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The relationship of international humanitarian law and war crimes: international criminal tribunals and their statutes

ROBERT CRYER

Introduction

In this contribution, I shall attempt to link some of the areas in which Peter Rowe has worked discussing the interplay of international humanitarian law (IHL) and the law of war crimes. The interrelationship of international human rights law and IHL has been the subject of a great deal of attention. Some might say a little too much and perhaps, at the risk of seeming to be a hypocrite, I would too.¹ However, the interrelationship of IHL and international criminal law has not been the subject

It is a pleasure to write in honour of Professor Peter Rowe for a number of reasons. The first is respect. Professor Rowe is a genuinely eminent figure in the worlds of the law of armed conflict, military law, human rights law, international criminal law and the interrelationship between domestic and international law in all of these fields. The second reason is collegial. Professor Rowe has always been a stalwart of the UK international law 'scene', always willing to contribute to ongoing debates and present at conferences in addition to the genuinely extraordinary administrative burdens he has shouldered for his universities. The third, which I flatter myself to separate from the foregoing, is personal. As well as being an esteemed international law colleague, Peter has always been an immensely supportive mentor and friend. Suffice it to say, when, after half past four on a Friday afternoon, owing to snafus on both my and a human resources department's parts, I wrote to Peter to ask a favour (I did not elucidate about what, as it was precisely what traditionally irritates academics when done by students, never mind colleagues: provide a reference at very short notice). Having done so, I received a very generous response at one minute past nine on Monday morning, asking how he could help. Suffice it to say the reference was written, sent and received before the deadline (first thing Tuesday). I have worked with Peter on a number of projects, and examined with him, and it has always been a pleasure. His knowledge, judgment, intellect and warmth have always been a source of inspiration.

¹ R. Cryer 'The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY', 14 *JCSL* (2009) 511.

of such frequent investigation.² Only very recently has there been any systematic study of the interplay between these two closely related areas of law.³

The law of war crimes is not the same as IHL *per se*, although, the two have large overlaps. There are differences, on both sides, which ought to be borne in mind. Therefore, this contribution will look at how IHL and the law of war crimes have been seen to relate and how one has contributed to the other, with specific reference to the approach of international criminal tribunals to the issue. It will do so, after some initial comments about the conceptual relationship between the two, by looking at the extent to which international criminal tribunals have considered themselves to apply their Statutes as determinative of the substantive law they are to apply, or as at least a partial *renvoi* to IHL (and within that, what version of IHL), and thus, the extent to which their judgments can contribute to our understanding of the latter body of law.

War crimes and international humanitarian law

Back in the early twentieth century, it might have been enough to say that ‘it is not necessary to enumerate exactly what may now be considered war crimes or violations of the laws of war. The list will change from time to time, by the addition of new offences and the omission of those now so considered’.⁴ However, this comment was made at a time when the relationship between the law of war crimes, domestic law and IHL was not clear. It is certainly no longer enough to be so lackadaisical. For various reasons (partly political, partly conceptual and partly related to human rights concerns), a more in-depth analysis of the question is needed.

It is absolutely correct to say that the law of war crimes and IHL have a very close relationship. There are, for example, no war crimes that are

² Although Peter has looked into the matter; see P. Rowe, ‘War Crimes’, in P. Rowe, D. McGoldrick and E. Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart, 2004), 203, 217–19.

³ For such recent discussions though, see R. Bartels, ‘Discrepancies between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law during Criminal Trials’, in M. Matthee et al. (eds), *Armed Conflict and International Law: In Search of the Human Face. Lieber Americum in Memory of Avril McDonald* (The Hague: Asser Press, 2013), 339; R. Bartels, ‘Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials’, 46 *Israel Law Review* (2013) 271.

⁴ E. Colby, ‘War Crimes’, 23 *Michigan Law Review* (1924–5) 482, 482.

not violations of IHL⁵ and, as Gerhard Werle has said, ‘war crimes law always makes reference to IHL. The substantive law is not autonomous that happens to be based on IHL, but is accessorial to this body of law’.⁶ Still, this does not mean that the relationship is one of unity. Aspects of the theoretical aspects of this discussion have been dealt with elsewhere;⁷ what this contribution seeks to do is to investigate the approach to the interplay of IHL and war crimes law by the international criminal tribunals. In particular, it seeks to investigate the authority that international criminal tribunals have to apply and interpret IHL as an aspect of their subject matter jurisdiction.

The extent to which international tribunals’ interpretation of international law is structured by its substantive/material jurisdiction is one that is perhaps not always investigated in detail.⁸ This may be for a number of reasons, the first being an inappropriate and inaccurate analogy to the ICJ. This relates to the general perception that the ICJ is the model for international courts and that it has plenary jurisdiction, i.e., whatever dispute is sent to that Court can be determined on whatever the applicable international law on point is.

This misunderstanding has perhaps arisen owing to the fact that most international lawyers follow their teaching and believe, as a default position, that the sources of international law are, for the most part, those in Article 38(1) of the ICJ Statute.⁹ As a matter of the substantive jurisdiction of the ICJ, this is not strictly true, its jurisdiction to adjudicate on a particular dispute is not necessarily all the possible law applicable to that dispute. For example, in one case the ICJ may have jurisdiction to apply customary law, but not treaty law, or *vice versa* in another.¹⁰ The ICJ understands this, but it tends to do its level best to ensure that the

⁵ G. Werle, *Principles of International Criminal Law*, 2nd edn (The Hague: T.M.C. Asser Press, 2009), 358.

⁶ *Ibid.*

⁷ R. Cryer, ‘War Crimes’, in N. D. White and C. Henderson (eds), *Research Handbook on Conflict and Security Law* (Cheltenham: Edward Elgar, 2013), 467, 474–5 and R. Cryer, ‘Individual Liability in International Law’, in T. L. H. McCormack and R. Liivoja (eds), *Routledge Handbook on the Law of Armed Conflict* (London: Routledge, 2014).

⁸ The relationship of such jurisdiction to personal/temporal jurisdiction is discussed in R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005), chs 5–6.

⁹ See, e.g., J. Crawford, *Brownlie’s Principles of Public International Law*, 8th edn (Oxford: Oxford University Press, 2012), 20.

¹⁰ An example of the former case is *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, ICJ Reports 1984, 4. One of the latter is *Case Concerning the Application of the Convention Concerning the Prevention and*

substantive outcome on the facts is the same¹¹ and upon occasion has used limited jurisdictional provisions to expound issues of general international law.¹²

The approach of international tribunals outside the criminal sphere to general international law and other specialised areas of international law is very interesting, as is the approach of the ICJ to the determinations of international criminal tribunals,¹³ but beyond the scope of this chapter.¹⁴ It is raised, however, to make the point that this narrow issue is, in fact, indicative of a more general issue relating to international tribunals, that is not always sufficiently appreciated – the limits of their material jurisdiction. In the end, international courts and tribunals are only expressly entitled to apply the law that their founding document(s) warrant(s) them to do so. Hence, for example, the European Court of Human Rights is no more entitled directly to apply the Inter-American Convention on Human Rights than its Inter-American counterpart is entitled to apply the European Convention on Human Rights (ECHR).

This is not to say that courts do, or ought to, avoid looking at other aspects of international law; in particular, in the context of treaty interpretation, Article 31(3)(c) of the Vienna Convention on the Law of Treaties more than encourages it.¹⁵ Also, direct and indirect judicial dialogue can work very strongly to ensure that their output at least avoids any gross instances of *per incuriam* decisions.¹⁶ However, although this can help, when understood in context, to contribute to

Punishment of the Crime of Genocide (Bosnia v. Serbia) ICJ General List no. 91, 26 February 2006.

¹¹ See, e.g., *Nicaragua* (n. 10, above), paras 92–7.

¹² *Case Concerning Oil Platforms (Iran v. USA)*, ICJ Reports 2003, 161. For critique, see F. Berman, ‘Treaty Interpretation in a Judicial Context’, 29 *Yale Journal of International Law* (2004) 315.

¹³ See, e.g., R. Cryer ‘Neither Here nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders’, in M. Bohlander and K. Kaikobad (eds) *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (The Hague: Brill, 2008) 183, 189–91.

¹⁴ For a useful study on one court’s approach, see M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford: Oxford University Press, 2010).

¹⁵ See R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), ch. 7; J.-M. Sorel and V. Boré Eveno, ‘Article 31’, in O. Corten and P. Klein, *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford: Oxford University Press, 2011), 804, 828–9.

¹⁶ A.-M. Slaughter, ‘Judicial Globalization’, 40 *Virginia Journal of International Law* (1999) 1103.

the overall corpus of international law, it is always important also to understand the foundational documents of the tribunals which define their material jurisdiction.¹⁷

Nuremberg, Tokyo and the cold war era

Prior to the creation of direct individual liability under international law for war crimes, the ambit of the law of war crimes and its relation to IHL was largely left to domestic law and, if truth be told, confusion about the issue abounded. Hence, it was only really with the international criminal tribunals established after the Second World War that the interrelationship of IHL and war crimes became a significant issue.¹⁸ The first two provisions on point, which granted the Nuremberg and Tokyo International Military Tribunals (IMTs) jurisdiction over war crimes, were, according to your perspective, either deeply telling or question begging. Article 6(b) of the Nuremberg IMT's constituent Statute granted that tribunal jurisdiction over 'violations of the wars and customs of war' followed by a non-exhaustive list. In addition to the fact that it considered its Charter to be 'decisive and binding' on it,¹⁹ and the clear, manifest, violations of IHL committed by the Nazis, the Nuremberg IMT had little to add to the question of the interrelationship of the law of war (as it was then called) and the law of war crimes.

Hence, responding to the claim that there might not be direct criminal responsibility for violations of IHL, the Tribunal issued a simple rebuttal; asserting that the question of criminality of violations of the Regulations attached to the Fourth Hague Convention of 1907 and Geneva Convention of 1929 (or, strictly speaking, in the case of the Hague Convention, and at times for the Geneva Convention, of their customary concomitants) was beyond doubt.²⁰ Custom, it ought to be said, had to come to the rescue in relation to the Hague Regulations owing to the IV Convention's *si omnes* clause that rendered the Hague Regulations, as a matter of treaty law, inapplicable as the Soviet Union was not a party to that Treaty.²¹ This could be seen as an implicit acceptance on point by the Nuremberg IMT that Article 6(b) of its Charter referred to the *applicable* humanitarian

¹⁷ Sadly there is no space to deal in detail with the *nullum crimen sine lege* issues that this issue raises. See generally, K. Gallant *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009).

¹⁸ Cryer, 'Individual Liability'.

¹⁹ 'Nuremberg IMT: Judgment and Sentence', 41 *AJIL* (1947) 171, 248. ²⁰ *Ibid.*

²¹ *Ibid.*

law, rather than creating an autonomous head of jurisdiction cast adrift of the conditions of applicability of the underlying law. Whether or not the authors of the judgment thought about it so clearly is, however, unclear, although it is notable that, despite generally referring to the 1929 Geneva Convention, when discussing crimes against Soviet prisoners of war, who were not protected by that convention, they noted that customary law still protected them.²²

The Tokyo IMT's Statute, on the other hand, simply granted jurisdiction to the Tribunal over 'violations of the laws and customs of war', a provision that implied that the Tokyo IMT could prosecute all violations of IHL without further discussion.²³ Owing to the discussion that the Tribunal engaged in about Japan's agreement to apply the 1929 Geneva Convention to prisoners of war, and the extent to which that agreement brought it into force, we can see a fairly clear example of a Tribunal considering its Statute to contain a reference to the applicable IHL, rather than a regime cut off from the underlying treaties and custom and their conditions of applicability.²⁴ On the secondary question of the relationship between IHL and the law of war crimes, following the Nuremberg IMT's lead, the majority in the Tokyo IMT adopted the view that there was criminal liability for seemingly all such violations.²⁵ Only the (in)famous dissentient, Judge Pal, questioned this, declaring that some (frankly, serious) violations of the laws of armed conflict were not criminal, although his reasons for doing so were not necessarily solely legalistic.²⁶

Whatever the position was then, after that the development of IHL and the law of war crimes, to the controversial extent to which they overlapped, tended to focus on the Geneva Conventions in the post-war era and, in particular, and in some ways inaccurately, on the grave breaches provisions of those conventions and their domestic prosecution.²⁷ This was understandable, given that, by the 1950s, the chances of an international criminal court being created were, to be optimistic, remote.²⁸ The International Law Commission may have spent a great

²² *Ibid.*, 228–9.

²³ N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), ch. 7.

²⁴ *Ibid.*, 183–7. ²⁵ *Ibid.*, 188–9. ²⁶ *Ibid.*

²⁷ J. Stewart, 'The Future of the Grave Breaches Regime: Segregate, Assimilate, or Abandon?', 7 *JICJ* (2009) 855.

²⁸ I. Brownlie, *Principles of Public International Law*, 4th edn (Oxford: Clarendon Press, 1990), 563–4.

deal of time working on international criminal law, on and off, in the post-war era, but there was little discussion of the interplay between substantive IHL and war criminality. Indeed, it was only in 1977 that Additional Protocol I went 'even' as far as to declare that grave breaches were, in fact, 'war crimes'.²⁹

The 'modern' era of war crimes prosecutions: the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the integrationist ideal

The ICTY

Against this background, probably the biggest development in the fifty years after the Nuremberg IMT's judgment was the creation of the ICTY in 1993. Article 2 of the ICTY's Statute granted the tribunal jurisdiction over grave breaches of the Geneva Conventions and Article 3 over a non-exhaustive list of 'serious violations of the laws and customs of war', that list essentially tracing those included in Article 6(b) of the Nuremberg IMT's statute.³⁰

Article 2

The possibility of there being a significant disjuncture between international criminal law and IHL could not be excluded as initially, with respect to Article 2 of the ICTY Statute, the Trial Chamber in the *Tadić* case argued that the Statute, rather than 'referring out' to IHL for its applicability criteria, was, in essence, an autopoietic system. Hence, rather than requiring an international armed conflict for the applicability of the grave breaches provisions (which remains, as a matter of general international law, the accepted position),³¹ the Trial Chamber determined that they could prosecute grave breaches of those conventions irrespective of the nature of the conflict. This was because it was included in the Statute, and the Chamber opined that it:

²⁹ AP I, Article 85(5).

³⁰ For early interpretations of this, see V. Morris and M. P. Scharf, *The International Criminal Tribunal for Former Yugoslavia: An Insider's Guide* (Irvington-on-Hudson, NY: Transnational, 1995), 63–73.

³¹ J.-M. Henckaerts, 'The Grave Breaches Regime as Customary International Law', 7 *JICJ* (2009) 683, although see S. Boelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?', 5 *JCSL* (2000) 63.

[H]as been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of ‘persons or property protected’ [...] [T]he requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met [...] [T]here is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention [*sic*] to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things.³²

This, in and of itself, does not convince. It would require considerable discussion to explain why Article 2 imports aspects of the conditions of applicability; that persons or property be ‘protected’ by the relevant Convention, whilst not importing the conditions of applicability of the Convention, which includes those criteria and the conditions for their application. Sadly, the Chamber provided no such reasoning, proceeding instead by way of assertion on point.

Had this been accepted, the law of war crimes, at least in some contexts, would have been cast adrift from its underlying norms – those of IHL. For the purposes of the consistency of IHL and international criminal law, it would have been deeply problematic. Therefore, at least two cheers are owed to the Appeals Chamber who took a firm (and firmly expressed) line against the autopoetic argument in the relevant *Tadić* appeal,³³ reasserting the centrality (in this regard) of the applicability of the Conventions as a whole to the interpretation of the Statute, stating that:

With all due respect, the Trial Chamber’s reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal. The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute ‘grave breaches’; closely bound up with th[e relevant] [...] enforcement mechanism [i.e., universal jurisdiction] [...] The international armed conflict requirement was a necessary limitation on the grave breaches

³² Trial Chamber Decision, paras 49–51 as cited in *Prosecutor v. Tadić*, Decision on Interlocutory Appeal on Jurisdiction (Case No. IT-94-1-AR72), ICTY Appeals Chamber, 2 October 1995, para. 79.

³³ As we will see, there has been more than one.

system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents [...] The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of 'grave breaches.' However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: 'persons or property protected under the provisions of the relevant Geneva Conventions.' [...] For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as 'protected' by the Geneva Conventions under the strict conditions set out by the Conventions themselves.³⁴

In his (sadly overlooked) opinion in *Tadić*, Judge Sidhwa summed the matter up, both eloquently and with admirable clarity and brevity:

Article 2 is not self contained. Its meaning only becomes clear by reference to the Conventions. This is a case of legislation by reference. The offences, therefore, listed under Article 2 are those that specifically fall under and are treated as 'grave breaches' in the Geneva Conventions of 1949 and are those that can be committed only in an international armed conflict. This is the interpretation on a straight evaluation of the Article.³⁵

In spite of the Appeals Chamber's clear rejection of the Trial Chamber's idea, it had a surprising (albeit brief) afterlife. Some four years after the *Tadić* Appeal Decision, Judge Rodrigues, in the *Aleksovski* decision,³⁶ attempted to reassert the independent nature of the ICTY statute, cutting it free from the tethers of the applicability provisions of the Conventions themselves. It cannot be said that Rodrigues was working *per incuriam*, he responded, quite directly, to the *Tadić* Appeal Chamber's view that the international armed conflict requirement applied to the Geneva Conventions, and thus to Article 2 too. He asserted that:

Article 2 of the Statute is autonomous in relation to the Geneva Conventions from which it is inspired and, a fortiori, from the conditions required for them to apply. The argument is based on the interpretation that the Security Council was the appropriate organ to characterise the

³⁴ *Prosecutor v. Tadić* (n. 32, above), paras 80–1.

³⁵ *Ibid.*, Separate Opinion of Judge Sidhwa, para. 110.

³⁶ *Prosecutor v. Aleksovski*, Judgment, IT-95-14-T, 25 June 1999, Dissenting Opinion of Judge Rodrigues.

conflict in the former Yugoslavia as internal or international and did not intend to make such a characterisation; concomitantly, the Security Council established the Tribunal under Chapter VII of the United Nations Charter and conferred on it definite and specific judicial powers defined by the Statute so that they might be applied as such, irrespective of issues of State sovereignty, protected under the Geneva Convention by the international character condition.³⁷

His argument, which deserves detailed consideration, proceeded along the following lines. First, that the Security Council did not identify the nature of the conflict, but intended that all persons responsible for serious violations of IHL were to be prosecuted.³⁸ He then attempted to turn the reasoning of the *Tadić* Appeals Chamber decision against itself, noting that it asserted that the grave breaches provisions related to the jurisdiction of foreign domestic courts, and pointed to the impact that the granting of such courts' universal jurisdiction has on sovereignty. Rodrigues said that this was all very well, but irrelevant. This was an international tribunal, set up by the Security Council under Chapter VII to prosecute offences accepted not to be simply a matter of domestic concern; therefore, for him the sovereignty concerns were simply inapplicable.³⁹ He bolstered this, relying on the ideas of Allain Pellet, by asserting that 'it would be "something of a paradox for the violation of treaty-based rules, which moreover have their own control mechanism, to be punished by a court created by non treaty-based means"'.⁴⁰

He then moved on to argue that the Secretary-General's report had intended the Tribunal to prosecute all violations of IHL in former Yugoslavia and therefore, by including grave breaches in the jurisdiction of the ICTY, the Security Council intended for the grave breaches to apply to the conflict in former Yugoslavia, irrespective of its classification. This, in his view, did not violate the *nullum crimen sine lege* principle owing to the fact that customary law had developed, as Judge Abi-Saab had argued (in dissent) in *Tadić*, to apply the grave breaches provisions to both types of conflict.⁴¹ He followed this up with a literal argument based on the idea that, owing to the fact that Article 2 refers to persons and property protected by the Geneva Conventions, when the Statute sought to incorporate external standards

³⁷ *Ibid.*, para. 32. ³⁸ *Ibid.*, paras 32–6. ³⁹ *Ibid.*, para. 38. ⁴⁰ *Ibid.*

⁴¹ *Ibid.*, paras 39–41, 44–6. This argument was discussed at n. 31, and accompanying text, above.

(such as the applicability provisions of the Geneva Conventions) it specifically mentioned them.⁴²

He finished, not without flourish, by arguing that his:

approach presents the undeniable advantage of being consistent with regard to the objectives which resulted in the establishment of the Tribunal, namely, the prosecution of persons accused of serious violations of IHL committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions imposed upon it by the Statute and not by any other legislative instrument. It may also claim to be operational since it permits Article 2 to be applied more soundly and with greater certainty and unconditional respect for the dignity of the humankind as a universal value. One must also bear in mind that any differences in the characterization of the conflict could jeopardize or even run directly counter to the objectives of the Tribunal which are to administer justice and to contribute to the restoration of peace and peacekeeping – especially to the extent that the conflict, at least in part, can be viewed as having been motivated by cultural, religious or ethnic reasons.⁴³

Let us leave aside the question of precedent within the Tribunal⁴⁴ and deal with his arguments in turn. The first is that the Security Council did not determine the nature of the conflict, but determined that the ICTY should prosecute all violations of IHL in the territory of former Yugoslavia. The former, factual, issue is accurate as, if nothing else, the fact that Article 4 of the ICTY's Statute on crimes against humanity refers to both international and non-international armed conflict is good evidence of this.

The legal conclusion he draws from it, however, is far less convincing. The Security Council can equally, and less problematically, be read as granting the ICTY jurisdiction over all violations of IHL applicable in the former Yugoslavia. This is more convincing in that the Security Council would not have the mandate retrospectively to apply otherwise inapplicable law to a situation. For example, it would not be plausible that the Security Council applied IHL to a non-conflict situation, but this would

⁴² *Prosecutor v. Aleksovski*, Judgment, IT-95-14-T, 25 June 1999, Dissenting Opinion of Judge Rodrigues, para. 42.

⁴³ *Ibid.*, para. 43.

⁴⁴ Which, to be fair, was only clearly set up on the Appeal from this decision, *Prosecutor v. Aleksovski*, Judgment, IT-95-14-A, 24 March 2000, para. 113. Equally, where there is an Appeals Chamber decision, even in the absence of a formal doctrine of precedent, it is a 'brave' Trial Chamber that ignores an Appeals Chamber decision on point. See Cryer, 'Neither Here nor There?', 192.

be the outcome of applying Judge Rodrigues's argument to its (il)logical conclusion. This could be accused of being an argument *reductio ad absurdum*, and to some extent it is. However, what it shows is that a simpler solution is available: the Security Council only intended for the Tribunal to prosecute violations of the applicable law. This would also deal with any claims of a violation of the *nullum crimen* principle.

To be fair, Judge Rodrigues deals with this in a later part of his argument where he argues that this aspect is dealt with by the fact that, in his view, customary law had developed to extend the grave breaches provisions to non-international armed conflicts. That view has found little support in state practice (including, as we will see, with all due caveats, in the Rome Statute) and was discussed above. There is, outside of one US statement,⁴⁵ which would be unlikely to be reiterated today,⁴⁶ and was not agreed with by others, no evidence that the Security Council sought to apply the grave breaches provisions outside of their traditional applicability provisions.⁴⁷ It could be argued that the Security Council members voting for it were just doing so in the specific circumstances of former Yugoslavia, but it is unlikely that, given the practical likelihood that it would be taken as a precedent, they would have done so; and certainly not *sub silentio*.

The second argument, that the grave breaches regime is inherently linked to the fact that they grant universal jurisdiction to national courts, a position which is distinguishable from international tribunals, has some merit, but fails to take sufficient account of the fact that an international tribunal is also seen by states as a considerable limitation on their sovereignty, as, for example, early US opposition to the ICC showed.⁴⁸

⁴⁵ See *Prosecutor v. Tadić* (n. 32, above), para. 83.

⁴⁶ Given that US hostility to aspects of AP I centres, *inter alia*, on its expansion of privileged belligerency and prisoner of war status in Article 44 of that Protocol and the extension of the concept of international armed conflicts to wars of national liberation (see Letter of Transmittal from President Ronald Reagan, AP II, 81 *AJIL* (1987) 910, 911). See generally, T. Meron, 'The Time Has Come for the United States to Ratify Protocol I', 88 *AJIL* (1994) 678. It is extremely unlikely that any post-9/11 US administration would adopt such a view.

⁴⁷ Still less would any of the Security Council members voting for Resolution 827, which brought the ICTY into being and adopted its Statute, be assumed to have applied, for example, the concept of privileged belligerency and occupation to non-international armed conflicts, the two areas upon which the law of international and non-international armed conflict has been resolutely kept separate by states, without very clear evidence that that was the intention.

⁴⁸ See, e.g., J. Gurule, 'United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?', 36 *Cornell International Law Journal* (2001–2) 1.

This is, admittedly, not a complete answer to Judge Rodrigues's point, in that the Security Council, when acting under Chapter VII, is entitled to ignore sovereignty issues, a position that Article 2(7) of the UN Charter makes clear,⁴⁹ and indeed the *Tadić* Appeals Chamber itself relied upon.⁵⁰ However, when adopting the ICTY's Statute the Security Council did not, on all the available evidence, address its mind to that point and certainly not to the extent to which Judge Rodrigues reads their hypothetical intent. It could be thought that the Secretary-General's report could provide some evidence of their intent; however, that report itself is by no means clear that the intention was to sever the grave breaches provisions from their conditions of applicability.

Furthermore, Judge Rodrigues's position fails to take into account the argument of the *Tadić* Appeals Chamber referred to above, i.e., that the reference to persons or property protected by the Geneva Conventions makes clear that it refers to those who are protected by the Conventions, where they are applicable.⁵¹ The concept of 'protected person' and 'property' is parasitic on the applicability of the Geneva Conventions as a whole, i.e., that there is an international armed conflict. The fact that common Article 3 to the 1949 Geneva Conventions protects, at one level, certain persons in non-international armed conflicts has never been interpreted as meaning those so protected by that article come under the grave breaches provisions. Hence, as the *Tadić* Appeals Chamber argued, the reference to protected persons or property necessarily includes the applicability of those concepts, which, in turn, rely on the applicability provisions of the 1949 Geneva Conventions as a whole – that there is an international armed conflict. If there is not an international armed conflict, then, as the Appeals Chamber argued, there are no protected persons or property; that status relies upon, and is created by, those aspects of those Conventions.

This is not to say that the ICTY has not developed those concepts (in particular in the context of 'protected persons' for the purposes of the Fourth Geneva Convention of 1949 (GC IV)),⁵² but such developments have been argued, and presented, as interpretation of the Conventions,

⁴⁹ Whether it ought in a particular situation or not, however, is a different question.

⁵⁰ See *Prosecutor v. Tadić* (n. 32, above), paras 56–60.

⁵¹ *Ibid.* This also deals with his penultimate (literal) argument, mentioned above.

⁵² *Prosecutor v. Tadić*, Judgment, IT-94-1-A, 15 July 1999, paras 164–6. Although the Appeals Chamber does not refer to it, a Trial Chamber previously took such a view; however, this was based less directly on the Conventions: *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Judgment, IT-96-21-T, 16 November 1998, paras 244–66. For a piece

rather than statements about hermetically sealed (ICTY) Statutory interpretation. It is on this basis that the ICTY has defended itself against charges of violating the *nullum crimen sine lege* principle, explaining that its expansive interpretation of ‘protected persons’ in GC IV:⁵³

is consistent with the rules of treaty interpretation set out in the Vienna Convention. Further, the Appeals Chamber in Tadić only relied on the travaux préparatoires to reinforce its conclusion reached upon an examination of the overall context of the Geneva Conventions. The Appeals Chamber is thus unconvinced by the appellants’ argument and finds that the interpretation of the nationality requirement of Article 4 in the Tadić Appeals Judgement does not constitute a rewriting of Geneva Convention IV or a ‘re-creation’ of the law. [...] The Appeals Chamber finds that this interpretative approach is consistent with the rules of treaty interpretation set out in the Vienna Convention.⁵⁴

To turn next to Rodrigues’s assertion that that it would be paradoxical for a tribunal to enforce treaty-based rules whilst having not been created by a treaty itself, this is legally unconvincing, for a number of reasons. First, briefly, paradox is not illegality. Second, there is no inherent paradox in a body of law based on one source of international law being enforced by one created by another. The ICJ, for example, adjudicates on the basis of customary international law and this is considered unexceptionable, or, at the very least, not paradoxical, even though it does so on the basis of a treaty.⁵⁵ Additionally, there have always been non-treaty-based methods of enforcing IHL, such as reprisals (to the extent to which they are still accepted),⁵⁶ so this does not seem sufficiently important to be used to reach substantive conclusions such as Rodrigues’s.

Admittedly, it is difficult to imagine general principles or customary international law creating a court, but, at least since the *Effect of Awards*

presaging the decision, see B. Brown, ‘Nationality and Internationality in International Humanitarian Law’, 34 *Stanford Journal of International Law* (1998) 347.

⁵³ *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Judgment, IT-96-21-A, 20 February 2001, paras 73 ff. See W. Schabas, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2010), 212.

⁵⁴ *Prosecutor v. Delalić, Mucić, Delić and Landžo* (n. 53, above), para. 73.

⁵⁵ Article 38(1)(b)(c) ICJ Statute. See A. Pellet, ‘Article 38’, in Andreas Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary*, 2nd edn (Oxford: Oxford University Press, 2012), 731, 759–60.

⁵⁶ On which, see F. Kalshoven, ‘Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal’, in L. C. Vohrah et al. (eds), *Man’s Inhumanity to Man: Essays in International Law in Honour of Antonio Cassese* (The Hague: Kluwer, 2003), 481.

opinion, notably relied upon by the Appeals Chamber in *Tadić*, it has been accepted that a resolution of an international organisation can create a tribunal.⁵⁷ It might be argued that criminal tribunals are different, but this would have applied similarly to the Tokyo IMT, which was created by a declaration of General MacArthur. Although the legality of that tribunal was the subject of considerable debate by the prosecution, defence and judges, even if not detailed in the final set of opinions, none of those protagonists even considered that the matter of treaties and custom being enforced by a Tribunal created by a resolution as being awkward.⁵⁸

Next, strictly speaking, the ICTY finds its legal authority in the UN Charter (a treaty), i.e., the powers granted to the Security Council under Chapter VII and the obligation of states to carry out its decisions under Article 25.⁵⁹ Pellet counters that just because something finds its basis in a treaty that does not make it a treaty, and '[m]oreover, it is terribly abstract and does not square with reality: certainly, a State against which an action is taken by, e.g. the Security Council under Article 41 or 42 of the Charter, cannot be deemed to have "agreed" to the measure'.⁶⁰ This is true, but does not make the point in that, as a matter of treaty law, the consequence is the same – they are so bound. Furthermore, given the nature of the ICTY's Statute, and the fact that, for the most part, it has treated its Statute (an annex to a Security Council Resolution) as a treaty for the purposes of interpretation,⁶¹ the distinction hardly seems fatal, not least because the ICJ has tended to apply the rules of the Vienna Convention on the Law of Treaties, *mutatis mutandis*, to Security Council Resolutions that are far less like treaties than the ICTY's Statute.⁶²

It is true that his final argument – that his interpretation was more consistent with ensuring human dignity – is not outside the naturalistic bent of many pronouncements of international criminal tribunals

⁵⁷ *Prosecutor v. Tadić* (n. 32, above), para. 38.

⁵⁸ On the nature of the Tribunal, see Boister and Cryer, *The Tokyo International Military Tribunal*, ch. 2.

⁵⁹ *Prosecutor v. Tadić* (n. 32, above), paras 28 ff. See also R. Cryer, H. Friman, D. Robinson and E. Wilmschurst, *An Introduction to International Criminal Law and Procedure*, 3rd edn (Cambridge: Cambridge University Press, 2014), 9.

⁶⁰ Pellet, 'Article 38', 767–78.

⁶¹ See W. Schabas, 'Interpreting the Statutes of the Ad Hoc Tribunals', in Vohrah et al., *Man's Inhumanity to Man*, 847.

⁶² *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ List 141, Opinion of 22 July 2010, para. 94.

(including the ICTY).⁶³ However, such pronouncements do not, in themselves, make strong legal arguments and beg the question of what 'human dignity', a deeply controversial concept, actually is.⁶⁴

Article 3

The interpretation that the ICTY took of Article 2, however, cannot be entirely separated off from its approach to Article 3, which it took to be a residual clause covering all other violations of applicable IHL to the international and/or non-international conflict(s) in former Yugoslavia, subject to the following conditions:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be 'serious,' that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- (iv) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁶⁵

In spite of condition (iv), which is controversial and has perhaps led to some of the ICTY's least-convincing 'proofs' of customary international law, this interpretation has had an enormous impact on the jurisdiction of the ICTY. It has meant that the ICTY has considered itself to have jurisdiction over all the treaties in force for the various conflicts, be they international or non-international, and the customary law applicable to both types of conflict. This has allowed it to concentrate on the content of the norms (which they frequently consider to be the same) in both treaty and custom, and between both types of conflict. Owing to this, the ICTY has been able to bypass the issue of the type of conflict and the issue of applicability criteria contained in the treaties (and custom). However, this is only because they have the backdrop of custom, which the ICTY has taken Article 3 to allow them to apply, in the (frequent)

⁶³ See R. Cryer, 'International Criminal Tribunals and the Sources of International Law: Antonio Cassese's Contribution to the Canon', 10 *JICJ* (2012) 1045.

⁶⁴ G. Fitzmaurice, 'Vae Victis or Woe to the Negotiators: Your Treaty or Our Interpretation of It', 65 *AJIL* (1971) 358.

⁶⁵ *Prosecutor v. Tadić* (n. 32, above), para. 94.

instances in which they determine it to be identical in both types of conflict, without regard for the applicability provisions that would otherwise have to be fulfilled from the point of view of treaty law.⁶⁶

On substantive issues, the ICTY has taken a strong line on the parasitic nature of the law of war crimes on IHL and this has, to a very great extent, permitted it to make very considerable contributions to IHL through its pronouncements on the law of war crimes, which have necessitated it to pronounce on issues of IHL. They are far too numerous to elucidate upon here.⁶⁷ To take but one example, related to the vexed issue of the applicability of the law of non-international armed conflict, the test set in *Tadić*, that of protracted armed violence between governmental armed forces and organised armed groups or between such groups, was, to all intents and purposes (linguistic infelicity aside), adopted in the Rome Statute.⁶⁸

The ICTY's contribution to the law of war crimes and IHL cannot be overestimated. However, it is not always appreciated that Article 3 allowed the ICTY to circumvent formal criteria of applicability via the escape-route of custom. This, though, was probably the high point of authority granted to a specialised court/tribunal to determine the ambit of the relevant international law. Since then, or at least after the creation of the ICTR, the manner in which international criminal tribunals have been given material jurisdiction over war crimes has reflected a desire on the part of states to retain control over the substantive content of international criminal law and, given the reflexive nature of the relationship between IHL and the law of war crimes, IHL too.

⁶⁶ S. Boelaert-Suominen, 'The Yugoslavia Tribunal and the Common Law Applicable to all Armed Conflicts', 13 *LJIL* (2000) 619.

⁶⁷ See, e.g., C. Greenwood, 'The Development of International Humanitarian Law by The International Criminal Tribunal for the Former Yugoslavia' (1998) 2 *Max Planck Yearbook of United Nations Law* 97. When it comes to the development of individual liability for violations in non-international armed conflict, Peter, at the time, expressed some surprise (although not unhappiness): C. Warbrick and P. Rowe 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadic* Case', 45 *ICLQ* (1996) 691, 698.

⁶⁸ *Prosecutor v. Tadić* (n. 32, above), para. 70; Rome Statute, Article 8(2)(f). See S. Sivakumaran, 'Identifying an Armed Conflict not of an International Character', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Brill, 2009) 363, 380. S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), ch. 5.

The ICTR

The ICTR, by virtue of Articles 3 and 4 of its Statute, was granted jurisdiction over serious violations of common Article 3 of the 1949 Geneva Conventions and Additional Protocol II, the latter in spite of questions over its customary status, owing to the fact that Rwanda was a party to that treaty,⁶⁹ and of the doubt expressed by some at the time as to whether or not there was, as a matter of law, a criminal law side to the law of non-international armed conflict.⁷⁰ Rather like in Nuremberg, the question of whether or not the conduct of the accused lay at the edges of IHL has not really arisen due to the clear breaches that have been at issue before that Tribunal. Hence, in a variation of the axiom that hard cases make bad law, the ICTR has made little law on point at all. When it comes to international crimes, generally speaking the ICTR has, rightly or wrongly, considered itself to have bigger crimes (genocide and crimes against humanity) to fry (to mix a metaphor). It has not always got the law of war crimes right,⁷¹ but it has always treated the law of war crimes as reliant on IHL and has therefore contributed, to a more limited, but still real extent, to our understanding of IHL, perhaps most notably on the conditions of applicability of Additional Protocol II. This is because, although the Statute treated the conflict as non-international, the ICTR has determined the applicability of IHL itself.⁷²

The Special Court for Sierra Leone: a mixed/muddled approach

One of the very helpful decisions made by the drafters of the ICTY Statute was to take a studiously ecumenical approach to the nature of the conflict(s) in former Yugoslavia, i.e., whether they were international

⁶⁹ Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, 13 February 1995 (UN Doc. S/1995/134), paras 11–12.

⁷⁰ P. Rowe, 'War Crimes and the Former Yugoslavia: The Legal Difficulties', 32 *Revue de Droit Militaire et le Droit de la Guerre* (1993) 317, 328–33. Peter was not alone: D. Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts', 278 *IRRC* (1990) 409, 414; Final Report of the Commission Established Pursuant to Security Council Resolution 780, Annex to Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council (UN Doc. S/1994/674), para. 42. Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, 13 February 1995 (UN Doc. S/1995/134), para. 12.

⁷¹ See generally, L. J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff, 2005), ch. 5.

⁷² *Ibid.*, 217.

or non-international. This, when it came to the applicable IHL, may have been accidental or based on an unstated assumption that, if the conflict was non-international, crimes against humanity (and perhaps genocide) would pick up the slack left by any lacunae in the law of war crimes.⁷³ The *Tadić* decision's approach to Article 3 of its Statute, which it took to grant it jurisdiction over all serious violations of the applicable IHL (i.e., that applicable to the relevant international or non-international armed conflicts at issue in any one case), rendered the decision somewhat moot. Furthermore, there is little question that the armed conflict in Rwanda was non-international. Hence, to frame the war crimes jurisdiction of that Tribunal in terms of the IHL applicable to non-international armed conflict, and its focus on genocide and crimes against humanity,⁷⁴ has not caused that Tribunal any legal difficulty, not least as the conflict in Rwanda in the early part of 1994 was undoubtedly an armed conflict and there was no reason to believe that the conflict had been internationalised.⁷⁵

Nonetheless, the issue of the nature of a conflict, and thus the substantive law applicable to it, being settled by a stroke of the drafter's pen, prior to a detailed analysis of the conflict and the relevant applicable law, is a problem, as can be seen from the Statute of the Special Court for Sierra Leone (SCSL). Here, the Secretary-General did not grant the SCSL jurisdiction over genocide as there was no evidence that it had occurred in Sierra Leone.⁷⁶ This may be the case, but it raises the issue of whether the possibility of a genocide charge ought to have been excluded from the beginning.⁷⁷ There is, however, no evidence that this absence had any significant impact on the practice of the Prosecutor or the Court.⁷⁸

⁷³ On the importance of crimes against humanity in international tribunals, see L. N. Sadat, 'Crimes against Humanity in the Modern Era', 107 *AJIL* (2013) 334.

⁷⁴ *Ibid.*, 346–9. ⁷⁵ See van den Herik, *The Contribution of the Rwanda Tribunal*, 226.

⁷⁶ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000 (UN Doc. S/2000/915), para. 13.

⁷⁷ This is particularly so as genocide, under customary law, does not require a plan or policy, and the relevant elements of crimes for the ICC do not themselves exclude the possibility of an individual perpetrator acting in the context of, for example, crimes against humanity. See, e.g., V. Oosterveld, 'Context of Genocide', in R. S. Lee et al. (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsey, NY: Transnational, 2001), 44, 47–8.

⁷⁸ For a discussion from the ex-prosecutor, see D. Crane, 'The Bright Red Thread: The Politics of International Criminal Law – Do We Want Peace or Justice? The West African Experience', in L. N. Sadat (ed.), *Forging a Convention on Crimes against Humanity* (Cambridge: Cambridge University Press, 2011), 59.

The same cannot be said when it comes to the war crimes jurisdiction of the Special Court. Although its Statute grants it jurisdiction over violations of common Article 3, Additional Protocol II and three named violations of IHL, in Articles 3 and 4 of its Statute, these, in accordance with the assumption of the drafters of the Statute, reflected the idea that the conflict in Sierra Leone was non-international.⁷⁹ The question of whether or not the activities of Liberia and other actors served to internationalise the conflict, however, became relevant when the defence in the *Fofana* case sought to argue that the Tribunal only granted the SCSL jurisdiction over offences in non-international armed conflicts, and the relevant conflict in Sierra Leone was not of that nature.

The Tribunal responded that, for the applicability of Article 3, which granted the SCSL jurisdiction over violations of common Article 3 and Additional Protocol II, the relevant norms were, essentially on the basis of custom, applicable to both types of armed conflicts.⁸⁰ This may be true, but does not quite answer the question of whether or not the SCSL has been granted jurisdiction over those violations under its Statute. It may be true, as the ICTY Appeals Chamber said in the *Čelebići* case (picking up on language in *Tadić*), that what is prohibited in non-international armed conflict must be prohibited in their international cousins.⁸¹ But the ICTY could make this move as Article 3 of its Statute, as interpreted in *Tadić*, was considered to give it plenary jurisdiction over all treaty and customary law applicable to the conflict (other than grave breaches – the subject of Article 2). This is not the case for the SCSL. It is also notable that the ICC, even where the prohibitions are identical in international and non-international conflicts, has insisted on charges being on the basis of the appropriate applicable law.⁸² The SCSL has responded to this type of claim by saying that:

⁷⁹ C. Byron, 'Commentary', in G. Sluiter and A. Klip (eds), *Leading Cases of the International Criminal Tribunals*, vol. 9 (Antwerp: Intersentia, 2006), 142.

⁸⁰ *Prosecutor v. Fofana*, Decision on Challenge to Jurisdiction *Materiae*: Nature of the Armed Conflict, SCSL-2004-14-AR72, 25 May 2004, paras 2–25.

⁸¹ *Prosecutor v. Delalić, Mucić, Delić and Landžo* (n. 52, above), paras 147, 150.

⁸² *Prosecutor v. Lubanga*, Judgment, ICC-01/04-01/06, 14 March 2012, para. 525, referring to the Pre-Trial Chamber's views, and, at para. 539, averring that 'In the view of the Chamber, for the purposes of the present trial the international/non-international distinction is not only an established part of the international law of armed conflict, but more importantly it is enshrined in the relevant statutory provisions of the Rome Statute framework, which under Article 21 must be applied. The Chamber does not have the power to reformulate the Court's statutory framework.'

where the rules are identical in respect of both internal and international armed conflict it cannot follow that because the provision of the Statute is framed in the terms of the treaty provision applicable to internal armed conflicts, the Tribunal has no jurisdiction to apply the provision in the context of an international armed conflict.⁸³

Precisely why this is the case is not elaborated upon. The SCSL, it must be remembered, did not have the luxury of a provision akin to Article 3 of the ICTY Statute that it could fall back on. Article 3 of the SCSL's Statute is far more like Article 2 of the ICTY Statute and cannot be 'liberated' from the applicability of the treaty provisions it granted the SCSL jurisdiction over violations of.

Admittedly, Article 4 of the SCSL Statute grants it jurisdiction over three named violations of IHL, which could be read as applicable to either type of armed conflict as it does not identify its criteria of applicability.⁸⁴ However, Article 3 of the SCSL Statute does by referring to common Article 3 and Additional Protocol II. Following the *Tadić* type reasoning, as that Tribunal applied it to its Article 2 (on grave breaches), the reference would include the conditions of applicability. The SCSL was not granted jurisdiction separately over customary offences and so the customary way around this was not, in law, available to the SCSL in the way it was to the ICTY. Nonetheless, the Tribunal has not considered this aspect in any detail since then and has confined its discussion of the applicability of common Article 3 and Additional Protocol II by virtue of the conditions and threshold set in the latter treaty.⁸⁵ This is somewhat paradoxical as it has never been claimed that the conditions in the second Additional Protocol apply to international armed conflicts and, as a matter of treaty law, Additional Protocol II only applies to non-international conflicts.

In the case in which the issue of the nature of the armed conflict would have been most germane, the *Taylor* case,⁸⁶ the Trial Chamber simply

⁸³ *Prosecutor v. Fofana* (n. 81, above), para. 26.

⁸⁴ *Ibid.*, para. 30. The reasoning is not entirely unassailable (as the language is drawn from parts of the Rome Statute dealing with non-international armed conflicts), but far stronger than the comments it made on Article 3.

⁸⁵ At one level this is understandable, in that AP II has a higher threshold of applicability than common Article 3, hence if AP II does, then so will common Article 3 (in non-international conflicts).

⁸⁶ *Prosecutor v. Taylor*, Judgment, SCSL-03-01-T, 18 May 2012. The reason it could have been relevant was that the essence of the Prosecution's case was that Liberia, through Taylor, had a hand in the conflict in Sierra Leone. This could have internationalised the conflict.

followed *Fofana* and said that all that was required was an armed conflict of either type.⁸⁷ However, given that the defence had not argued that the conflict was internationalised in *Taylor*, little practical effect can be laid at the door of this problem. What it does show, however, is that the pre-determination (even implicitly) by a drafter of the nature of a conflict is ill-advised.

That said, on the substance of IHL, the Special Court has, to all intents and purposes, adopted the view that IHL is the appropriate law to apply as the predicate for war crimes. Whilst it may (again) be the case that it has not always got the law right,⁸⁸ it has made some important and influential strides with respect to, for example, the protection of peacekeepers under the law of war crimes and IHL.⁸⁹ For our purposes, the point is that, applicability aside, it has not struck out on its own on the substantive norms of IHL that it has applied.

The Rome Statute: a semi-autonomous regime

As William Schabas has said, the Rome Statute was the first time that the question of the applicable law was expressly dealt with in the Statute of an international criminal tribunal (at least in a similar manner to, for example, the ICJ Statute). The other tribunals' statutes were not intended, in many ways, to be self-contained regimes.⁹⁰ Nor entirely is the Rome Statute. Article 21 provides that:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not

⁸⁷ *Ibid.*, para. 563.

⁸⁸ See, e.g., J. K. Kleffner, 'Friend or Foe? On the Protective Reach of the Law of Armed Conflict', in Matthee et al., *Armed Conflict and International Law*, 285.

⁸⁹ For a useful survey, see S. Sivakumaran, 'War Crimes before the Special Court for Sierra Leone', 8 *JICJ* (2010) 1009.

⁹⁰ Schabas, *The Rome Statute of the International Criminal Court*, 281–2.

inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.⁹¹

What is notable, though, is that Article 21 creates a hierarchy with the Statute at the top.⁹² Only if there is a lacuna in the Statute, Rules of Procedure and Evidence and Elements of Crimes that cannot be resolved by the application of the usual canons of treaty interpretation is the ICC entitled to go outside of them to custom or general principles.⁹³ This is important as the Rome Statute exhaustively defines the war crimes subject to its jurisdiction and, indeed, goes further in that the elements of crimes (which the ICC has decided to apply unless there is an 'irreconcilable contradiction' between them and the Statute)⁹⁴ provide even further elaboration of the road the drafters wanted the ICC Chambers to take.⁹⁵ It is the case that a number of war crimes in the Rome Statute are defined more narrowly than their IHL counterparts.⁹⁶ For an example, it is useful to compare the provisions on collateral damage in IHL and the Rome Statute.⁹⁷ The standard definition of an indiscriminate attack, contrary to IHL in international armed conflict, is contained in the (customary) Article 57(2)(iii) of Additional Protocol I, which requires belligerents to:

refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.⁹⁸

⁹¹ See generally, G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in Stahn and Sluiter, *The Emerging Practice of the International Criminal Court*, 285.

⁹² See generally, R. Cryer, 'Royalism and the King: Article 21 and the Politics of Sources', 12 *New Criminal Law Review* (2009) 390.

⁹³ *Prosecutor v. al-Bashir*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-02/05-01/09, 4 March 2009, para. 126. For critique, see Cryer, 'Royalism and the King', 397–8.

⁹⁴ *Prosecutor v. al-Bashir* (n. 92, above), paras 127–8.

⁹⁵ Schabas, for example, describes them as an 'obsessive exercise in legal positivism', 'Interpreting the Statutes of the Ad Hoc Tribunals', 887.

⁹⁶ See Cryer, *Prosecuting International Crimes*, 268–83.

⁹⁷ I am grateful for discussions with Dapo Akande on this point.

⁹⁸ See generally, Y. Sandoz, C. Swiniarski and B. Zimmerman (eds), *Commentary on the Additional Protocols* (Geneva: ICRC, 1987), 683–5. On its customary status, see *Prosecutor v. Galić*, Judgment, IT-98-29-T, 5 December 2003, paras 57–8.

The relevant grave breach (of Article 85(3)(b)(iii)) of Additional Protocol I is defined as follows:

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii).⁹⁹

The addition of a knowledge requirement can be understood as responding to the issue that the general definitions are not created with criminal liability (in particular *mens rea* requirements) in mind. However, the relevant part of the Rome Statute (Article 8(2)(b)(iv)) grants the ICC jurisdiction over offences related to this principle in the following terms, criminalising:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects [...] which would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.¹⁰⁰

Note that instead of the damage being ‘excessive in relation to the concrete and direct military advantage’, Article 8(2)(b)(iv) requires a higher threshold of ‘*clearly* excessive in relation to the concrete and direct *overall* military advantage’ (emphasis added). There are arguments about whether this was for the understandable reason of parsing obligations designed with state, rather than criminal, liability in mind.¹⁰¹ That does not explain the raising of the threshold (by the addition of the italicised words) that is not customary.¹⁰² However, owing to Article 21, the ICC will have to apply it. Therefore, when looking at the jurisprudence of the ICC when prosecuting this and certain other crimes,¹⁰³ the statutory background (i.e., the Rome Statute) must be borne in mind. They cannot be read as straightforward applications of IHL. To do so would risk narrowing

⁹⁹ See Sandoz, Swiniarski and Zimmerman, *Commentary on the Additional Protocols*, 995–6.

¹⁰⁰ Emphasis added. See generally, R. Arnold, ‘Article 8(2)(b)(iv)’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn (Oxford: Hart, 2008), 338.

¹⁰¹ H. von Hebel and D. Robinson, ‘Crimes within the Jurisdiction of the Court’, in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer, 1999), 79, 111.

¹⁰² Cryer, *Prosecuting International Crimes*, 277–9.

¹⁰³ For example, Article 8(2)(b)(i), where the customary *mens rea* is probably recklessness, not knowledge. See A. Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *EJIL* (1999) 144, 154.

the protection under IHL by reading a controversial definition of a war crime (which is narrower than the relevant grave breach of the underlying treaty).

However, the situation is not quite as bleak for those (myself included)¹⁰⁴ who prefer coherence over fragmentation in international criminal law, at the very least where international criminal tribunals, or courts acting on the basis of universal jurisdiction, are interpreting international crimes. There are a number of reasons for this. The first is that the Rome Statute itself suggests a recourse to general IHL in Article 21(1)(b), which refers to '[i]n the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'. This does, admittedly, render such reference secondary, but, in the context of war crimes, general IHL is likely to be a fairly frequent source of reference.

There are two aspects to this. The first relates to Articles 8(2)(a) and 8(2)(e). These grant the ICC jurisdiction over grave breaches of the 1949 Geneva Conventions and violations of common Article 3. It was clear in the drafting and terminology of both of these provisions that they were intended, *pace Tadić*, to refer to the conditions of applicability and the ambit of protections provided for in those Conventions. Not least, Article 8(2)(a) refers to grave breaches of the Conventions and to 'persons and property protected' by the relevant convention and the Elements of Crimes (drafted, as was the Rome Statute, after *Tadić*) require an international armed conflict for the application of that provision.¹⁰⁵

For the other two provisions granting the ICC jurisdiction over war crimes, both Article 8(2)(b) and (e) (on international and non-international armed conflicts respectively) condition the jurisdiction of the court 'within the established framework of international law'. This seems quite directly to give a *renvoi* to IHL when the ICC is prosecuting war crimes. It may be the case that this condition was imposed to ensure that the Tribunal does not become too 'progressive' in its interpretations of IHL,¹⁰⁶ and the Elements of Crimes do not always dispel this

¹⁰⁴ Cryer, 'Royalism and the King', 394–5.

¹⁰⁵ For example, K. Dörmann et al., 'The Context of War Crimes', in Lee et al., *The International Criminal Court*, 112, 114–15. It was assumed that this means the same thing in the context of Articles 8(2)(a) and (b).

¹⁰⁶ M. Cottier, 'Article 8(2)(b)', in Triffterer, *Commentary on the Rome Statute*, 332, 323.

suspicion.¹⁰⁷ Still, this is, in fact, a useful clarification for the Court, tying its interpretations to IHL. Some time ago Peter noted that a number of the terms in the Rome Statute, such as ‘attack’, are defined *inter alia* in Additional Protocol I and this was a way for the ICC to apply those definitions to ensure consistency.¹⁰⁸ This has proved prophetic, in that the ICC has, for the most part, kept to the definitions found in existing IHL treaties¹⁰⁹ and the jurisprudence of the *ad hoc* tribunals. For example,¹¹⁰ in the *abu Garda* case, while interpreting the crime of attacking peacekeepers in Article 8(2)(e)(iii) of the Rome Statute (which was, to all intents and purposes, cut and pasted into Article 4(b) of the SCSL Statute), the relevant Pre-Trial Chamber drew upon both Additional Protocol I and the SCSL’s decision in the *RUF* case to interpret the relevant terms in accordance with IHL.¹¹¹

Looking to international armed conflicts the ICC has noted that the Rome Statute and the Elements of Crimes do not define the concept themselves.¹¹² Therefore, the ICC has looked to the jurisprudence of the ICTY, in particular, to determine the existence and nature of an armed conflict.¹¹³ In addition to this, when looking at the criteria for an international armed conflict, taking into account that the requirement that Article 8(2)(b) needs to be interpreted in accordance with existing IHL, the Trial Chamber in *Lubanga* looked specifically to the Geneva Conventions and Additional Protocol I, and its acceptance that it applies in situations of occupation, to delineate whether Article 8(2)(b) did apply (finding that it does).¹¹⁴ Perhaps more controversially it adopted the ICTY’s test of ‘overall’ control over armed groups, for the purposes of internationalising conflicts, over the ICJ’s preferred ‘effective control’ test.¹¹⁵ Given the controversy on point,¹¹⁶ the ICC in *Lubanga* might have addressed that particular issue further.

¹⁰⁷ See Elements of Crimes for Article 8(2)(b)(viii) and H. von Hebel, ‘Article 8(2)(b)(viii)’, in Lee et al., *The International Criminal Court*, 158, 159–62.

¹⁰⁸ Rowe, ‘War Crimes’, 219.

¹⁰⁹ Although, as Peter has written, the issue of reservations here may cause difficulties, although this has not, as yet, been an issue: Rowe, ‘War Crimes’, 218–19.

¹¹⁰ For discussion, see Schabas, *The Rome Statute of the International Criminal Court*, 396–7.

¹¹¹ *Prosecutor v. abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09, 8 February 2010, paras 64–5, as they noted, *ibid.*, attacks in international and non-international armed conflicts mean the same thing in this context.

¹¹² *Prosecutor v. Lubanga* (n. 82, above), para. 531. ¹¹³ *Ibid.*, para. 541.

¹¹⁴ *Ibid.*, para. 542. ¹¹⁵ *Ibid.*, para. 541.

¹¹⁶ See J. Crawford, *State Responsibility* (Cambridge: Cambridge University Press 2013), 146–56.

Turning to non-international armed conflicts, Article 8(2)(f) of the Rome Statute does provide a definition:

Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.¹¹⁷

This, of course, pursuant to Article 21, is the controlling definition for the ICC. That said, the language is intentionally almost identical to the test developed by the ICTY in the *Tadić* case.¹¹⁸ Therefore, it is notable that, in setting out the test applicable before the ICC, the Trial Chamber in *Lubanga* looked at Additional Protocol II's conditions of applicability but drew heavily on the jurisprudence of the ICTY. It preferred the standards the ICTY set for the application of the customary law of non-international armed conflict, as well as the factors that it had identified as being relevant, to the (higher) threshold that was set as a matter of treaty law for its applicability, in Additional Protocol II.¹¹⁹ In doing so the Trial Chamber in *Lubanga* tied the interpretation of the Statute (back?) to the general standard set in IHL. This, for our purposes, is welcome. It avoids fragmentation between tribunals and the law of war crimes and its parent law: IHL.

The fact that earlier tribunals have, when it has come to substantive norms, based themselves on IHL (and, in doing so, contributed to that law too) assists greatly, as Peter has noted, with an important caveat:

The International Criminal Tribunals for the Former Yugoslavia and for Rwanda have produced a number of decisions of great authority on issues relating to war crimes [...] These Tribunals have acted under their respective Statutes, the wording of which differs from that of Article 8

¹¹⁷ The ICC has also seemingly applied this to Article 8(2)(c) of the Rome Statute, which grants it jurisdiction over violations of Common Article 3 of the Geneva Conventions. This is probably unexceptionable. See Schabas, *The Rome Statute of the International Criminal Court*, 205–6.

¹¹⁸ See *Prosecutor v. Tadić* (n. 32, above), para. 70. The slight discrepancy is most probably the result of a *lapsus calami* rather than an intention to change the test.

¹¹⁹ *Prosecutor v. Lubanga* (n. 82, above), paras 535–8. It is interesting that they did not discuss in any depth the practice of the ICTR or SCSL, although this is probably because they tended to deal with the (higher) threshold in AP II.

of the Rome Statute [...] when discussing war crimes these differences should be borne in mind. It may be that the Court would take a different view.¹²⁰

This links back to what was said above, that the ICC must, in the final analysis, apply its Statute first. The risk of fragmentation therefore cannot be entirely discounted. It ought to be said, on the other hand, that on the issue on which we have concentrated most attention, the applicability of IHL and which type, the ICC has done a great deal to ensure consistency between its Statute, the jurisprudence of the tribunals and pre-existing IHL, as seen above.¹²¹

Conclusion

As this, necessarily partial, survey attempts to show, the relationship between the law of war crimes and IHL is a close one and, for the most part, international criminal tribunals have done their best to tie their interpretations back to the relevant applicable IHL, although there are some exceptions. Additionally, they have attempted to be, so far as possible, consistent between themselves. As Nerlich has said, though, the first duty of each tribunal is to apply its Statute first and general international law (including as interpreted by the *ad hoc* tribunals) second.¹²² In some ways the practice of the ICTY in particular has proven to be exceptionally important, but cannot be divorced, any more than the decisions of the other courts and tribunals discussed above, from the Statute it was called upon to interpret and apply. It is simply that the tribunal in the *Tadić* case interpreted Article 3 of that Statute to grant it jurisdiction over all criminal violations of the applicable treaty and customary law (other than the grave breaches provisions, covered by Article 2) applicable in former Yugoslavia. The other tribunals in the post-Nuremberg/Tokyo world have not had that luxury (although they have done their best to avoid too many consequences to flow from this – occasionally (step forward the SCSL) on somewhat stretched legal grounds).

¹²⁰ Rowe, 'War Crimes', 219.

¹²¹ On this see also V. Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings before the ICC', in Stahn and Sluiter, *The Emerging Practice of the International Criminal Court*, 305. Procedure may be a different matter, but it is far outside the scope of this contribution.

¹²² *Ibid.*, 325.

The tying of war crimes law so closely to IHL has enabled the *ad hoc* tribunals (and, to the extent to which it has built up jurisprudence on point, the ICC) to contribute back to IHL, which is a law that rarely receives detailed judicial consideration – particularly in relation to battlefield conduct. Nonetheless, it is true that the practice of the criminal tribunals, particularly with respect to ‘Hague’ law, has been criticised, especially from the point of view of the level of expertise, difficulty of finding facts and the complexity of the law.¹²³ Furthermore, some have said that the tribunals have been too willing to put their thumb on the scale on the side of humanity rather than military necessity.¹²⁴ Some of these critiques may have purchase, although it ought to be said that their interpretation of military necessity has tended to be not too bad¹²⁵ and, for the most part, their jurisprudence, whilst often open to criticism,¹²⁶ bears up fairly well when compared to other national and international tribunals’ work on point.¹²⁷

Detailed evaluation of the specific decisions on point would render this piece a monograph rather than a chapter in a book. Suffice it to say that the way in which the tribunals have attempted, albeit imperfectly, to reconcile treaties, custom and their constituent documents has contributed strongly to the detail and corpus of IHL, even if occasionally by negative example. Twenty years ago, works on IHL tended to speak of specific incidents and pronounce, from an academic Olympian height, whether they were lawful or not, often without providing reasons. The tribunals have worked quite hard to be coherent on point, at times (step forward again the SCSL) at the risk of ignoring their founding documents’ jurisdictional provisions, perhaps on the basis of inapposite inferences drawn from the ICTY’s, perhaps Lauterpachtian,

¹²³ Bartels, ‘Dealing with the Principle of Proportionality’.

¹²⁴ M. Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’, 50 *VJIL* (2010) 795.

¹²⁵ N. Hayashi, ‘Requirements of Military Necessity in International Humanitarian Law and International Criminal Law’, 28 *Boston University International Law Journal* (2010) 39, 139–40.

¹²⁶ Some recent decisions have few defenders. See, e.g., J. N. Clark, ‘Courting Controversy: The ICTY’s Acquittal of Croatian Generals Gotovina and Markač’, 11 *JICJ* (2013) 399.

¹²⁷ For critical views of national courts on point, see Y. Ronen ‘*Silent Enim Leges Inter Arma* – but Beware the Background Noise: Domestic Courts as Agents of Development of the Law on the Conduct of Hostilities’, 26 *LJIL* 599 (2013); E. Benvenisti, ‘Judicial Misgivings regarding the Application of International Norms: An Analysis of Attitudes of National Courts’, 4 *EJIL* (1993) 159.

interpretation of its Article 3.¹²⁸ Whether the ICC will be able to do so is more complex in that the drafters of its Statute took care to prevent it being too 'progressive'.¹²⁹ Its jurisprudence ought therefore, as with those of its siblings, to be read carefully and with appropriate reference to the jurisdictional provisions that govern its action.

¹²⁸ On Lauterpacht's influence on international criminal law, see M. Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law', 2 *JICJ* (2004) 810.

¹²⁹ The role of Article 10 of the Rome Statute here is important, but its nuance is, unfortunately, often lost in the maelstrom that often characterises debate on custom or treaty interpretation.