The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia

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> "The kinds of grave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in many other parts of the world, and continue to exhibit new forms and permutations. The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of existing provisions of international customary law."[1]

There is a progressive tendency of the International Criminal Tribunal for the former Yugoslavia (ICTY)[2] to extend the applicability of international humanitarian law to meet the requirements of its Statute, most notably when giving effect to the drafters' intentions in establishing the Tribunal. In broadening the applicability of international humanitarian law, the Tribunal relies on existing rules of customary international law while adopting a purposive interpretation of the law of armed conflict. This methodology of decision-making adopted by the Tribunal has led to substantive developments of international humanitarian law since the 1999 *Tadic* Appeals Chamber Judgement,[3] the results of which include the extension of the nationality requirement of protected persons status and the broadening of individual criminal responsibility to include the common purpose doctrine.

The Tribunal provides an interpretive framework and forum for existing international humanitarian law and as such, is well suited to develop the

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law in order to address new forms and permutations of grave violations of international humanitarian law. The teleological[4] approach adopted by the Tribunal thus provides both a persuasive authority and a necessary development in broadening individual criminal responsibility to respond to modern international inter-ethnic conflict such as that in the former Yugoslavia.

The scope of this article is limited in two important respects. First, in adjudicating on the nationality requirement and on the common purpose doctrine, the Tribunal has left unanswered a number of questions that arise from such extensions. In relation to the nationality requirement for example, the question arises regarding the ability of a State, a soldier, or of a humanitarian organization, to determine, during the conduct of international hostilities, whether or not a person or a group of persons maintains allegiance to the State, and whether that person or group is effectively protected by it. Second, from a criminal law perspective, the common purpose doctrine raises several issues concerning the rights of the accused and the notion of individual criminal responsibility.[5] The purpose of this article is to trace two

1 *Prosecutor* v. *Delalic et al. (Celebici Case), Judgement*, Case No. IT-96-21-T, T. Ch. IIqtr, 16 Nov. 1998, (hereinafter "*Celebici Case* 1998"), para. 170.

2 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704, annex (1993), reprinted in 32 ILM 1192 (1993) (hereinafter ICTY or Tribunal).

3 *Prosecutor* v. *Tadic, Judgement*, Case No. IT-94-1-A, App. Ch., 15 July 1999 (hereinafter *Tadic* Appeals Chamber Judgement).

4 The teleological approach has been defined as follows: "[A]lso called the 'progressive' or 'extensive' approach of the civilian jurisprudence, [it] is in contrast with the legislative historical approach. The teleological approach plays the same role as the 'mischief rule' of common law jurisprudence. This approach enables interpretation of the subject matter of legislation within the context of contemporary conditions. The idea of the approach is to adapt the law to changed conditions, be they special, economic or technological, and attribute such change to the intention of the legislation." *Celebici Case* 1998, *op. cit.* (note 1), para. 163.

5 For a discussion of issues raised concerning the extension of the nationality requirement of protected person status, see J-F. Quéguiner, "Dix ans après la création du Tribunal pénal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire", *International Review of the Red Cross*, this volume. See also M. Sassòli and L M. Olson: *International Decision: Prosecutor* v. *Tadic (Judgement). Case No. IT-94-1-A*,. 39 ILM 1518 (1999); "International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, July 15 1999", *American Journal of International Law*, Vol. 94, 2000, p. 571. For issues relating to the rights of the accused in extending individual criminal responsibility to include the common purpose doctrine, see the following analysis by Sassòli and Olson: *International Decision: Prosecutor* v. *Tadic (Judgement). Case No. IT-94-1-A*,. 39 ILM 1518 (1999); "International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, July 15 1999", *American Journal of International Law*, Vol. 94, 2000, p. 571; and "The judgment of the ICTY Appeals Chamber on the merits in the Tadic Case: New horizons for international humanitarian and criminal law?", *International Review of the Red Cross*, Vol. 839, 2000, p. 733.

key developments of international humanitarian law by the Tribunal, to examine arguments both for and against these developments, and to illustrate the need, given both the Tribunal's Statute and the new forms of violations of international humanitarian law, to develop the law of armed conflict.

Interpretation of the Statute by the International Criminal Tribunal for the former Yugoslavia

Security Council Resolution 827[6] mandates the International Criminal Tribunal for the former Yugoslavia "to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991."[7] The Statute of the Tribunal confers jurisdiction over violations of rules of international humanitarian law that are declaratory of customary law and that are applicable to international armed conflicts.[8] The subject-matter over which the Tribunal exercises jurisdiction includes grave breaches of the 1949 Geneva Conventions (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5). In his commentary on the Statute given in his Report to the Security Council, the United Nations Secretary-General emphasized that the principle 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."[9]

6 SC Res. 827 (May 25, 1993), reprinted in 32 ILM 1203 (1993).

7 Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, Annex, (hereinafter ICTY Statute or Statute). Security Council resolution 808 (1993) established the purposes of the Tribunal, which were later elaborated in Security Council resolution 827 (1993).

8 T. Meron, "International criminalization of internal atrocities", *American Journal of International Law*, Vol. 89, 1995, p. 554 and p. 559.

9 Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, para. 37 (1993), reprinted in 32 ILM 1159, 1192 (1993). (Hereinafter Report of the Secretary-General or Secretary-General's Report). The principle *nullum crimen sine lege* is illustrative of the fact that the Tribunal was not empowered to "legislate" or to create new law in the field of international humanitarian law. Granting a law-making power to a United Nations body would in fact "... be contrary to the present configuration of the law-making process in international law." In establishing the Tribunal, the verbatim records of the discussions in the Security Council reveal that "... The Tribunal would not be empowered with (...) the ability to set down norms of international law or to legislate with respect to those rights. It simply applies existing international humanitarian law." A. Cassese, "The International Criminal Tribunal for the former Yugoslavia and the implementation of international humanitarian law", in L. Condorelli *et al.* (ed.), *The United Nations and International Humanitarian Law*, Pedone, Paris, 1995, p. 232 and footnote 1.

He also stated that the Geneva Conventions[10] are declaratory of customary law and constitute "the core of customary law applicable in international armed conflicts."[11]

The Tribunal's rulings thus both reflect[12] and contribute to the development of customary law governing armed conflicts. Moreover, the jurisprudence of the ICTY illustrates how conventional law contributes to the emergence of a contemporary interpretation of international humanitarian law. For example the Tribunal, through its ground-breaking decision in the *Tadic* case,[13] has developed customary norms[14] while relying on and preserving fundamental humanitarian protections of existing law.[15] The increasing frequency with which treaty-based and customary international law influence and reciprocate one another is unprecedented:

> "Customary law has come to play a role of paramount importance, since contemporary humanitarian law applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols. Customary law has accelerated the development of the law of armed conflict, particularly in relation to crimes committed in internal conflicts. In this respect, the case law established by the ad hoc Tribunal for the former Yugoslavia has made an important contribution."[16]

The Tribunal may interpret the Statute in either a broad or a narrow sense. Broadly speaking, judicial interpretation involves "... extending,

10 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Convention relative to the Treatment of Prisoners of War, 12 August 1949; Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter Geneva Conventions or Conventions).

11 Report of the Secretary-General, *op. cit.* (note 8), p. 1192.

12 S. W. Tiefenbrun, "The paradox of international adjudication developments in the International Criminal Tribunals of the former Yugoslavia and Rwanda, the World Court, and the International Criminal Court", *NC Journal of International Law and Commercial Regulation*, Vol. 25, 2000, p. 572 and footnotes 143-144.

13 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3).

14 A. Carrillo-Suarez, "Hors de logique: Contemporary issues in international humanitarian law as applied to internal armed conflict", *American University International Law Review*, Vol. 15, 1999, p. 3 and footnote 5.

15 B. S. Brown, "Nationality and Internationality in International Humanitarian Law", *Stanford Journal of International Law*, Vol. 34, 1998, p. 348.

16 E. Greppi, "The evolution of individual criminal liability under international law", *International Review of the Red Cross*, No. 835, 1999, p. 541 and footnote 52.

restricting or modifying a rule of law contained in its statutory form" according to the particular facts of the case before it. Alternatively, the Tribunal can suggest the restrictive role of judges "...in explaining the meaning of words or phrases used in a statute."[17] Judicial "gap-filling," including the interpretive role of the judiciary is, according to the Tribunal, a means of securing and giving effect to the drafters' intentions.[18]

The decisions by the Tribunal nevertheless represent uncharted judicial territory, for the Geneva Conventions are to be applied as criminal law by the ICTY in a manner different from the way in which they were initially construed.[19] Modern conventional international humanitarian law has its origins in the nineteenth century,[20] a time governed by state-centric notions of international law and by the law of nations. Rights and duties were defined for States rather than for individuals. The law of armed conflict, as it first emerged, did not formally recognize or provide for the rights of individuals or for individual criminal responsibility for violations of international rules.[21] Moreover, at the time the 1949 Geneva Conventions were formulated the drafters did not envisage the present-day type of inter-ethnic conflict.[22] The law applied by the Tribunal must, however, correspond to the contemporary context in which serious violations of international humanitarian law took place in the former Yugoslavia.[23]

17 *Celebici Case* 1998, *op. cit.* (note 1), para. 158.

18 *Ibid.*, para. 165.

19 Brown, *op. cit.* (note 15), p. 347.

20 See F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, International Committee of the Red Cross (ICRC), Geneva, 2001, Chapters I and II.

21 Brown, *op. cit.* (note 15), p. 347 and footnotes 2-3.

22 Deborah Ungar argues that "... since the Tadic decision was the first case to put international humanitarian law to the test, it cannot be ignored that the theatre of war between and within States has evolved. Because fifty years passed since the Nuremberg trials, the ICTY had to apply international humanitarian laws according to the standard of conventional wars. Today, few of the major conflicts 'are conventional wars — that is, wars that entail the direct, sustained confrontation of the military forces of two or more States within a defined space, usually occurring on the soil of one of the combatants'. After the fall of the Soviet Union, contemporary wars consist of 'nation-based violence'. As most evident in the former Yugoslavia, violence erupts between groups with differences grounded in ethnicity, religion, and history. Further, in contemporary wars, groups attempt to establish independence based on their national identities, such as the Serbs in creating the Republika Srpska." D. L. Ungar, "The Tadic war crimes trial: The first criminal conviction since Nuremberg exposes the need for a permanent war crimes tribunal", *Whittier Law Review*, Vol. 20, 1999, pp. 720-721.

23 According to the Tribunal in the *Celebici Case* 1998, *op. cit.* (note 1), "[t]he nature of the international armed conflict in Bosnia and Herzegovina reflects the complexity of many modern conflicts and not, perhaps, the paradigm envisaged in 1949."

In order to accomplish this, the ICTY bridges the gap between traditional State-centric notions of conventional humanitarian law and its own mandate to prosecute individuals for serious violations of international humanitarian law.[24] Because humanitarian legal norms have only recently become the object of international judicial interpretation and application,[25] an alternative theory and methodology of decision-making is needed. Judicial flexibility is also needed because the ICTY represents the first time that individual cases concerning the Geneva Conventions have been adjudicated by an International Tribunal.[26] As illustrated by the 1999 *Tadic* case, the Tribunal achieves this flexibility through a functional adaptation of existing international humanitarian norms,[27] resulting in the extension of provisions of international humanitarian law. The ICTY — in particular the interpretive role of the judiciary — is thus able to further the development of international humanitarian law in the *rapprochement* between the conventional and a more contemporary interpretation of the law of armed conflict.

Tadic, the grave breaches regime, and the common purpose doctrine

According to the Trial Chamber in the 1995 *Tadic* case,[28] the existence of an international armed conflict was not a requirement for the exercise of jurisdiction under Articles 2, 3 or 5 of the Statute. The Trial Chamber held that, despite its references to grave breaches of the Geneva Conventions, Article 2[29] of the Statute enabled the Tribunal to treat those provisions as declaratory of customary law, and to try persons committing the acts listed in the grave breaches provisions in internal armed conflict. Deeming Articles 2, 3, and 5 applicable, the Trial Chamber considered it unnecessary to deter-

24 Kalshoven and Zegveld note in relation to individual responsibility, the "... total silence on the possibility of international adjudication of violations of the Geneva Conventions, this notwithstanding the experience of the two International Military Tribunals, and in stark contrast with the position adopted by the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article VI of which expressly reserves the possibility of trial by a competent 'international tribunal'." Kalshoven and Zegveld, *op. cit.* (note 20), p. 81.

25 L. Boisson de Chazournes, "Les résolutions des organes des Nations Unies, et en particulier celles du Conseil de Sécurité, en tant que source de droit international humanitaire", in L. Condorelli *et al.* (eds), *The United Nations and International Humanitarian Law*, Pedone, Paris, 1995, p. 169.

26 A. Cassese, *op. cit.* (note 9), p. 245.

27 Brown, *op. cit.* (note 15), p. 348.

28 *Prosecutor* v. *Tadic, Decision of the Defence Motion on Jurisdiction*, Case No. IT-94-1-T, T. Ch., 10 Aug. 1995 (hereinafter "*Tadic – 1995 Decision on Jurisdiction*").

29 According to Article 2 of the ICTY Statute, *op. cit.* (note 7), "[t]he International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva

mine the character of the armed conflict in Bosnia-Herzegovina.[30] However the Appeals Chamber reversed these findings in its 1995 *Tadic* ruling.[31] The Appeals Chamber held that there are two burdens of proof for Article 2 of the ICTY Statute to apply: first, a requirement that the armed conflict be international at all relevant times, and second, that the victims of the alleged grave breach fall within the definition of protected persons[32] as defined by the Geneva Conventions.[33] In contrast to the Trial Chamber, the Appeals Chamber considered at length whether there was an armed conflict taking place, and designated it as "mixed," involving both internal and international armed conflict.[34] A strict interpretation of Article 2 was therefore adopted by the Appeals Chamber *in lieu* of a progressive interpretation of the grave breaches system.

Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

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

30 *Tadic – 1995 Decision on Jurisdiction, op, cit.* (note 28), paras. 46-83.

31 *Ibid*.

32 Article 4 of the Fourth Geneva Convention, *op. cit*. (note 7), defines protected persons as follows: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." In this regard see J. Pictet *et al*. (eds), *Commentary on the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1958,. 46-47.

33 In order for jurisdiction to be granted over grave breaches of the 1949 Geneva Conventions, other general requirements must be met, including the existence of an international armed conflict, a nexus between the armed conflict and the crime, and the requirement that the crime be committed against persons and property protected under the Conventions. See, for example, *Prosecutor* v. *Tadic, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-AR72, App. Ch., 2 Oct. 1995 (hereinafter "*Tadic* – 1995 Appeal on Jurisdiction"), para. 67; see also *Prosecutor* v. *Tadic, Opinion and Judgement*, Case No. IT-94-1-Y, T. Ch. II, 7 May 1997, (hereinafter "*Tadic – 1997 Opinion and Judgement*"), para. 561 (quoting the *Tadic* – 1995 Decision on Jurisdiction). According to Judge Shahabuddeen, "[i]f the accused is charged with a grave breach, then, no matter what he has actually done and how outrageous it may be, he cannot be said to have engaged in the criminal conduct under that provision unless that element, concerning the status of the victim as a 'protected' person, is proved." *Prosecutor* v. *Jelisic, Judgement*, Case No. IT-95-10, App. Ch., 5 July 2001 (Partial Dissenting Opinion of Judge Shahabuddeen, para. 39).

34 *Tadic* – 1995 Appeal on Jurisdiction, *op. cit*. (note 33), paras. 71-78.

In particular, the concept of grave breaches under the Geneva Conventions was, according to the Appeals Chamber, indivisible from the notion of protected persons and property.[35] The definition of protected persons is itself narrow and both the Trial and the Appeals Chamber rejected a broader definition.[36] Moreover, neither the notion of protected persons nor that of protected property was included in common Article 3, the sole provision in the Conventions applicable to internal armed conflict.[37] Article 2 of the Statute was thus interpreted by the Tribunal as a provision that grants jurisdiction vis-à-vis grave breaches of the Convention rather than as a free-standing provision.[38] The conclusion that the grave breaches system applied only to violations committed in an international armed conflict defied recent trends in State practice illustrating a change in customary international law.[39]

Also indicative of a conventional interpretation of humanitarian provisions was the technical definition of protected persons and protected property as inseparable from the grave breaches regime.[40] Conventional interpretations of the law were thus very much at odds with developing customary norms, as evidenced by the fact that the Tribunal did not address:

> "… the possibility that, divorced from some of their conventional and formal aspects, the core offences listed in the grave breaches provisions may have an independent existence as a customary norm applicable also to violations of at least common Article 3."[41]

35 *Ibid*., para. 81.

36 According to this strict interpretation by the Appeals Chamber of Article 4 of the Fourth Geneva Convention, grave breaches occur solely when victims and perpetrators differ in terms of nationality, and the Bosnian-Muslim victims of Dusko Tadic were not protected persons, for they were not in the hands of a party to the conflict of which they were not nationals. Rather, they were in the hands of Bosnian Serbs, including Tadic, who were of the same nationality as their victims. Sassòli and Olson, "The judgment of the ICTY", *op. cit*. (note 5), pp. 733 and 738 and footnotes 30-31.

37 Tadic – 1995 Appeal on Jurisdiction, *op. cit*. (note 33), para. 81.

38 C. Greenwood, "International humanitarian law and the *Tadic* case", *European Journal of International Law*, Vol. 7, 1996, p. 273.

39 *Tadic* – 1995 Appeal on Jurisdiction, *op. cit*. (note 33), paras. 83-84.

40 T. Meron, "The continuing role of custom in the formation of international humanitarian law", *American Journal of International Law*, Vol. 90, 1996, p. 238 and p. 243.

41 In his separate opinion, Judge Abi-Saab stated that "[a]s a matter of treaty interpretation — and assuming that the traditional reading of 'grave breaches' has been correct — it can be said that this new normative substance has led to a new interpretation of the Conventions as a result of the 'subsequent practice' and opinio juris of the States parties: a teleological interpretation of the Conventions in light of their object and purpose to the effect of including internal conflicts within the regime of 'grave breaches.'"

Tadic – 1995 Appeal on Jurisdiction, *op. cit*. (note 33), (Separate Opinion of Judge Abi-Saab).

Refraining from judicial flexibility, the majority adopted a narrow interpretation by applying traditional notions of international humanitarian law, the result of which was a finding of guilt solely under Articles 3 and 5 of the Statute.

Formalistic approaches to the issues of both nationality and internationality were also adopted by the Trial Chamber II in the 1997 *Tadic* case.[42] The strict test of agency[43] applied by the Tribunal led it to conclude that the victims could not be considered civilians in the hands of a Party or Occupying Power of which they were not nationals and that after 19 May 1992[44] the conflict was no longer international in character.[45] Consequently, the grave breaches provisions did not apply. In referring to the *Nicaragua* case[46] and in applying the concept of effective control[47] to the case before it, the Trial Chamber II adopted a restrictive approach in interpreting international humanitarian law. The Trial and Appeals Chamber rulings in 1995 and the 1997 judgement of the Trial Chamber II were not to be characterized by definitions of nationality and internationality other than what had traditionally been conceived. In his separate opinion, Judge Abi-Saab noted that:

> "[T]he ICTY is (...) afforded a unique opportunity to assume the responsibility for the further rationalization of these categories [of international crimes under the Statute] at some distance from the historical and psychological conditions from which they emerged and from the perspective of the evolving international legal order."[48]

42 *Tadic – 1997 Opinion and Judgement*, *op. cit.* (note 33).

43 Brown, *op. cit.* (note 15), p. 379.

44 The date is of significant importance, for the question arose as to whether the acts committed by Tadic were perpetrated in the context of an international armed conflict. A. de Hoogh, "Commentary" in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia 1993-1998*, Intersentia, Antwerp, Vol. I, 1999, p. 468.

45 *Tadic – 1997 Opinion and Judgement*, *op. cit.* (note 33), paras. 607-608.

46 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment*, ICJ Reports 1986, p. 14.

47 In her dissent, Judge McDonald suggested that there had been a grave misreading of the *Nicaragua* case. In disagreeing with the majority, she espoused the concept of dependency and control. Having adopted this lower standard vis-à-vis the threshold of agency control, Judge McDonald concluded that the armed conflict was international in character, that the victims were protected persons and that the grave breaches regime was in fact applicable in relation to the specific indictments. See *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33) (Separate Opinion of Judge McDonald).

48 *Tadic* – 1995 Appeal on Jurisdiction, *op. cit.* (note 33), (Separate Opinion of Judge Abi-Saab).

Although desirable and indeed inevitable, progressive legal developments were not going to be achieved through a "quasi-legislative judicial process",[49] according to the majority of the Appeals Chamber in 1995.[50]

Technical interpretations of the grave breaches regime were superseded only recently by the Tribunal in the 1999 *Tadic* Appeals Chamber case.[51] The Tribunal adopted a functional approach to nationality,[52] effectively broadening the concept of protected persons under the Fourth Geneva Convention, and allowing a guilty finding of grave breaches. The Appeals Chamber achieved this in part by revisiting the applicability of the grave breaches regime and in particular, the threshold of agency control[53] in overturning the 1997 Trial Chamber II findings and qualifying the conflict as international.[54] The Appeals Chamber abandoned the literal interpretation of protected persons following both the cross-appeal by the Prosecution and suggestions to adapt the definition of protected persons "to the principal challenges of contemporary conflicts."[55] The substance of relations or alternatively, factors of allegiance and effective protection, become the controlling factors rather than nationality. In referring to the concept of a party "of which they are not nationals", the Tribunal held that:

> "a legal approach, hinging on substantial relations more so than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for the allegiance (…). Article 4 of Geneva Convention IV, if interpreted in light of its object and

49 Brown, *op. cit.* (note 15), p. 403 and footnote 244.

50 *Prosecutor* v. *Tadic, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 Oct. 1995, para. 84.

51 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3).

52 Brown, *op. cit.* (note 15), p. 380 and footnote 161, p. 398 and footnote 227.

53 In addressing the subject of responsibility for a military organization, the Tribunal held that international humanitarian law was applicable to international armed conflict when *overall* control by a foreign State over that organization could be established. This would in turn render the foreign State responsible for all acts committed by the organization. See *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), paras. 115-162. The threshold of agency control held by the majority reflects the dissenting opinion of Judge McDonald in *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33). See note 62.

54 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 162.

55 Sassòli and Olson, "The judgment of the ICTY", *op. cit.* (note 5), p. 733 and p. 738, footnote 32.

> purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Geneva Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting protection Article 4 intends to look to the substance of relations, not to their legal characterisation as such."[56]

The justification for reconceptualization was provided for in terms of the lack of adequate protection afforded by the nationality criterion, and the need to apply international humanitarian law to substantive rather than to legal bonds. Given the realities of present-day armed conflict, conventional doctrines of international humanitarian law failed to account, much less provide, for the protection of civilians caught up in international inter-ethnic conflict.[57]

Also of significance in the development of international humanitarian law by the 1999 *Tadic* case is the common purpose doctrine. The conventional basis for this doctrine is the Geneva Convention system, which in the

56 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), paras. 166 and 168.

57 Since, for example, "... it cannot be contended that the Bosnian Serbs constitute a State, arguably, the classification [of the conflict as exclusively international] would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as 'grave breaches', because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as 'protected persons' under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as 'grave breaches', because such civilians would be 'protected persons' under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage vis-à-vis central authorities of Bosnia-Herzegovina." *Prosecutor* v. *Tadic, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, App. Ch., 2 Oct 1995, para. 76. The Appeals Chamber held, in *Prosecutor* v. *Delalic et al.* that "[t]he Commentary did not envisage the situation of an internationalised conflict where a foreign State supports one of the parties to the conflict, and where the victims are detained because of their ethnicity, and because they are regarded by their captors as operating on behalf of the enemy. In these circumstances, the formal link with Bosnia and Herzegovina cannot be raised before an international tribunal to deny the victims the protection of humanitarian law." *Prosecutor* v. *Delalic et al. (Celebici Case), Judgement*, Case No. IT-96-21, App. Ch., 20 Feb. 2001, (hereinafter *Celebici Case* 2001), para. 58 (quoting the *Aleksovski* Appeals Judgement: *Prosecutor v. Aleksovski, Judgement*, Case No. IT-95-14/1, App. Ch., 24 March 2000, para. 79).

context of individual criminal responsibility[58] represents fundamental institutional changes vis-à-vis international legal norms.[59] Common design first appeared in 1997,[60] although Dusko *Tadic* was found not guilty of wilful killing under Article 2(a) of the Statute.[61] The Appeals Chamber overturned this on cross-appeal by the Prosecution on the basis of facts established by the Trial Chamber and on law, whereby co-perpetrators are criminally responsible for acts committed by others.[62] Under the common purpose doctrine, a defendant could be held responsible for killings committed by other members of his group, even if the killings were not necessarily a part of the common plan.[63]

58 Individual criminal responsibility is defined in Article 7 of the ICTY Statute. The relevant provision in the *Tadic* case is Article 7(1), which reads as follows: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." ICTY Statute, *op. cit.* (note 7), Art. 7.

59 L. S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, Martinus Nijhoff Publishers, Dordrecht, 1992, p. 53.

60 The common purpose doctrine was identified by the Trial Chamber as a form of participation within the context of direct criminal responsibility. In determining the required extent of participation, the Trial Chamber held that criminal responsibility is incurred "[i]f people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law (...). Thus not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced." *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33), paras. 685, 687 (quoting the *Almelo* case: *The Almelo Trial*, Case No. 3, *Law Reports of War Criminals*, United Nations War Crimes Commission, Vol. 1, HMSO, London, 1949, p. 40).

61 The Trial Chamber was not satisfied with regard to the evidence that the accused had any part in the killing of the five men. It considered that the killing of five men in the village of Sivci "may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible." *Tadic – 1997 Opinion and Judgement*, *op. cit.* (note 33), esp. para. 373.

62 Sassòli and Olson, "The judgment of the ICTY", *op. cit.* (note 5), p. 740. The Appeals Chamber identified three distinct categories in which the notion of common purpose leads to collective criminality, the third of which is common purposes cases. The common purpose doctrine "... concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region to effect 'ethnic cleansing' with the consequence that, in the course of doing so, one or more of the victims is shot and killed." The other two categories identified by the Appeals Chamber in which common purpose leads to collective criminality are cases of co-perpetration and concentration cases. *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 204.

63 According to the Appeals Chamber, "[t]here is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise." *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 227.

According to the Appeals Chamber, responsibility was incurred when a predictable consequence of the common plan was the risk of death, and *Tadic* willingly took that risk:

> "The Appellant actively took part [in the attack on Jaskici on 14 June 1992], rounding up and severely beating some of the men from Jaskici (…). Accordingly, the only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prjedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless took that risk."[64]

Awareness of risk and in particular, awareness that other members of the group may possibly commit a crime, becomes a basis of criminal liability, henceforth widening the concept of *mens rea* vis-à-vis individual criminal responsibility.

The Chamber based its conclusion on analysis of precedents and national legal systems rather than on a provision in the Statute or on a rule of international humanitarian law.[65] Although there is no general principle of law recognized by nations in the field of common purpose,[66] the Appeals Chamber concluded that "[the] case law [supporting the Appeals Chamber's approach] reflects customary rules of international law."[67] Common design as a form of accomplice liability is firmly established in customary international

64 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 232.

65 Sassòli and Olson., *International Decision*, *op. cit.* (note 5), p. 1518; Sassòli and Olson, "International Criminal Tribunal", *op. cit.* (note 5), p. 571 and p. 573.

66 Sassòli and Olson, "International Criminal Tribunal", *op. cit.* (note 5), p. 573. The Appeals Chamber referred to Article 25 (paragraph 3(d)) of the Rome Statute of the International Criminal Court as justification for recognizing common purpose liability. The legal weight attributed to the Rome Statute was set out by the Tribunal in *Prosecutor* v. *Furundzija*, wherein it held that the Statute "… possesses significant legal value. (…) The text (…) may be taken to express the legal position i.e. *opinio juris* of [the overwhelming majority of States attending the Rome Diplomatic Conference]." *Prosecutor* v. *Furundzija*, *Judgement*, Case No. IT-95-14/1-T, T. Ch. II, 10 Dec. 1998. According to the Appeals Chamber in the *Tadic* case, "[t]his is consistent with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting." *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), paras. 204 and 223 (quoting the *Furundzija* Judgement, para. 227). Given the legal weight attributed to the Rome Statute and the Tribunal's reliance on a principle of law contained therein, it can be argued that a general principle of law recognized by nations in the field of common purpose does in fact exist.

67 *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 226.

law and is upheld implicitly in Article 7 of the Statute, according to the Appeals Chamber.[68] The Tribunal cited the Secretary-General's Report, stressing the belief that "... *all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations."[69] Reference was also made in the Judgment to the language of Article 2, with particular emphasis on the term *ordering* grave breaches of the Geneva Conventions to be committed.[70] The Tribunal held that personal jurisdiction of its Statute is no longer limited to "... providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution."[71] The Statute "... does not stop there",[72] given the need to uphold individual criminal responsibility for serious violations of international humanitarian law, most notably when attributing liability via participation in a joint criminal enterprise.

Application of the *Tadic* Appeals Judgement principles

The principles advanced by the Appeals Chamber in the 1999 *Tadic* Judgement serve as the authoritative basis on which subsequent interpretations of Articles 2 and 7(1) of the Statute are founded. The Tribunal adopts a consistent legal pattern in relation to the grave breaches regime in part by adopting a teleological interpretation of Article 4 of the Fourth Geneva Convention. It also achieves a direct line of rulings on the nationality requirement following an examination of the object and purpose of international humanitarian law, which is to protect civilians during armed conflict to the maximum extent possible. Similar linear developments regarding individual criminal responsibility are based on an expansive interpretation of criminal liability to include inactive participation via a joint criminal enterprise. The Tribunal distinguishes between active and inactive participation in the commission of a crime, and reveals the possible equal attribution of criminal liability to both modes of participation. Such developments are based on the notion of objective foresight in the possible commission of a crime and are consistently adhered to by the Tribunal in its jurisprudence subsequent to the 1999 *Tadic* Appeals Chamber decision.

68 *Prosecutor* v. *Krstic*, *Judgement*, Case No. IT-98-33, T. Ch. I, 2 Aug. 2001, para. 601.
69 *Ibid*. at para. 190 & n. 222. Emphasis in original.
70 Tadic Appeals Chamber Judgement, *op. cit*. (note 3), para. 189. Emphasis in original.
71 *Ibid*., para. 190.
72 *Ibid*.

Protected person status

In Prosecutor v. *Blaskic*,[73] the Trial Chamber confirmed the principle advanced by the Prosecution and followed the conclusion adopted by the *Tadic* Appeals Judgement.[74] According to the Trial Chamber, ethnicity becomes the decisive factor in determining to which nation one pledges one's allegiance, which can in turn establish protected person status.[75] The Appeals Chamber in *Prosecutor* v. *Aleksovski*[76] found that the Trial Chamber had applied the wrong test in determining the applicability of Article 2 of the Statute,[77] and confirmed the *Tadic* Appeals Judgement, endorsing a "wider construction"[78] through an "extended application"[79] of Article 4 of the Fourth Geneva Convention. According to Judge Hunt, this conceptual adaptation raises a tension between the need for certainty in international criminal law and that of flexibility, where adhering to a previous ruling will create an injustice.[80] In order for the Appeals Chamber to respond to this tension, departures from previous decisions should be made cautiously and should constitute the exception rather than the rule.[81] The need for certainty may be reconciled by the consistency with which the Tribunal is bound to Appeals Chamber decisions.[82] Similarly, the need for flexibility may also be resolved by the teleological approach adopted by the Tribunal in interpreting modern inter-ethnic armed conflict. Thus inherent in the decisions granting protected persons status is the application of principles enunciated in the 1999 *Tadic* Appeals Chamber case, and the decision by the Tribunal, "see[ing] no cogent reasons in the interests of justice, to depart from the *Tadic* Appeal Judgement."[83]

73 *Prosecutor* v. *Blaskic*, *Judgement*, Case No. IT-95-14, T Ch. I, 3 March 2000.

74 *Ibid*., para. 126.

75 *Ibid*., para. 127.

76 *Aleksovski* Appeals Judgement, *op. cit*. (note 57).

77 *Ibid*., para. 153.

78 *Celebici Case* 2001, *op. cit*. (note 57), para. 58 (quoting the *Aleksovski* Appeals Judgement, para. 151).

79 In referring to the teleological approach by the 1999 *Tadic* Appeals Chamber Judgement (*op. cit*., note 3) in interpreting Article 4 of the Fourth Geneva Convention, the Appeals Chamber held that "this extended application of Article 4 meets the object and purpose of Geneva Convention IV, and is particularly apposite in the context of present-day inter-ethnic conflicts." *Aleksovski* Appeals Judgement, *op. cit*. (note 57), para. 152.

80 *Ibid*., (Declaration of Judge Hunt, para. 4).

81 *Ibid*. (Declaration of Judge Hunt, paras. 8-9).

82 *Ibid*. (Declaration of Judge Hunt, para. 10).

83 *Celebici Case* 2001, *op. cit*. (note 57), para. 84 (quoting the application of the teleological approach enunciated in the *Aleksovski* Appeals Judgement, *op. cit*. (note 57)).

In *Prosecutor* v. *Delalic*[84] for example, the Appeals Chamber examined the interpretative approach of nationality in the Fourth Geneva Convention and in particular, the rules of treaty interpretation established by the 1969 Vienna Convention on the Law of Treaties.[85] Rejecting the Defence submission that "traditional rules of treaty interpretation" mandate a strict interpretation of nationality,[86] the Appeals Chamber held that a teleological approach was consistent in light of the object and purpose of the Fourth Geneva Convention.[87] According to the Appeals Chamber,[88] the *Tadic* Appeals Judgement constituted neither a rewriting nor a recreation of the law of that Convention in having relied on the *travaux préparatoires* for the purpose of "... reinforc[ing] its conclusions reached upon an examination of the overall context of the Geneva Conventions."[89] The *Celebici* Appeals Chamber held that the object and purpose of international humanitarian law is "directed to the protection of civilians to the maximum extent possible",[90] and concluded that the nationality requirement in Article 4 should be construed within this context.[91]

Hence the "more purposive and realistic approach"[92] adopted by the Appeals Chamber in the *Celebici* case, which upheld the Trial Chamber's conclusions based on legal reasoning consistent with the *Tadic* Appeals Judgement.[93] Judicial interpretation was thus broad in requiring that the law

84 *Ibid*.

85 Vienna Convention on the Law of Treaties, 23 May 1969. Article 31 states that "[a] treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32, entitled "Supplementary means of interpretation" states that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous and obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

86 *Celebici Case* 2001, *op. cit.* (note 57), paras. 59 and 65.

87 *Ibid*., para. 73.

88 The Appeals Chamber in the *Tadic* case held that Articles 4(1) and 4(2) of the Fourth Geneva Convention, in addition to the preparatory work, illustrate that "... already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases." *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), paras. 164-165.

89 *Celebici Case* 2001, *op. cit.* (note 57), para. 73.

90 *Ibid*., para. 168.

91 *Ibid*., para. 73.

92 *Ibid*., para. 81.

93 *Ibid*., para. 86.

"be applied to the reality of the situation"[94] whilst "emphasi[zing] the necessity of considering the requirements of article 4 of the Fourth Geneva Convention in a more flexible manner".[95] Legal prerequisites such as the internationality of the armed conflict and protected persons status continue to provide the *context* in which alleged offences take place;[96] these controlling factors have, however, entailed a conceptual adaptation:

> "[I]t would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of Article 4, that was apparently inserted to prevent interferences in a State's relations with its own nationals. In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach taken here. As was recently stated by [Theodor] Meron, in interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals."[97]

A linear pattern of judicial reasoning has emerged and the Tribunal in *Prosecutor* v. *Kordic and Cerkez* has ruled out deviation from this reasoning.[98] The consistency with which the allegiance rather than the nationality determinant is applied was guaranteed by the Trial Chamber in the Kordic case, which held that "[t]hose decisions [by the Aleksovski and Celebici cases] are binding on this Chamber".[99] Interpretive flexibility was also confirmed by the Trial Chamber in the *Kordic* case, wherein it adopted a teleological approach "[b]y parity of reasoning" with the *Aleksovski* and *Tadic* Appeals Judgements.[100] The Tribunal consistently abides by its jurisprudence on this issue, as confirmed by *Prosecutor* v. *Naletilic and Martinovic*, for the Tribunal "... will review, on a case by case basis, the effective allegiance of the victims rather than their formal nationality".[101] The linear trend adopted by the

94 *Ibid*., para. 87 (quoting the *Celebici Case* 1998, *op. cit*. (note 1), para. 264).

95 *Ibid*., para. 86 (quoting the *Celebici Case* 1998, *op. cit*. (note 1), para. 263).

96 *Ibid*., para. 26 (Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna).

97 *Celebici Case* 1998, *op. cit*. (note 1), para. 266 (quoting Theodor Meron).

98 *Prosecutor* v. *Kordic and Cerkez, Judgement*, Case No. IT-95-14/2, T. Ch. II, 26 Feb. 2001 (hereinafter *Kordic and Cerkez Judgement*).

99 *Ibid*., para. 148.

100 *Ibid*., para. 150.

101 *Prosecutor* v. *Naletilic and Martinovic, Judgement*, Case No. IT-98-34-T, 31 March 2003, para. 207.

Tribunal since the 1999 *Tadic* Appeals Chamber Judgement can thus be characterized as persuasive precedent[102] regarding protected persons status.

Common criminal enterprise

The general principle of criminal law that an individual is responsible for his acts or omissions is given effect by Article 7 of the Statute.[103] However neither in Article 7(1) nor elsewhere does the Statute specify the necessary degree of participation by the individual in the crime.[104] According to the 1997 *Tadic* Judgment and subsequent case law, criminal liability under Article 7(1) entails participation via "complicitous conduct".[105] A distinction can thus be made between conventional doctrines of active participation in the sense of having personally physically committed the crime, and "inactive participation"[106] in the sense of having "participated" in a common criminal enterprise.[107] There is a "basic understanding", according to the Trial Chamber in the *Celebici* case, that jurisdiction over the principles of individual criminal responsibility under Article 7(1) "is not limited to persons who directly commit the crimes in question".[108] The word participation is therefore construed in such a way as to encompass "all forms of responsibility which are included within Article 7(1)", notwithstanding the fact that some forms are more direct than others, according to the *Celebici* Appeals Judgement.[109]

In the *Kordic* case[110] for example, the Prosecution submitted that the responsibility of the accused entailed their "active participation" in the

102 For the use of persuasive precedent, see *Prosecutor* v. *Bagambiki et al. Decision on the Defence Motion on Defects in the Form of the Indictment*, Case No. ICTR-97-36-(I), T. Ch. II, 24 Sept. 1998, para. 7. See also *Prosecutor* v. *Kupreskic et al., Judgement*, Case No. IT-95-16, 14 Jan. 2001, para. 540

103 *Kordic and Cerkez Judgement*, *op. cit.* (note 98), para. 364.

104 *Ibid*., para. 374.

105 *Tadic – 1997 Opinion and Judgement*, *op. cit.* (note 33), para. 674.

106 K. Askin, "Developments in international criminal law: Sexual violence in decisions and indictments of the Yugoslav and Rwandan Tribunal: Current status", *American Journal of International Law*, Vol. 93, 1999, pp. 97, 103 and 104.

107 See for example, *Prosecutor* v. M*ucic et al., Judgement on Sentence Appeal,* Case No. IT-96-21, 8 April 2003, para. 40. For a detailed discussion of joint criminal enterprise liability, see *Prosecutor* v. *Radoslav Brdanin and Momir Talic, Decision on Form Further Amended Indictment and Prosecution Application to Amended Indictment and Prosecution Application to Amend*, Case No. IT-99-36-PT, 26 June 2001.

108 *Blaskic Judgement*, *op. cit.* (note 73), para. 263 (quoting the *Celebici Case* 1998, *op. cit.* (note 1), para. 319).

109 *Celebici Case* 2001, *op. cit.* (note 57), para. 355.

110 *Kordic and Cerkez Judgement*, *op. cit.* (note 98).

crimes charged in the Indictment.[111] In citing the *Tadic* Appeals Chamber decision, the Trial Chamber found that Article 7(1) comprises two distinct categories of criminal responsibility, divided between principal perpetrators and accomplices.[112] An individual's "participation in the commission of a crime other than through direct commission",[113] or indirect liability, is within the scope of Article 7(1), according to the Trial Chamber.[114] Primary and secondary forms of participation, although not explicit within the Statute, have nevertheless been qualified as the responsibility of direct or principal perpetrators and accomplice liability, respectively.[115]

Moreover, the Trial Chamber in *Prosecutor* v. *Kvocka et al.*[116] held that lack of participatory specification in the Indictment would not prevent the Chamber from taking into consideration all possible modes of participation, including the common purpose doctrine.[117] Given the different primary and

111 *Ibid*., para. 372. Quotation marks in original.

112 *Ibid*., para. 373 (quoting the *Tadic* Appeals Chamber Judgement, *op. cit*. (note 3), para. 186).

113 *Ibid*., para. 385.

114 This reflects the finding in the *Tadic* Appeals Chamber Judgement that allows the Prosecution to plead Article 7(1) in its entirety vis-à-vis the accused's participation in a joint criminal enterprise: "... Although only some members of the group may physically perpetrate the criminal act, (...) the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less — or indeed no different — from that of those actually carrying out the acts in question. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrator of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending on the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminality." *Prosecutor* v *Krnojelac, Judgement*, Case No. IT-97-25, T. Ch. II, 15 March 2002 (hereinafter *Krnojelac Judgement*), para. 73 (quoting the *Tadic* Appeals Chamber Judgement, *op. cit*. (note 3), paras. 191-192.

115 *Krstic Judgement*, *op. cit*. (note 68), para. 643.

116 *Prosecutor* v. *Kvocka et al., Judgement*, Case No. IT-98-30/1, T. Ch. I, 2 Nov. 2001 (hereinafter *Kvocka Judgement*).

117 The Trial Chamber held that "... though the Prosecutor did not expressly refer to the common purpose in the indictment, indeed far from it, nothing prohibits the Chamber from taking into consideration the theory which, after all, constitutes only one of the many forms of participation covered by the Statute." Press Release, Trial Chamber, *Judgement in the Case of the Prosecutor against Miroslav Kvocka, Milojica Kos, Mlado Radi, Zoran Zigic and Dragoljub Prac: Omarska/Keraterm/Trnopolje*, 2 November 2001, CC/P.I.S./631e (on file with author). See also *Krstic Judgement, op. cit*. (note 68), para. 602. However, in *Prosecutor* v. *Krnojelac* the Trial Chamber held that "... in the exercise of its discretion considers that, in the light of its own express interpretation that only a basic joint criminal enterprise had been pleaded, it would not be fair to the Accused to allow the Prosecution to rely upon [an] extended form of joint criminal enterprise liability with respect to any of the crimes alleged in the Indictment in the absence of such an amendment to the Indictment to plead it expressly." *Krnojelac Judgement*, *op. cit*. (note 114), para. 86.

secondary degrees of participation since the 1999 *Tadic* Appeals Judgement, discretionary powers fall within the jurisdiction of the Tribunal in order to "...characterize the form of participation of the accused, if any, according to the theory of responsibility it deems most appropriate...".[118] Theories of responsibility include a twofold distinction between what is stated explicitly in Article 7(1) and what is implicitly upheld therein, according to the Trial Chamber in the *Kvocka* case.[119] A linear pattern of judicial interpretation has since the *Tadic* Appeals Judgment revealed that common design constitutes "a mode of participation in the wider sense under Article 7(1)"[120] and falls within a broad interpretive scope of the Statute.

This extension of Article 7(1) was not initially referred to in *Prosecutor* v. *Milosevic et al.*; rather, each of the accused was deemed "... individually responsible for the crimes alleged against him in [the] Indictment, pursuant to Article 7(1) of the Tribunal Statute."[121] Criminal culpability was construed in the Indictment in terms of the exact language of Article 7(1), namely through "committing, planning, instigating, ordering or aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2 to 5 of the Tribunal Statute."[122] Clarification was made in the Amended Indictment in relation to the word "committed", for the Prosecutor did not intend to suggest that any of the accused personally and physically perpetrated any of the crimes charged.[123] Clarification was again made in relation to the word "committing," in turn specifying the degree of criminal culpability: "[c]ommitting in this indictment refers to participation in a joint criminal enterprise as a co-perpetrator."[124]

118 *Kvocka Judgement*, *op. cit.* (note 116), para. 248 (referring to the *Furundzija Judgement*, *op. cit.* (note 66), para. 189; *Kupreskic Judgement*, *op. cit.* (note 102), para. 388).

119 *Kvocka Judgement*, *op. cit.* (note 116), para. 297 (citing *Tadic* Appeals Chamber Judgement, *op. cit.* (note 3), para. 229).

120 *Kupreskic Judgement*, *op. cit.* (note 102), para. 772.

121 *Prosecutor* v. *Milosevic et al.*, Indictment, Case No. IT-02-54, 24 May 1999, para. 83.

122 *Ibid*., para. 83.

123 *Prosecutor* v. *Milosevic et al., Amended Indictment*, Case No. IT-99-37-I, 29 June 2001, para. 16. See also *Prosecutor* v. *Milosevic, Indictment*, Case No. IT-01-51-I, 22 Nov. 2001 (hereinafter *Milosevic Indictment*), para. 5; and *Prosecutor* v. *Stanisic and Simatovic, Indictment*, Case No. IT-03-69, 1 May 2003, paras. 8-14.

124 *Prosecutor* v. *Milosevic et al., Indictment*, Case No. IT-01-50-I, 8 Oct. 2001, para. 5. See also *Milosevic Indictment, op. cit*. (note 123), para. 5. This is suggestive of an approach more similar to the finding of the Trial Chamber in *Prosecutor* v. *Krnojelac* than to the *Celebici* Appeals Chamber and *Prosecutor* v. *Kvocka et al.* Judgements. Interestingly the Tribunal, in citing the *Tadic* Appeals Chamber Judgement, held in *Prosecutor* v. *Naletilic and Martinovic* that "[c]ommitting means physically and personally perpetrating a crime or engendering a culpable omission in violation of a rule of criminal law", without actually stating as it did in the *Tadic*

The date on which the joint criminal enterprise materialized, including its duration, was identified in the Second Amended Indictment, as well as the underlying purpose for which the alleged crimes took place.[125] According to the Tribunal:

> "In order for the joint criminal enterprise to succeed in its objective, Slobodan Milosevic worked in concert with or through other individuals in the joint criminal enterprise. Each participant or co-perpetrator within the joint criminal enterprise, sharing the intent to contribute to the enterprise, played his or her own role or roles that significantly contributed to achieving the objective of the enterprise."[126]

Article 7(1) was thus extended in the Second Amended Indictment to include both the *mens rea* and *actus reus* of common design.[127]

Arguments for and against extending the grave breaches regime[128] and individual criminal responsibility

Those who support the extension of the grave breaches regime and individual criminal responsibility refer to the importance of reinforcing the strength of grave breaches provisions and the need for substantive clarification of the Tribunal's Statute. The teleological approach justifies these extensions, particularly when giving effect to the object and purpose of international humanitarian law. Authors who are against such extensions cite arguments relating to nationality and sovereignty, retroactivity and the principle of legality, and the collectivization of responsibility. Accordingly, the Tribunal should exercise greater restraint when both interpreting and applying the law of armed conflict. Upon closer examination of selected jurisprudence however, the Tribunal offers persuasive evidence in favour of extend-

Appeals Chamber Judgement, *op. cit.* (note 3) that "... the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose." See *Naletilic and Martinovic Judgement, op. cit.* (note 101), para. 62. See also *Prosecutor* v. *Krstic*, wherein the Prosecutor refers to joint criminal enterprise liability as "co-perpetration" and considers "co-perpetration" to be a form of "committing". *Krstic Judgement*, *op. cit.* (note 68), para. 601. (Quotation marks in original)

125 *Prosecutor* v. *Milosevic et al., Second Amended Indictment*, Case No. IT-99-37-PT, 29 Oct. 2001, paras. 16-17. See also *Milosevic Indictment*, *op. cit.* (note 123), paras. 6-7.

126 There were a number of ways in which Slobodan Milosevic, acting alone and in concert with other members of the joint criminal enterprise, participated in the common plan. See *Milosevic Indictment*, *op. cit.* (note 123), paras. 9 and 25.

127 *Prosecutor* v. *Milosevic et al., Second Amended Indictment*, Case No. IT-99-37-PT, 29 Oct. 2001, para. 18.

128 Brown, *op. cit.* (note 15), pp. 352, 387 and 394.

ing both the grave breaches regime and individual criminal responsibility when adopting a purposive interpretation of international humanitarian law.

Reinforcing the grave breaches regime

The teleological approach is the basis on which the argument in favour of extending the grave breaches regime is founded. Judicial "gap-filling" vis-à-vis grave breaches enables the Tribunal to give effect to the drafters' intentions; that is, to the object and purpose of the Geneva Conventions.[129] According to Georges Abi-Saab:

> "If the special legal characteristics of the Geneva Conventions and Protocols ultimately derive from their object and purposes, they in turn command the teleological interpretation of those instruments in the light of their object and purpose; an interpretation which provides the thrust and continuous drive towards perfecting the content and expanding the ambit of humanitarian protection."[130]

A narrow interpretation of grave breaches limits the scope under which alleged perpetrators could be held criminally liable for violations of international humanitarian law. This was illustrated by the 1995 *Tadic* Appeals Chamber ruling, which found the defendant guilty solely under Articles 3 and 5 of the Statute, and by the *Tadic* Trial Chamber II in 1997, which ruled that the grave breaches provisions did not apply. Moreover, the threshold required to charge an accused is much higher for alternative charges under the Statute than that required for grave breaches.

This regime, referred to as the "... nexus between international humanitarian law and international criminal law", loses credence when interpreted narrowly, as it was by the Appeals Chamber in the 1995 *Tadic* case:

> "The restrictive approach taken by the majority in the *Tadic* case handicaps the ICTY by effectively depriving it of the ability to convict for 'grave breaches of the Geneva Conventions', an especially serious and

129 In its ruling in *Prosecutor* v. *Kupreskic*, the Tribunal referred to the "... progressive trend towards the so-called 'humanisation' of international legal obligations..." and in particular, to the Martens Clause, which, as a minimum, enjoins reference to the "principles of humanity" and "the dictates of public conscience (...) and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates." *Kupreskic Judgement*, *op. cit*. (note 102), paras. 518 and 525.

130 G. Abi-Saab, "The specificities of humanitarian law," in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva, 1984, p. 273.

enforceable category of offence under international humanitarian law. If followed, it will leave the ICTY with an even narrower range of crimes within its jurisdiction than those available to the International Tribunal for Rwanda."[131]

The argument for extending the grave breaches regime is thus underscored by the importance of the regime itself and in particular, of the only partial compensation offered by alternative charges if Article 2 of the Tribunal's Statute is not applied.[132] The limited scope in applying two of the three crime categories other than grave breaches is a result of the required proof of special elements.[133] The grave breaches regime is a category of crimes whose potential application is much broader, requiring only the material elements of an international armed conflict and the victims' status as protected persons.[134] Furthermore, grave breaches are subject to a more developed international enforcement regime and as such, benefit from a superior normative status under international humanitarian law than do, for example, violations of the customs of war.[135] The proscribed acts listed in Article 2 of

131 "From the outset", Brown continues, "the situation in Rwanda was seen as an internal armed conflict. Therefore, the Rwandan Tribunal's Statute does not include 'grave breaches of the Geneva Conventions' as crimes within its jurisdiction. Unlike the ICTR, the ICTY was granted jurisdiction over grave breaches under Article 2 of its Statute, and it would be unfortunate if any unduly narrow application of that article were to neutralize this central aspect of its intended jurisdiction." Brown, *op. cit.* (note 15), pp. 394, 381 and footnotes 162-164. See International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), reprinted in 33 ILM 1602 (1994).

132 The alternative charges available include crimes against humanity, violations of the laws and customs of war, and genocide. Only partial compensation is due to three factors, according to Brown: "difficulties in proving the elements of some alternative categories of crimes, the relatively weak normative status of others, and the lack of an international enforcement regime applicable to most of them." Brown, *op. cit.* (note 15), p. 391.

133 Brown notes that the possibility to convict for crimes against humanity requires proof of "widespread or systematic acts against a group based on race, sex, language, or religion." "Similarly", he continues, "without proof that the accused had the specific intent to destroy a racial, ethnic, or religious group in whole or in part, it will be impossible to convict for genocide." Of all crimes, violations of the laws and customs of war are the easiest to prove, for they are not subject to any of the above-mentioned requirements. *Ibid.*, p. 391 and footnotes 199-200.

134 Article 2 differs from Article 3 of the Statute in that it "requires a materially distinct element, namely that the victim was a 'protected person', in accordance with the 1949 Geneva Conventions." *Jelisic, op. cit.* (note 33), (Partial Dissenting Opinion of Judge Wald, para. 13).

135 Brown, *op. cit.* (note 15), pp. 391-393.

the Statute should therefore be applied as widely as possible in order to best serve the purposes of international humanitarian law.[136]

Nationality and sovereignty

The extension of the grave breaches regime runs counter to those who argue against a wider application thereof, on the grounds of upholding national sovereignty. The doctrine of domestic jurisdiction long precluded judicial scrutiny of States' conduct vis-à-vis their own citizens.[137] Nationality has traditionally been a matter entirely within the domestic jurisdiction of States and its extension would by definition encroach upon and compromise State sovereignty. With the advent of international humanitarian, criminal and human rights law, however, abuses committed within national borders are no longer confined therein. For example, the doctrine of domestic jurisdiction eventually yielded, albeit reluctantly, to the demands of international human rights law.[138] States can therefore no longer shield themselves behind traditional theories of nationality, according to the way in which the concept of sovereignty has itself evolved:

> "The sovereignty of states remains an important international value, but the prerogatives it entails have been limited and redefined to accommodate the newly recognized values of international human rights. In this day and age, insistence upon a traditional concept of state sovereignty is anachronistic, especially in a humanitarian context. Viewed from this perspective, a modest extension of the grave breaches can indeed be justified."[139]

State-centric notions of both nationality and sovereignty have been surpassed by a number of international legal developments, including the more functional approach by the Tribunal to the nationality requirement. Sovereignty arguments thus offer little persuasive force against the extension

136 *Ibid*., p. 394.

137 A. Bianchi, "Denying State immunity to violators of human rights", *Austrian Journal of Public International Law*, Vol. 46, 1994, pp. 195 and 221.

138 *Ibid*.

139 Brown also argues that "[t]he notion of moving beyond state-centricism is implicit in the idea of an international law of human rights, since the rights with which this law is concerned are those of individuals, or groups of individuals, rather than those of states. The very concept of internationally recognized human rights is in derogation of state sovereignty. While traditional state-centric approaches to international law insist upon a very broad definition of state sovereignty and a formalistic defense of it from any external intrusion, international humanitarian law requires some encroachment on sovereignty." Brown, *op. cit*. (note 15), p. 395 and footnote 219, p. 353.

of the grave breaches regime, most notably when the Tribunal itself refuses to be guided by the dictates of citizenship status under domestic law.[140]

Retroactivity and the principle of legality

Arguments may be brought concerning the ability of the ICTY— or of any other criminal court — to reinterpret retroactively the nationality requirement of Article 4 of the Fourth Geneva Convention, a key element necessary for finding criminal liability. The reinterpretation of the common purpose doctrine may similarly constitute a questionable development under the principle *nullum crimen sine lege*.[141] Recognizing the traditional way in which customary law develops, particularly its evolution in adapting to changing social needs, Marco Sassòli and Laura M. Olson argue that:

> "Many legal observers, (...) — especially from the Continental tradition — would have expected a criminal tribunal, because of the principle nullum crimen sine lege, to exercise particular restraint in extending the law, especially in sentencing and in applying legal theories that were not in place when the acts were committed. The innovative and imaginative solutions applied by the ICTY Appeals Chamber to several issues were certainly not necessary to punish Tadic for the acts he had committed. In this respect, one has the impression that the ICTY often rushes ahead to clarify every legal issue that it can, whereas other courts decide only the issues that they must, thereby building up their jurisprudence step by step and producing more careful and reliable results."[142]

Prohibitions against the non-retroactive application of criminal sanctions and against *ex post facto* criminal laws are fundamental principles of legality.[143] According to the Trial Chamber in the *Celebici* case, "[t]hese considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised."[144] The disintegration of the former Yugoslavia demonstrates, however, that the realities of contemporary inter-ethnic

140 *Celebici Case* 2001, *op. cit.* (note 57), para. 46 (quoting the Trial Judgement, *op. cit.* (note 1), paras. 275- 276).

141 Sassòli and Olson, *International Decision*, *op. cit.* (note 5), p. 577.

142 *Ibid.*, pp. 577-578.

143 *Celebici Cas*e 1998, *op. cit.* (note 1), para. 402.

144 *Ibid.*, para. 402.

conflict require a more purposive approach to the nationality requirement in establishing protected persons status.

For example, the Tribunal is bound both by the principles of legality and by the need to fulfil its mandate, and had to reconcile the non-retroactivity of criminal legislation with the object and purpose of the Geneva Conventions. It did so in light of the fact that there was no jurisprudence on this particular question when reaching its compromise conclusions. Specifically, in interpreting Article 4 of the Fourth Geneva Convention, the Tribunal sought guidance in the Commentary to that Convention when the Appeals Chamber held in the *Celebici* case that:

> "The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected person status of persons caught up in conflicts which ensue from such events. The Commentary to the Fourth Geneva Convention charges us not to forget that 'the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests' and thus it is in the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible. It would indeed be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security (...), or the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law."[145]

The concept of nationality has thus been neither retroactively reinterpreted nor manipulated by the Tribunal; rather, it has been applied in light of the object and purpose of international humanitarian law, which is to protect civilians to the maximum extent possible.

Furthermore, the legal test ascertaining nationality is limited in context and in purpose, the latter relating to the specific application of the Fourth Geneva Convention to cases before the Tribunal: "[the nationality requirement] would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose."[146] Strict adherence to conventional nationality requirements undermines protection afforded by the

145 *Celebici Cas*e 2001, *op. cit.* (note 57), para. 46 (quoting the 1998 Trial Judgement, *op. cit.* (note 1), paras. 275- 276).

146 *Ibid*., para. 49 (quoting the 1998 Trial Judgement, *op. cit.* (note 1), para. 259.

Geneva Conventions in modern inter-ethnic conflict. Jurisprudence relating to Article 4 of the Fourth Geneva Convention thus exemplifies a persuasive extension of the grave breaches regime, rather than a power *contra legum* of the United Nations to legislate.

Arguments concerning the reinterpretation of individual criminal responsibility can also be countered by referring to the principle of legality. This principle dictates that the Tribunal "... has jurisdiction over offences that constituted crimes under customary international law at the time the alleged offences were committed."[147] The requirement of specificity in criminal legislation is associated with the principles *nullum crimen sine lege*, *nulla poena sine lege*, the prohibition against *ex post facto* criminal laws, and the non-retroactive application of criminal laws and criminal sanctions.[148] The Secretary-General emphasized in his commentary on the Statute that the International Tribunal should apply rules of international humanitarian law that have attained the status of customary international law. The requirements of both specificity and non-ambiguity are met regarding the subject-matter over which the Tribunal exercises jurisdiction, for Article 2 of the Statute has been identified as declaratory of customary international law.[149] Arguments against the extension of Article 7(1) to include the common purpose doctrine, and in particular the question of whether common purpose represents a sound development of international criminal law under the principle *nullum crimen sine lege*,[150] can be countered by citing the explicit and prior criminalization by the Geneva

147 *Prosecutor* v. *Kordic and Cerkez, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3*, Case No. IT-95-14/2-PT, T. Ch. III, 2 March 1999, para. 20.

148 *Celebici Case* 1998, *op. cit.* (note 1), para. 402.

149 See the decision by the Trial Chamber in the 1995 *Tadic* case, which stated that: "[t]he Report of the Secretary-General (...) makes it clear, in paragraph 34, that it was intended that the rules of international law that were to be applied should be 'beyond any doubt part of customary law', so that problems of non-adherence of particular States to any international Convention should not arise. Hence, no doubt, the specific reference to the law of the Geneva Conventions in Article 2 since, as the Report states in paragraph 35, that law applicable in armed conflict has beyond doubt become part of customary law. But there is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including reference in common Article 2 of the Geneva Convention 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. It simply confers subject matter jurisdiction to prosecute what, if one were concerned with the Conventions, would indeed be grave breaches of those Conventions, but which are, in the present context, simple enactments of the Statute." *Tadic – 1995 Decision on Jurisdiction*, *op. cit.* (note 28), para. 51.

150 Sassòli and Olson, "The judgement of the ICTY", *op. cit.* (note 5), pp. 733, 742 and footnote 65, p. 748.

Conventions of the offences committed by the accused.[151] For example, the Tribunal held in the 1997 *Tadic* Opinion and Judgment that "[i]mplicit in the [1995] *Appeals Chamber Decision* is the conclusion that the Geneva Conventions are a part of customary international law, and as such their application in the present case does not violate the principle of *nullum crimen sine lege*."[152] More importantly:

> "the principle of *nullum crimen* does not preclude all development of criminal law through the jurisprudence of courts and tribunals, so long as those developments do not criminalise conduct which, at the time it was committed, could reasonably have been regarded as legitimate. That principle is not infringed where the conduct in question would universally be acknowledged as wrongful and there was doubt only in respect of whether it constituted a crime under a particular system."[153]

The development by the Tribunal of the common purpose doctrine and the ensuing expansion of individual criminal responsibility for violations of international humanitarian law may thus be said to satisfy the principle of legality.

The collectivization of responsibility

Criticism regarding the extension of the common purpose doctrine is advanced in relation to the collectivization of responsibility as a result of simple membership in, and knowledge of, the policy of the group.[154] Certain authors express concern that the development of the common purpose doctrine recollectivizes criminal responsibility[155] by undermining the basic norm that criminal culpability resides in the acts of the individual.[156] Accordingly, the Tribunal should exercise greater restraint when ruling on the applicability of both grave breaches and individual criminal responsibility.[157]

151 It is understood that the term "committed" refers to the traditional physical perpetration of a crime and inactive participation in the sense of having "committed" a crime via a common criminal enterprise.

152 *Tadic – 1997 Opinion and Judgement, op. cit.* (note 33), para. 577 (quoting the *Tadic* Jurisdiction Decision of the Appeals Chamber).

153 C. Greenwood, "The development of international humanitarian law by the International Criminal Tribunal for the former Yugoslavia", *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, pp. 132-133.

154 Sassòli and Olson, "The judgement of the ICTY", *op. cit.* (note 5), p. 743.

155 *Ibid.*, pp. 743 and 748.

156 *Ibid.*, p. 743.

157 *Ibid.*, pp. 748 and 749.

The Tribunal has however, in ruling on the matter, adopted a high level of participation for co-perpetrator liability, excluding marginal participation by the accused.[158] Any notion of "recollectivization of responsibility" is also challenged by the judgement of *Prosecutor* v. *Kvocka et al.*, wherein the Trial Chamber stressed in relation to co-responsibility that "... this does not mean that anyone who works in a detention camp where conditions are abusive automatically becomes liable as a participant in a joint criminal enterprise."[159] According to the Tribunal, participation must be significant and must entail an act or an omission that contributes to the efficiency or effectiveness of an enterprise.[160] Furthermore, participation would in general require assessment on a "case by case basis", most notably for those who do not physically perpetrate the crimes.[161] Thus irrespective of the nature of the joint criminal enterprise — whether broadly defined or temporally and geographically limited — a person incurs criminal liability solely when that person's participation makes a substantial contribution to the functioning or endeavours of the enterprise.[162]

Moreover, the Trial Chamber held that a more substantial level of mid- or low-level participation is required in a joint criminal enterprise during periods of war or mass violence than when following orders and carrying out a low-level function on a single occasion in a criminal endeavour.[163] Both the significance and the level of participation depend on a number of

158 In *Prosecutor* v. *Furundzija*, the Trial Chamber found that two types of liability for criminal participation "appear to have crystallised in international law — co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other." It further stated that, to distinguish a co-perpetrator from an aider or abettor, "it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim of a third person)." It then concluded that, to be convicted as a co-perpetrator, the accused "must participate in an integral part of the torture and partake in the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person." *Furundzija, Judgement*, *op. cit.* (note 66), paras. 231, 118, 216, 253, and 257. Emphasis in original.

159 *Kvocka Judgement*, *op. cit.* (note 116), para. 309.

160 As an example, the Trial Chamber cited "a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution." *Ibid.*, para. 309.

161 *Ibid.*

162 *Ibid.*, para. 310.

163 *Ibid.*

factors,[164] according to the Trial Chamber, the most important of which includes the role played by the accused in terms of the gravity and scope of the crimes committed.[165] *Individual* criminal responsibility is thus preserved by the Tribunal with regard to the accused's participation in the joint criminal enterprise:

> "In sum, an accused must have carried out acts that substantially assisted in or significantly affected the furtherance of the goals of the enterprise, with the knowledge that his acts or omission facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise. The culpable participant would not need to know of each crime committed. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability. The aider or abettor or co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning."[166]

The Tribunal has thus effectively distinguished between collective and individual criminal responsibility.[167] Murder as a result of simple looting, an

164 The variety of factors includes "... the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealousness or gratuitous cruelty exhibited in performing the actor's function. It would also be important to examine any direct evidence of a shared intent or agreement with the criminal endeavour, such as repeated, continuous, or extensive participation in the system, verbal expressions, or physical perpetration of the crime." *Kvocka Judgement*, *op. cit.* (note 116), para. 311.

165 For example, "even a lowly guard who pulls the switch to release poisonous gas into the gas chamber holding hundreds of victims would be more culpable than a supervising guard stationed at the perimeter of the camp who shoots a prisoner attempting to escape." *Ibid*., para. 311.

166 *Ibid*., para. 312.

167 In the *Krstic Judgement, op. cit.* (note 68), the Trial Chamber held that "... it is essential to make a distinction between what might be collective responsibility and individual responsibility. The Tribunal has not been established to deal with the possibility of collective responsibility. What is of interest (...) in each of the trials (...) in this court is to verify whether the evidence presented before it makes it possible to find an accused guilty. [It] seeks to judge an accused [and not] a people." Press Release, Trial Chamber, "Radislav Krstic becomes the first person to be convicted of genocide at the ICTY and is sentenced to 46 years imprisonment", 2 August 2001, OF/P.I.S./609e (on file with author).

example to which Marco Sassòli and Laura M. Olson attribute the collectivization of responsibility through the common purpose doctrine,[168] would therefore seem unlikely in view of the high level of participation[169] required by the Tribunal to establish criminal liability through participation in a joint criminal enterprise.

The need for substantive clarification

The extension of the grave breaches regime and of individual criminal responsibility reveals the need for substantive clarification of the rules of international humanitarian law contained in the Tribunal's Statute. According to the Tribunal in the *Celebici* case, the ICTY "... provides a forum and framework for the enforcement of existing international humanitarian law."[170] Although the Statute clearly defines the Tribunal's subject-matter jurisdiction, the Tribunal must develop its own approach to define the constituent elements of serious violations of international humanitarian law.[171] For example, Tribunal judges are tasked with the responsibility to redefine and adjust individual criminal responsibility within the confines of international humanitarian law.[172] International humanitarian law similarly requires further refinement when developing individual criminal responsibility[173] for violations of the law of armed conflict. Substantive developments when interpreting provisions of the Geneva Conventions, and the nationality requirement in particular, thus lead to an extended scope of charging practices for atrocities committed in the course of international inter-ethnic conflict. These developments have led the Tribunal to espouse "normative fluidity" vis-à-vis its functional view of nationality.[174]

Interestingly, the teleological approach adopted by the Tribunal allows for it not only to circumvent a strict application of Article 4 of the Fourth Geneva Convention but also to do so whilst drawing on both human rights and humanitarian law. A *rapprochement* of these two bodies of law was alluded to in the *Celebici* case, wherein the Tribunal held that "it would be

168 Sassòli and Olson, "The judgement of the ICTY", *op. cit.* (note 5), p. 743.
169 *Kvocka Judgement*, *op. cit.* (note 116), para. 289.
170 *Celebici Case* 1998, *op. cit.* (note 1), paras. 415-417.
171 Brown, *op. cit.* (note 15), p. 356 and footnote 40.
172 *Ibid.*, p. 404.
173 *Ibid.*, p. 357 and footnotes 44-45.
174 *Ibid.*, p. 404 and p. 396.

incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of Article 4."[175] Thus in adopting a strict interpretation of the nationality requirement, a twofold paralysis of existing protective mechanisms ensues: both of the concept of human rights and of humanitarian legal instruments.

Conclusion

The twofold extension of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia has given rise to a contemporary understanding of Articles 2 and 7(1) of the Tribunal's Statute. Conventional law has not been negated in this process of substantive clarification; rather, interpretive gap-filling has allowed the Tribunal to further the development, rather than the redefinition, of these two aspects of international humanitarian law. Functional adaptations[176] of the grave breaches regime and the extension of individual criminal responsibility to include the common purpose doctrine have significantly expanded the means to interpret the Tribunal's Statute, including violations thereof.[177]

By adopting a teleological approach in its purposive interpretation of the law of armed conflict, the International Criminal Tribunal for the former Yugoslavia offers a convincing basis for extending grave breaches and individual criminal responsibility. In so doing, the Tribunal avoids the paralysis of protective mechanisms and reinforces the objectives of international humanitarian law by affording protection to civilians to the maximum extent possible.

175 *Celebici Case* 1998, *op. cit.* (note 1), para. 266. See also *Prosecutor* v. *Kupreskic*, wherein the Tribunal held that "[i]t is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred." *Kupreskic Judgement*, *op. cit.* (note 102), para. 529.

176 Brown, *op. cit.* (note 15), p. 348.

177 Certain authors view the ICTY's judgements (most notably the *Tadic* 1999 Appeals Chamber Judgement) as judicial lawmaking, rather than as representing a progressive interpretation of existing law. For example, William A. Schabas notes that: "[i]n the future, judges will have greater difficulty undertaking the kind of judicial lawmaking that the *ad hoc* Tribunal for Yugoslavia performed in the [1999 Appeals Chamber] *Tadic* case, and this will make it harder for justice to keep up with the imagination and inventiveness of war criminals. Indeed, the Tadic Appeals Chamber may well have frightened States with its bold judicial lawmaking, who then resolved that they would leave far less room for such developments in any statute of an international criminal court." W. A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2001, p. 42.

Résumé

Le développement du régime des infractions graves et de la responsabilité pénale individuelle par le Tribunal pénal international pour l'ex-Yougoslavie

Natalie Wagner

Cet article analyse deux faits nouveaux essentiels dans le droit international humanitaire, attribuables au Tribunal pénal international pour l'ex-Yougoslavie. Il se concentre sur l'interprétation progressive, par le Tribunal, du régime des infractions graves et sur la doctrine dite de l'intérêt commun, actuellement utilisée pour poursuivre Slobodan Milosevic. À cette fin, l'article décrit la jurisprudence pertinente depuis l'Arrêt de la Chambre d'appel du Tribunal dans l'affaire Tadic *(1999). Cette jurisprudence démontre qu'en adoptant une approche fonctionnelle de la nationalité, le Tribunal a élargi le régime traditionnel des infractions graves. En outre, le Tribunal a reconceptualisé le droit de la responsabilité pénale individuelle de façon à y intégrer la doctrine dite de l'intérêt commun.*

Toutefois, ces développements ne recueillent pas un soutien unanime dans les publications. Une école de pensée se prononce en faveur d'une approche du droit international humanitaire strictement fondée sur les Conventions, tandis qu'une autre apporte son soutien à une interprétation et une application téléologiques de celles-ci. Par contraste avec l'opinion de la première, l'auteur discerne un schéma juridique cohérent dans la jurisprudence récente du Tribunal à l'égard du régime des infractions graves et de la doctrine dite de l'intérêt commun.