* 105 (1997), 419 at 453, paras 138-42.

135 See, e.g., R. Jennings and A. Watts, *Oppenheim's International Law*, Vol. I (9th edition), p. 996.

136 See note 113, at p. 76.

was no connection with any of the armed conflicts which took place. That was probably the case with some of the incidents which occurred in Kosovo prior to 1998. It seems likely, however, that there has been an armed conflict (of an internal character), within the definition in *Tadic*, taking place in Kosovo (a region of Serbia and thus part of the FRY) since March 1998.[137]

VII. Degrees of Criminal Responsibility

One final subject which requires comment is that several of the decisions address issues concerning the degrees of criminal responsibility under international law. This issue is addressed in article 7 of the Tribunal's Statute, which provides that:

> "(1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
> ...
> (3) The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

In its decision in *Tadic* (*Trial*), the Trial Chamber gave a broad interpretation to article 7 para. 1, holding that "aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present"[138] and concluding that:

> "the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participa-

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137 Thus, on 10 March 1998 the Prosecutor issued a press release to the effect that the jurisdiction of the Tribunal extended to "the current violence in Kosovo" (Press Release CC/PIO/302-E). On 31 March 1998 the Security Council adopted Resolution 1160, para. 17 of which urged the Prosecutor to "begin gathering information related to the violence in Kosovo that may fall within [the Tribunal's] jurisdiction."

138 Para. 689.

tion directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident."[139]

Article 7 envisages two different types of command responsibility. Under article 7 para. 1, a commander (which the Trial Chambers have held can include civilian political leaders such as Karadzic and Martic)[140] can be held criminally responsible for crimes which he ordered. Under article 7 para. 3, a commander who knew, *or ought to have known*, that offences were being committed or had been committed by those under his command can be held responsible for failing to prevent or punish such acts.[141]

In *Nikolic* and *Martic* the Trial Chamber held that there was a *prima facie* case under both heads of article 7.[142] In *Mrksic* the Trial Chamber found *prima facie* evidence that two of the defendants had been present at the Vukovar hospital when those who were to be killed were taken away but considered that the command responsibility provisions would be of great importance in relation to Colonel Mrksic himself, as he had overall command of the units which appeared to have been involved.[143] In *Rajic*, where there appeared to be no evidence that the defendant was physically present when the attack on Stupni Do took place, the Trial Chamber found that there was a *prima facie* case against the defendant on the basis of evidence (much of which came from UNPROFOR personnel) that the defendant commanded the units which had attacked the village and had personally ordered the attack.[144] Both types of command responsibility are at issue in the *Karadzic and Mladic* proceedings. The Trial Chamber in this case emphasised the positions of the two defendants and their overall responsibility for the acts of those under their command but also pointed to evidence of more direct involvement in the offences alleged in the indictment.[145] The most interesting discussion of command responsibility will come in the trial and preliminary motions in the case of *Blaskic*, the most senior defendant actually in custody, where the nature of criminal responsibility and the requisite *mens rea* under article 7 para. 3 is directly in issue. At the time of writing, this trial had not yet been completed.

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139 Para. 692.

140 Respectively the political leaders of the Bosnian and Croatian Serbs.

141 See the Decision of the Trial Chamber in *Prosecutor v. Blaskic*, (IT-95-14-T), 4 April 1997, paras 10–12.

142 *ILR* 108 (1998), 21, para. 24 and *ILR* 108 (1998), 39, para. 21.

143 *ILR* 108 (1998), 53, para. 17.

144 *ILR* 108 (1998), 141, paras 58–61.

145 *ILR* 108 (1998), 85, paras 81–85.

In addition, the decisions in *Erdemovic* contain an interesting discussion of the law on superior orders and duress.[146] Erdemovic pleaded guilty, so that the question whether superior orders or duress were defences which relieved a defendant of criminal responsibility did not strictly arise before the Trial Chamber. Moreover, article 7 para. 4 of the Statute expressly provides that superior orders is not a complete defence. Nevertheless, the Trial Chamber gave careful consideration to duress in the context of determining whether the plea of guilty could be accepted as valid and to duress and superior orders in determining their importance as mitigating factors. The Chamber concluded that duress was a defence completely excluding criminal responsibility provided that there was a real absence of moral choice on the part of the defendant. Moreover, it considered that this defence would be particularly difficult to establish in relation to a crime against humanity, because the "violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole."[147] The Trial Chamber held that the conditions for establishing a full defence of duress did not exist in Erdemovic's case but it took account of both duress and superior orders as mitigating factors, along with the defendant's cooperation with the Tribunal and sentenced him to ten years' imprisonment for participating, as a member of a firing squad, in the killing of prisoners after the fall of Srebrenica.

On appeal, Erdemovic argued that his plea of guilty had not been entered on the basis of a proper understanding of the charges against him. Part of his argument was that duress should be regarded as a complete defence to a charge of crimes against humanity. By a majority of 3 to 2, the Appeals Chamber rejected this argument (although it remitted the case to the Trial Chamber on other grounds). The majority considered, on the basis of a detailed examination of the case law on war crimes and the provisions of national law, that duress was not a complete defence to war crimes or crimes against humanity. President Cassese, however, gave a powerful dissenting judgment on this point, in which he emphasised that the decisions of the war crimes courts at the end of World War II were far from unanimous on this point.[148]

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146 Case IT-96-22-T (Sentencing), Decision of the Trial Chamber of 29 November 1996, *ILR* 108 (1998), 180 and Case IT-96-22-A, Decision of the Appeals Chamber of 7 October 1997, to be published in Vol. 111 of the *ILR* (1998).

147 *ILR* 108 (1998), 180, para. 19.

148 When the case was remitted to the Trial Chamber II, Erdemovic pleaded guilty to war crimes. On 5 March 1998 the Trial Chamber sentenced him to five years' imprisonment.

VIII. Conclusion

It is still far too early to say whether the International Criminal Tribunal for the Former Yugoslavia will prove effective in bringing to justice the perpetrators, especially the more senior perpetrators, of the appalling atrocities which have occurred in the conflicts in the former Yugoslavia, let alone whether, even if it does achieve this goal, it will make the contribution to international peace and security envisaged in resolution 827. Nevertheless, the decisions reviewed in this article will undoubtedly make an important contribution to the development of the laws of armed conflict. In some cases, as the criticisms made above indicate, this writer considers that the Tribunal has misunderstood the law and it is to be hoped that if the Rule 61 decisions are followed by trials, these mistakes will be corrected. On the whole, however, there is more to welcome than to criticise in this new body of case law on a subject where decisions of courts have been so rare.