1. The criminalization of the violations of international humanitarian law from Nuremberg to the Rome Statute

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I. INTRODUCTION

Following the post-World War II trials of Nazi leaders at Nuremberg and of Japanese leaders at the International Tribunal of the Far East criminal prosecution has become critically significant as a means of repressing and preventing violations of the rules of international humanitarian law (IHL). Since then the international community has paid increased attention to such violations. Efforts have been made to define the behaviors requiring criminal prosecution for ‘war crimes’ under international law and to ensure that perpetrators are brought before competent international and domestic jurisdictions for trial and appropriately sentenced if found guilty.

Admittedly not just any violation of international rules governing the conduct of hostilities may be regarded as constituting an international war crime\(^1\). Rather only serious violations of IHL qualify as crimes entailing individual criminal responsibility under international law. Consequently States are only internationally required to prosecute and impose criminal sanctions on perpetrators for these serious violations, without prejudice to a more extended criminalization of violations of the law of armed conflict under national legislation\(^2\).

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\(^2\) See in this regard eg Art 146 (3) GC IV.
II. DEFINING WAR CRIMES UNDER THE GENEVA CONVENTIONS

The developments in international criminal law occurring in the last few decades have been largely influenced by the humanitarian considerations which inspired, in the aftermath of World War II, the elaboration of the UN Charter in 1945, as well as a trend towards a more significant protection of civilians in wartime and more generally, the foundation of international human rights law. While the latter started and to some extent culminated in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations (UNGA) on 10 December 1948, the trend towards humanizing the conduct of hostilities resulted in the adoption of the four Geneva Conventions (GCs), concluded on 12 August 1949 under the auspices of the International Committee of the Red Cross.

Having identified the persons whose protection is envisaged, each of these GCs sets forth the undertaking of the High Contracting Parties ‘to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches’ defined in the GCs and obligates each State party to search for such persons and to bring them ‘regardless of their nationality, before its own courts’, under the condition that ‘in all circumstances, the accused persons shall benefit by safeguards of proper trial and defence’.

As to the definition of ‘grave breaches’, each GC spells out a list of acts, which if committed against persons or property protected by the GC, falls within the States’ obligation to adopt effective criminal legislation and prosecute appropriately. The said list is largely common to all the GCs, the most comprehensive of which is set forth in GC IV, which lists as grave breaches:

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3 See in particular Arts 1 (3), 55(c) and 56 UN Charter. See also Fausto Pocar, ‘Codification of Human Rights Law by the United Nations’, in Nandasiri Jasentuliyana (ed), Perspectives on International Law (Kluwer 1995), 139–44.
4 See UNGA Res 217 A (III) 10 December 1948. For a commentary see Asbjørn Eide et al (eds), The Universal Declaration of Human Rights (Scandinavian UP 1992).
5 See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I), Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II), Convention Relative to the Treatment of Prisoners of War (GC III), and Convention Relative to the Protection of Civilian Persons in Time of War (GC IV).
6 See Art 4 GC I, Art 5 GC II, Arts 4 and 5 GC III, and Arts 4 and 13 GC IV.
7 See Art 49 GC I, Art 50 GC II, Art 129 GC III, Art 146 GC IV.
willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.\(^8\)

While this definition of war crimes draws to a large extent on their initial description in the London Charter of the Nuremberg International Military Tribunal (IMT)\(^9\), which was primarily intended for international adjudication\(^10\), within the GCs it is instrumental to their prosecution by the domestic courts of States parties. In both cases however the definition is largely incomplete from the criminal law standpoint. In particular it does not always contain a detailed description of the actus reus of the envisaged violation, and rather refers to it generically. Additionally almost no indication is given with

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\(^8\) See Art 147 GC IV. See also Art 50 GC I (which omits a reference to unlawful deportation or confinement, compelling a person to serve in hostile forces, depriving a person of the right to fair trial, and taking of hostages), Art 51 GC II (which has the same tenor as Art 50 GC I), and Art 130 GC III (which contains the same list, without the breaches against property, and replaces the words ‘protected persons’ with ‘a prisoner of war’).

\(^9\) See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945 (UNTS, vol 82, 279). The London Charter did not limit war crimes to violations of the ius in bello but also envisaged, as a separate war crime, the crime of aggression, as a violation of the ius ad bellum, which was classified in the London Charter within the category of ‘crimes against peace’. See Yoram Dinstein, ‘The Distinctions between War Crimes and Crimes against Peace’ (1994) 24 Israel YB Human Rights, 1–17. Because of the difficulty of agreeing on a definition of aggression, although that violation was considered in the codification of war crimes by the ILC (see infra Section III), it was not included in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993. However the crime of aggression was later included in the Statute of the International Criminal Court (ICC) in 1998, and eventually defined at the Review Conference in Kampala in June 2010, although this amendment to the Rome Statute has yet to take effect. See Noah Weisbord, ‘Prosecuting Aggression’ (2008) 49 Harvard Int LJ 161–220; Mary Ellen O’Donnell and Mirakmal Niyazmatov, ‘What is Aggression? Comparing the Jus ad Bellum and the ICC Statute’ (2012) 10 JICJ 189–207.

\(^10\) Only Art 11 of the London Charter refers to domestic prosecution ‘before a national, military or occupation court’, but it is only described as being independent from the Tribunal’s prosecution, without defining its scope as to the crimes that may be adjudicated.
respect to the modes of individual responsibility and the required *mens rea*\(^{11}\).

This begs the question of how to fill in these normative gaps. The London Charter left the task of defining the specific elements of these crimes to the IMT, which to that effect was bound to rely on existing treaties and customary international law. In the absence of any express guideline in the London Charter, this is a compelling conclusion in light of the consideration that the list of violations is preceded by a general definition of war crimes as being ‘namely, violations of the laws and customs of war’, thus implying that the prohibited conducts constituted war crimes as far as they represented a violation of rules of international law. Moreover as the list of violations in the London Charter is not exhaustive\(^ {12}\), any conduct could be regarded as criminal if it was contrary to the laws and customs of war. The non-conformity with international law was therefore the paradigm for establishing the qualification as a war crime of the conduct of an accused before the IMT.

With respect to the GCs, defining the elements of the war crimes resulting from their grave breaches falls rather to State parties in their national legislation. As earlier mentioned the GCs merely impose on States parties the obligation to enact any legislation necessary to provide penal sanctions for perpetrators, without giving specific guidelines as to the elements of the crimes and the modes of responsibility, thus allowing for a certain margin of appreciation between States adopting such legislation. It goes without saying however that the implementing domestic legislation must conform to the GCs and also to existing laws and customs of war. In particular the legislation must respect the principles of international criminal law as affirmed by the Nuremberg Tribunal, bearing in mind also that

\(^{11}\) There was a limited reference to modes of responsibility in the Charter of the IMT, in particular with respect to common participation in war crimes: see Arts 6 last paragraph and 8 of the Charter. A more limited indication can be found in the GCs: see eg Art 146 GC IV, which distinguishes between ‘committing’ and ‘ordering’ a war crime to be committed. However these rules were in principle not drafted as complete and self-executing criminal rules, the aim of the GCs being rather to impose on States the obligation to criminalize certain behaviors in their domestic legislation.

\(^{12}\) In listing the prohibited conducts, Art 6 (b) of the Charter expressly establishes that ‘such violations shall include, but not be limited to’ thus allowing the IMT to add other crimes to the list provided that it shows they constitute violations of the laws and customs of war. As the Tribunal was mandated with the prosecution of crimes committed before its establishment, a reference to customary international law as the applicable substantive law was in any event unavoidable in order to ensure consistency with the principle *nullum crimen sine lege*. 
those principles were subsequently endorsed by the UNGA as constituting customary international law.\footnote{See infra fn 16.}

### III. CONTRIBUTIONS OF THE INTERNATIONAL LAW COMMISSION TO DEFINING WAR CRIMES

This situation – where the definitions of the crimes and the modes of responsibility depend on different sources of law including treaty law, customary international law and domestic legislation – required further action in order to clarify the notion and the elements of war crimes and to rationalize the interaction of the legal sources, with a view to achieve more predictability and to strengthen compliance with the principle of legality, which is a cornerstone of criminal law.\footnote{For a positive affirmation of the principle nullum crimen sine lege as the expression of an absolute right of anyone accused of a criminal offence see Art 15, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UNTS, 171; see also Manfred Nowak, U.N. Covenant on Civil and Political Rights. ICCPR Commentary, 2nd ed (Engel 2005), 358–68.}

This was particularly necessary for the possible future adjudication of war crimes by a permanent international criminal jurisdiction, which was foreseen after the closing of the IMTs.

In this perspective the UNGA had already taken a step towards clarifying the principles applicable to individual criminal responsibility for war crimes and their definition in 1947 by adopting a resolution entrusting the International Law Commission (ILC) to formulate the principles of international law recognized in the London Charter and in the judgement of the Nuremberg Tribunal, as well as with the task of preparing a draft code of offences against the peace and security of mankind.\footnote{See UNGA Resolution 177 (II) of 21 November 1947.}

The first task resulted in the ILC’s adoption in 1950 of a text of the principles and a definition of war crimes that essentially reiterates their description in the London Charter.\footnote{‘Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal’ (1950) Yearbook ILC (vol II) 374–8. It has to be noted that the task of the ILC was limited to formulating the principles and did not extend to expressing any appreciation of them as principles of international law, as they had already been unanimously affirmed by the UNGA Res 95 (I) of 11 December 1946.} The second UNGA directive led to the elaboration of a first draft code...
of crimes against the peace and security of mankind, which was submitted by the ILC to the UNGA in 1951 and amended in 1954. This draft code did not contain any detailed definition of war crimes and simply referred to them as ‘acts in violation of the laws and customs of war’. Notwithstanding the task assigned to the ILC of compiling a draft code, this short definition implied a mere reference to customary international law and did not further clarify the elements of war crimes. Rather than describing the elements of these crimes, the draft code focused on: crimes against the peace imputable to a public authority of a State; crimes against humanity; and the identification of some principles of individual criminal responsibility.

Subsequently the UNGA retained the draft for many years, particularly because of the difficulty of agreeing on a definition of aggression, which finally culminated in 1974. It was only much later that the UNGA invited the ILC to resume its work of elaborating a draft code, which would take into account the results achieved by the process of the progressive development of international law. After resumption of its work and based on a number of reports the ICL adopted in 1991 a preliminary draft code, which the UNGA then commented on, resulting finally in the eventual adoption by the ILC in July 1996 of a ‘Draft Code of Crimes against the Peace and Security of Mankind’, which included, inter alia, a more detailed list of the acts constituting war crimes that had since been agreed upon.

In reaching this result and discharging its mandate, the ILC considered all relevant and significant developments of international law, including the conventional norms of the GCs and their Additional Protocols of 8 June 1977, as well as the more recent developments of the initial case law.

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20 ‘Draft Code of Crimes against the Peace and Security of Mankind’ (Draft Code of Crimes) (1966) Yearbook ILC (vol II, Pt Two 1998), 15–56. The form which the Draft Code of Crimes could take was left open for an appropriate decision of the UNGA: the ILC recommended three possible forms, including an international convention, the incorporation of the code in the statute of an international criminal court, or the adoption of the code as a declaration of the GA.
21 Art 20 Draft Code of Crimes. See infra Section VI.
22 ‘Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol
of the first international criminal jurisdiction ever established by the UN\textsuperscript{23}, as will be discussed in the next paragraph. It has to be noted however that although the Draft Code of Crimes undoubtedly represents great progress as compared to the ILC’s first draft from 1951, its detailed list only provides limited clarification of the elements of each war crime. Like pre-existing international legislation the Draft Code of Crimes only offered incomplete criminal norms, which had to be supplemented by additional rules before they could be applied by a domestic or international court. In particular if the Draft Code of Crimes was incorporated in the statute of an international criminal court, as the ILC recommended, either it needed to implement conventional rules or had to reference customary international law as a means of supplementing its provisions and making them applicable as rules under criminal law.

IV. THE SIGNIFICANT CONTRIBUTION OF THE ICTY TO DEFINING WAR CRIMES

Before the finalization of the Draft Code of Crimes in 1996 the situation in the Balkans, following the dissolution of the former Yugoslavia, including allegations of serious crimes committed during the armed conflicts that broke out both between successor States and within them, prompted the UN Security Council (UNSC) in 1993 to establish the ICTY by adopting a resolution under Chapter VII of the UN Charter and to entrust it with the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991\textsuperscript{24}. For the first time since Nuremberg war crimes had to be defined in an international document such that an international

\textsuperscript{23} That is, the jurisdiction of the ICTY.

\textsuperscript{24} UNSC Res 827 (1993), 25 May 1993.
criminal tribunal could exercise jurisdiction. Inevitably and also due to the short deadline given by the SC to the Secretary-General for drafting the statute of the ICTY, the definition of war crimes could only be drawn from and refer to existing definitions enshrined in the GCs and in consolidated customary international law, as expressed in international practice.

As the Secretary-General’s Report (SG Report) to the SC clarifies when dealing with the applicable law of the ICTY, IHL ‘exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional law has become part of customary international law’\textsuperscript{25}. The allusion to the GCs, which are generally regarded as constituting customary international law, is self-evident.

The SG Report goes on explaining that:

\begin{quote}
\textit{in the view of the Secretary-General, the application of the principle \textit{nullum crimen sine lege} requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.}\textsuperscript{26}
\end{quote}

Thus, in establishing the jurisdiction of the ICTY its Statute draws a distinction between the grave breaches of the GCs and other violations of the laws and customs of war, on the assumption that both bodies of law are part of customary international law. In this context while Art 2 of the Statute reproduces almost verbatim the list of serious breaches in the GC IV, Art 3 generally refers to violations of the laws or customs of war. The SG Report clarifies that these violations reflect a second important instrument of conventional international law which was considered part of the body of customary international law: the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto\textsuperscript{27}. However the list in Art 3 ICTY Statute is not exhaustive; as in the London Charter, it is preceded by a direction that the violations ‘shall include, but not be limited to’ those in said list, thus allowing the ICTY to assess the existence of other violations under customary international law.

In light of the approach taken by the Secretary-General in advising the Security Council about the competence of the ICTY or its \textit{ratione materiae}

\begin{footnotes}
\item \textsuperscript{25} Report of the Secretary-General pursuant to Paragraph 2 of SC Resolution 808 (1993), presented 3 May 1993, S/25704, para 33.
\item \textsuperscript{26} SG Report, para 34.
\item \textsuperscript{27} SG Report, para 41.
\end{footnotes}
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jurisdiction, his report fails to mention two treaties that are of the utmost importance in IHL, that is the two APs of 1977, relating to the protection of victims of international armed conflicts and of non-international armed conflicts, respectively. While indeed it is generally recognized that the GCs have become part of customary international law, there is still disagreement on whether the APs’ transformation from conventional to customary international law encompasses the entirety of their provisions. Consequently there is no consensus on all the violations thereof being in breach of customary international law, which is also true with respect to the regime of the ‘grave breaches’ in AP I. Therefore an express reference to the ‘grave breaches’ under AP I would have been inconsistent with the Secretary-General’s approach aimed at excluding treaty law from the laws applicable at the ICTY and at relying rather on customary law as a basis for the jurisdiction of the ICTY. If this also explains why Art 2 ICTY Statute only mentions ‘grave breaches’ of the GCs, the solution adopted did not exclude that Art 85 AP I might be applied under Art 3 of the ICTY Statute, as far as it deals with violations of AP I provisions that are indeed recognized as part of customary international law. This conclusion has indeed been confirmed by the ICTY case law, which additionally considered that the APs could also be taken into account under Art 3 Statute as treaty law, since they were in force in the territory of the former Yugoslavia at the time when the offenses were committed.

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29 Art 85 AP I.

30 See Prosecutor v Tadić, ICTY Case No IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (Tadić Jurisdiction Decision), paras 74, 88, 143–44. The Tadić Jurisdiction Decision does not consider the issue, certainly taken into account by the SG in recommending the application of customary international law, whether the treaties in force in the former Yugoslavia were applicable to the countries actually concerned with the armed conflicts, as successor States. The issue was however taken up later by the ICTY Appeals Chamber, which reasoned that the IHL treaties entered into by the predecessor State applied through automatic succession to the successor States: see Prosecutor v Delalić et al (Čelebići case), ICTY Case No IT-96-21-A, Appeal Judgement, 20 February 2001 (Delalić Appeal Judgement), paras 107–15; Fausto Pocar, ‘Some Remarks on the Continuity of Human Rights and International Humanitarian Law Treaties’, in Enzo Cannizzaro (ed), The Law of Treaties Beyond the Vienna Convention (OUP 2011) 278–93 at 289.
V. THE EFFECT OF THE CHARACTERIZATION OF THE ARMED CONFLICT ON THE DEFINITION OF WAR CRIMES BY THE ICTY

The described evolution in shaping the notion and the definition of war crimes reached a critical point with the establishment of the ICTY whose jurisprudence addresses an additional, highly relevant feature. On its face the definition used in international practice encompassed only serious violations of international rules governing the conduct of hostilities committed in armed conflicts of an international character. This conclusion rests on the consideration that the four GCs deal with international armed conflicts – except for common Art 3 that applies to armed conflicts of a non-international character – and that their relevant provisions dealing with ‘grave breaches’ expressly envisage the protection of persons addressed in each GC but do not mention common Art 3. This reading of the scope of the expression ‘grave breaches’ finds further affirmation in the APs. While AP I contains provisions on the repression of grave breaches\(^{31}\), which supplement those of the GCs, AP II lists certain acts committed against protected persons as prohibited but ignores any obligation of States to make them the object of criminal prosecution and punishment\(^{32}\). A proposal to include a parallel provision obligating State prosecution of such acts within AP II was explicitly rejected by the majority of the States attending the revision conference in Geneva. Although it was indeed largely recognized that violations of IHL in international armed conflicts must entail individual criminal prosecution, traditionally States have been reluctant to accept that universal jurisdiction, as provided for in the GCs, could be exercised over war crimes committed in internal armed conflicts, and have therefore been inclined to limit the prosecution of war crimes to international conflicts. A different approach was perceived as an unacceptable intrusion on State sovereignty\(^{33}\).

This approach made assessing the nature of the conflict extremely important for the ICTY as the first international criminal tribunal established by the UN to exercise such jurisdiction. Both grounds of its jurisdiction over war crimes – Art 2 ‘grave breaches of the Geneva Conventions of 1949’ and Art 3 ‘violations of the laws or customs of war’ – include, although they are not limited to, acts that reflect behaviors relating to international conflicts. The characterization of the conflicts in the former

\(^{31}\) See Art 85 AP I.

\(^{32}\) Art 6 AP II.

Yugoslavia was therefore critical for assuming jurisdiction over most, if not any, cases brought before the ICTY. In approximation one can say that an international armed conflict exists in at least three scenarios: i) where there is an armed conflict between different States; ii) where there is an internal armed conflict with one or more foreign States (or international organizations made up of States) intervening; and iii) when there is a struggle for independence in the form of a war of national liberation. However this creates the issue of determining the appropriate degree of intervention by a foreign State that transforms a non-international armed conflict into an international one. The ICTY held in the Tadić case that when a foreign government exerts ‘overall control’ over an organized armed group abroad, the conflict must be regarded as international, in contrast with the view previously expressed by the International Court of Justice (ICJ) in the Nicaragua case that ‘effective control’ was necessary to incur State responsibility. Subsequently the ICJ when dealing with this issue and the potential State responsibility for acts committed by paramilitary units (armed forces which are not among its official organs), found in the Genocide case that the overall control test established by the ICTY was inappropriate on two concurring grounds. First, the ICJ stated that individual criminal responsibility and State responsibility were distinct issues and did not logically require application of the same standard. Second, the ICJ found that the overall control test overly broadened the scope of State responsibility. Without going into the matter more than strictly necessary here, it is apparent that this broadening of the notion of an international armed conflict, as compared with the narrower notion applied by the ICJ, entails a broader application of the GCs and consequently of the jurisdiction of the ICTY over grave breaches thereof.

The practical significance of this approach had been limited however by the Tadić Jurisdiction Decision itself, which interpreted Art 3 ICTY Statute as comprising, among the violations of the laws or customs of war,
the ‘serious violations’ of common Art 3 GCs. As it has been said this interpretation constitutes a ‘breakthrough’: it was equivalent to stating that most acts constituting war crimes in international conflicts also constitute war crimes when committed in non-international armed conflicts, thus making the issue of assessing the nature of the conflict less critical for the purposes of exercising criminal jurisdiction. This issue was nevertheless litigated in many subsequent cases before the ICTY because of the Prosecution’s pleading practice, which used to refer to a specific context in its indictments or charge a behavior alternatively (or even cumulatively) as a grave breach of the GCs or as a serious violation of the laws or customs of war by referencing the nature of the conflict and, as far as international conflicts are concerned, characterizing the victims as protected persons.

VI. THE NATURE OF THE ARMED CONFLICT AND THE STATUTE OF THE ICC

The assimilation of war crimes committed in internal armed conflicts to those perpetrated in international armed conflicts as proposed by the ICTY case law has not prevented subsequent international legislation and practice from continuing to describe these crimes separately and as dependent on the nature of the conflict. This has been the case not only of the concurrently discussed Draft Code of Crimes, but also more recently of the Rome Statute of the ICC.

The Draft Code of Crimes, which was adopted only a few months after the seminal Tadić Jurisdiction Decision, followed to a large extent the existing practice, focusing primarily on war crimes committed in international armed conflicts. In doing so it regarded the expression ‘international humanitarian law’ without further qualification as referring to international conflicts. Thus on one hand according to Art 20 Draft Code of

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38 See Tadić Jurisdiction Decision, paras 89–93.
40 The Tadić Jurisdiction Decision explicitly declares that ‘at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant’: see para 102, quoting para 218 of the ICJ judgement in the Nicaragua case, supra fn 36.
41 See eg Delalić Appeal Judgement, paras 389–427.
Crimes the acts committed in violation of IHL constituting war crimes are essentially the grave breaches of the GCs and of AP I, as well as the serious violations of the laws and customs of war embodied in the Hague Convention IV of 1907 and the Regulations thereto\(^43\). On the other hand Art 20 also considers as war crimes the serious violations of IHL ‘applicable in armed conflicts not of an international character’, as contained in Art 3 common to the GCs and Art 4 (2) AP II\(^44\). Only with respect to one violation – outrages upon personal dignity in violation of IHL, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault – is the expression IHL used to equally refer to both types of armed conflict\(^45\). Additionally the last provision of Art 20 Draft Code of Crimes refers to armed conflicts, without specifying their nature, when proscribing as a war crime the use of methods or means of warfare not justified by military necessity with the intent to cause serious damage to the natural environment, which might prejudice the health or survival of the population, when such damage occurs\(^46\).

Although the Draft Code of Crimes essentially rests on the distinction between international and non-international armed conflicts, it clearly introduces the notion that war crimes may also be committed in internal conflicts. The Draft Code of Crimes relies both on the UNSC approach

\(^43\) Draft Code of Crimes Art 20 (a)–(c) and (e).

\(^44\) Draft Code of Crimes Art 20 (f). This sub-paragraph is drawn from Art 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), and has been considered by the ILC to be ‘of particular importance in view of the frequency of non-international armed conflicts in recent years’: see Draft Code of Crimes, Art 20, Commentary at 14.

\(^45\) Draft Code of Crimes Art 20 (d). It is worth noting that the violation here referred to also appears in sub-para \(f\) in the list of violations of IHL applicable to non-international armed conflicts. The reason given by the ILC for singling out this violation lies in the importance ‘to reaffirm explicitly the criminal nature of such conduct as a war crime when committed in armed conflict of an international character’, bearing in mind that ‘the fundamental guarantees provided for by the law applicable to armed conflict of a non-international character constitutes a minimum standard of humanitarian treatment of protected persons which is applicable to any type of armed conflict, whether international or non-international in character’: see Draft Code of Crimes, Art 20, Commentary at 12.

\(^46\) Draft Code of Crimes Art 20 (g). Although this crime is recognized when committed during an international or a non-international armed conflict, it is not described in the Draft Code as a violation of IHL, ‘to avoid giving the impression that this type of conduct necessarily constitutes a war crime under existing international law in contrast to the preceding subparagraphs’: see Draft Code of Crimes, Art 20, Commentary at 15. The ILC thus considers this war crime, based on Arts 35 and 55 AP I, which does not characterize their violations as grave breaches entailing individual criminal responsibility, as constituting a development of international law.
to establishing the statute of the ICTR in 1994 and on the case law of the ICTY as it explicitly notes that the principle of individual criminal responsibility for violations of the law applicable in internal armed conflict was reaffirmed by the ICTY in the Tadić Jurisdiction Decision. \footnote{See Draft Code of Crimes Art 20, \textit{Commentary} at 14.} Furthermore the two last provisions mentioned above – on outrages upon personal dignity and on methods and means of warfare severely damaging the environment – show the Draft Code of Crimes had been prudent in its approach towards overcoming this distinction by identifying war crimes that would be recognized irrespective of the international or internal context in which they are perpetrated. Here too, the jurisprudence of international courts appears to have played a significant role.\footnote{Ibid at 12.} 

Notwithstanding these developments, the Statute of the ICC (ICC Statute or Rome Statute), which was elaborated and adopted at the Rome conference two years after the Draft Code of Crimes, demonstrates a more traditional approach as its description and classification of war crimes is more rigidly based on the distinction between international and non-international armed conflicts.

Following a consolidated tradition, Art 8 Rome Statute opens by declaring that, for the purposes of the Rome Statute, the expression ‘war crimes’ means ‘grave breaches of the Geneva Conventions of 12 August 1949’ and ‘other serious violations of the laws and customs applicable in international armed conflicts’.\footnote{Art 8 (2)(a)–(b), respectively.} Each sub-paragraph of Art 8 is followed by the list of the prohibited conducts: regarding the GCs, the list is the usual one, also present in the ICTY Statute and the Draft Code of Crimes; on the contrary, regarding other violations of the laws and customs applicable in international armed conflicts, the list is partially based on the grave breaches of AP I but also comprises other prohibited conducts encompassing new developments like, inter alia, attacks causing severe damage to the natural environment or conscripting or enlisting children into the national armed forces or using them to participate actively in hostilities. This is a much longer list than those of previous international instruments, but it is meant to be an exhaustive one, preventing the ICC from assessing the existence of other violations of laws and customs that would otherwise entail criminal prosecution under international law.\footnote{Except in the case provided for in Art 21 (1)(b) Rome Statute, on which see however, \textit{infra} Section VII.}

While these provisions deal with international armed conflicts, in the case of an armed conflict not of an international character, the expression
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‘war crimes’ under Art 8 Rome Statute encompasses ‘serious violations of Art 3 common to the four Geneva Conventions of 12 August 1949’ and ‘other serious violations of the laws and customs applicable in conflicts not of an international character’. In both cases these headings are followed by a list of the relevant crimes, which again is meant to be exhaustive.

The rigid distinction followed by the Rome Statute in classifying war crimes according to the nature of the armed conflict during which they are committed may appear surprising, or even a step backwards, in light of the trend, discussed above, towards minimizing the role of the characterization of the conflict. It may be less surprising however if one considers that unlike previous instruments, the Rome Statute is a treaty negotiated by State delegations at an international conference, where the contracting parties were probably concerned about adopting a text entailing precise rather than flexible obligations, particularly when crimes committed in internal conflicts are at issue. Such a concern is confirmed by the effort to restrict the notion of non-international conflicts to armed conflicts that take place in the territory of a State ‘when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups’, in contrast to internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. Again the outcome of the Rome negotiation shows and confirms the resistance of governments to consent to an excessive intervention by the international community, through a judicial body like the ICC, in matters that States still consider to be essentially within their domestic jurisdiction.

VII. CONCLUSION

Besides the reliance on a rigid reference to the distinction between international and non-international armed conflicts, the prudence shown by

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51 Art 8 (2)(d)–(f) Rome Statute. As Michael Bothe, supra fn 39, at 418, has pointed out, ‘the systematic order of Article 8 . . . involves the need to determine two different thresholds: that between an international and a non-international armed conflict and that between an armed conflict and a situation which does not at all constitute an armed conflict within the meaning of subparagraphs (c) or (e). The latter threshold is regulated by subparagraphs (e) and (f) for (c) and (e), respectively’.

52 See also Gabriella Venturini, ‘War Crimes’, in Flavia Lattanzi and William A Schabas (eds), Essays on the Rome Statue of the International Criminal Court, vol I (Il Sirente 1999), 171–81 at 178, noting the ‘compromise, where the embodiment of the war crimes committed in internal conflicts is counterbalanced by the provision on the threshold’.
the Rome conference in shaping the list of war crimes also results, as mentioned above, from the drafting of closed lists as opposed to open lists that would not be limited to the crimes expressly described therein but rather would allow for the court’s assessment of the existence of other crimes under the laws and customs of war, as was done in the ICTY and ICTR Statutes. On one hand it is undeniable that the approach followed in the Rome Statute appears to ensure a stricter respect for the principle of legality, since a statutory hard provision is prima facie more predictable than a customary one. On the other hand it can also be argued that a legal provision based on customary law is likely to ensure more adherence to the feelings of the human society in which the provision is meant to have effect, as customary law evolves simultaneously with the society, while a statutory provision undergoes a legislative process before coming into existence and normally follows the development of the society with some delay.

While it is not necessary here to take a final stance on the desirability of opting for one approach over the other, it has to be noted that the solution adopted in the Rome Statute, in contrast to other existing international courts entrusted with jurisdiction over war crimes, presents the risk of favoring divergent interpretations from different courts, whereas these should by definition as international crimes be universal. Paradoxically the ICC, which is tasked with exercising universal jurisdiction over international war crimes, risks – at least until its Statute is universally ratified – being the judicial body that produces fragmentation in international case law by strictly sticking to statutory provisions that may not exactly match customary international law, while the application, or the dialogue on the application of customary provisions by a plurality of existing international courts with limited geographic and temporal jurisdiction has to a large extent succeeded in avoiding such fragmentation, thus far.

Under the Rome Statute the ICC also has the power to apply ‘the rules and principles of international law, including the established principles of the international law of armed conflicts’ instead of the Rome Statute ‘where appropriate’. However the Rome Statute itself appears to discourage such an application by indicating that the Statute should be applied ‘in the first place’, and the other rules ‘in the second place’ where appropriate\(^5\). This notwithstanding the ICC should be encouraged to rely on customary law to the largest extent possible, with a view to bridging the gap between its hard statutory rules and the slightly more flexible ones stemming from customary international law and to bringing about the

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\(^5\) Art 21 (1)(b) Rome Statute.
universality of international criminal law by establishing continuity with the role played by the ad hoc tribunals, which have produced abundant case law that currently represents almost the entirety of international jurisprudence on international crimes including war crimes.