(c) Case Analysis

The Prosecutor *v.* Tadić
The Appellate Decision of the ICTY and Internal Violations of Humanitarian Law as International Crimes

Keywords: International Criminal Tribunal for the Former Yugoslavia; international humanitarian law; jurisdiction; war crimes.

1. INTRODUCTION

Recently, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) issued its opinion on jurisdictional matters in the case of *The Prosecutor* v. *Dusko Tadić*.[1] The defendant had challenged the establishment and jurisdiction of the Tribunal. While the defendant specifically contested the authority of the Tribunal on three grounds, it is the claim of lack of subject matter jurisdiction which will be the focus of this article.[2] As the first case proceeding towards trial, this challenge gives the Tribunal its first opportunity to comment upon and clarify the extent of its subject matter jurisdiction.

Its Statute gives the Tribunal jurisdiction over four categories of offences: genocide, grave breaches of the Geneva Conventions,[3] violations

1. Case No. IT-94-1-AR72, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction. The International Tribunal for the Former Yugoslavia and its Statute are established by UN Doc. S/RES/827 (1993), reproduced *in* 32 ILM 1203 (1993). At the time of writing, all documents submitted by the parties concerning this case, had not yet been published. Publication of these materials will be forthcoming in the relevant 'Pleadings'.
2. The defence also challenged the authority of the Tribunal on the grounds that its establishment by the Security Council and its primacy over national courts was unjustified and illegal. The Appeals Chamber rejected both of these arguments.
3. Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (1950); Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (1950); Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (1950); and Convention Relative to the Pro-

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of the laws or customs of war, and crimes against humanity.[4] The Report of the Secretary-General of the UN accompanying the Statute, indicated that the Tribunal should apply customary international law as its primary legal source.[5] While much has been written concerning the customary status of international humanitarian norms, there is a notable absence of judicial opinion on the subject.[6] Although the pronouncements of international tribunals do not constitute a source of international law *per se*, their authoritativeness concerning the current state of customary international law cannot be denied. Consequently, the conclusions reached by this Tribunal will have future implications upon the activities and declarations of states and organizations, even if the employment of *ad hoc* tribunals remains a rare event.

During the appeal, the defence contested the Tribunal's jurisdiction over three of the four offences; namely grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity.[7] The basis of the appeal in each instance is similar. The defence claimed that the Tribunal's authority is limited to offences which occur in the context of an international armed conflict. While all three claims were denied by the Trial Chamber of the Tribunal, the Appeals Chamber upheld one of the defence assertions while rejecting the other two. The appellate body agreed that a grave breach of the Geneva Conventions requires an international armed conflict while no such criterion applies to violations of the laws or customs of war or crimes against humanity. The remainder of this article will examine the substantive aspects of the

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tection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (1950).

4. *See* Arts. 2-5 ICTY Statute, *supra* note 1.
5. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993), reproduced *in* 32 ILM 1159 (1993).
6. *See, generally,* Th. Meron, Human Rights and Humanitarian Norms as Customary Law (1989); C. Greenwood, *Customary Law Status of the 1977 Geneva Protocols, in* A. Delissen & G. Tanja (Eds.), Humanitarian Law of Armed Conflict, Challenges Ahead 93 (1991); A. Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA Pacific Basin Law Journal 55 (1984); and F. Kalshoven, *Applicability of Customary International Law in Non-International Armed Conflict, in* A. Cassese (Ed.), Current Problems of International Law 267 (1975). *See also* Workshop on Customary Law and the 1977 Protocols, 2 American University Journal of International Law and Policy 472 (1987).
7. Tadić is not charged with the offence of genocide.

Chamber's decision and its implications for the customary legal status of these offences.

2. GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 1949

The Appeals Chamber concurred with the defendant that Article 2 of its Statute, entitled 'Grave breaches of the Geneva Conventions of 1949', was applicable solely to international armed conflicts. The Chamber adjudged that Article 2, as drafted, compels a reference to the texts of the Geneva Conventions.[8] It determined that the requirement of internationality in grave breaches springs from two sources: the mandatory obligation upon states to prosecute or extradite offenders, and the provisions of the Conventions themselves, specifically the definition of 'persons and property' protected by the Conventions.[9] This conclusion reversed the ruling of the Trial Chamber on this issue.

The position taken by the Chamber is undeniably the only plausible one if Article 2 of its Statute is read as being strictly governed by the Geneva Conventions. The texts of those instruments clearly indicate that the acts considered to be 'grave breaches' are only classified as such if they occur against persons or property protected by the Conventions. This is a restrictive definition and does not include persons participating in, or civilians affected by, an internal conflict.[10] Therefore, violations of Article 3 common to the Geneva Conventions do not constitute grave breaches and do not violate Article 2 of the Tribunal's Statute.

2.1. Violations of common Article 3 as international crimes

The Tribunal's conclusion does not exclude violations of common Article 3 as being international crimes, nor does it isolate them from the Geneva Convention enforcement provisions. Grave breaches exist as a specific category of international offence and do not codify all the offences relative to

8. Geneva Conventions, *supra* note 3.
9. *Id.*
10. *See* Art. 4 of the Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 3.

armed conflict. The Chamber was of the opinion that the requirement of an international armed conflict was a derivative of the mandatory obligation upon each state to search for, and prosecute or extradite, those responsible for their commission. Violations of common Article 3 can exist as international offences and be subject to universal jurisdiction; but not the mandatory type of jurisdiction envisioned by the Geneva Conventions. This non-mandatory universal jurisdiction does not compel states to exercise jurisdiction. It allows every state the right to do so.[11] A state could assert its prerogative, under customary law, to try offenders of common Article 3, provided that such violations amounted to 'war crimes'.[12] Thus, the Chamber's conclusion does not render violations of common Article 3 as non-enforceable. A further implication of the Chamber's interpretation is that it dislodges the obligation to repress violations of common Article 3 by penal legislation. Unlike the explicit duty to criminalize the perpetration of grave breaches in national criminal law, the employment of similar legislation in relation to common Article 3 is not as clear.[13]

Importantly, the Chamber did not exclude the future classification of common Article 3 violations as grave breaches, which could arise by the development of an autonomous customary rule.[14] The Chamber noted that the law is in state of transition, thus implying that such a classification is not far off. The establishment of such a rule would indicate that customary law recognized mandatory universal jurisdiction as well as the obligation of penal repression in relation to violations of common Article 3.

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11. *See, e.g.* Th. Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554, at 573-574 (1995); and K.C. Randall, *Universal Jurisdiction Under International Law*, 66 Texas Law Review 785, at 821 (1988).
12. It is accepted that customary law recognizes universal jurisdiction for war crimes. *See* Randall, *supra* note 11; and I. Brownlie, Principles of International Law 305, 4th ed. (1995). *See also*, for the criteria put forth by the Chamber for an act to be classified as a war crime under Art. 3 of its Statute, note 16, *infra*.
13. Geneva Conventions, *supra* note 3, Arts. 49-50, 129, and 146 of which provide that the High Contracting Parties criminalize the commission of grave breaches and take measures necessary to suppress other violations of the Conventions.
14. Judge Abi-Saab argued that the grave breach provisions are applicable in an internal conflict. Although he preferred to base his arguments on a teleological interpretation of the Conventions and subsequent state practice, he recognized that a new customary rule may have developed independent of the Conventions. *See* Case No. IT-94-1-AR72, *supra* note 1, at 4-6 (Judge Abi-Saab, Separate Opinion).

3. VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR

The Appeals Chamber embraced a broader scope of application for Article 3 of its Statute, entitled 'Violations of the laws or customs of war.' It concluded that such violations could occur in any armed conflict, irrespective of its context. Although the Article is textually based upon the 1907 Hague Convention Respecting the Laws and Customs of War on Land (IV), the Chamber concluded that it encompasses all international humanitarian law. Accordingly, the Article grants jurisdiction over all serious violations of international humanitarian law other than grave breaches and crimes against humanity.[15]

Realizing that this rendered a wide range of norms potentially applicable, the Chamber set out to establish those customary rules germane to all armed conflicts which entail criminal responsibility.[16] The analysis focused upon the customary prescriptions applicable to internal conflict. Recognizing the trend within the international community to establish general rules for internal conflicts, the Chamber resolved that such norms include obligations relative to the protection of the civilian population and civilian objects, the protection of those *hors de combat*, and prohibitions on the means and methods of warfare. In addition, it was concluded that the violation of these norms entailed the international criminal responsibility of the offender.

3.1. The rules applicable to internal armed conflicts

From a humanitarian viewpoint, this conclusion is a welcome declaration. Its primary significance is that it confirms the existence of a nucleus of humanitarian norms applicable to every armed conflict, irrespective of its character. Such principles were implicit in the *Nicaragua* judgment of the International Court of Justice[17] and the rules established under common

15. Case No. IT-94-1-AR72, *supra* note 1, at 49-50.
16. *Id.*, at 51-52. The Chamber identifies those criteria which qualify an act for prosecution under Art. 3, namely: the violation must constitute an infringement of a rule of international humanitarian law; the rule must be customary in nature or, if it belongs to treaty law, certain conditions must be met; the violation must be serious, i.e. it must constitute a violation effecting important values and have grave consequences for the victim; and violation of the rule must entail the individual criminal responsibility of the violator.
17. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States

Article 3 provide these principles with specificity.[18] Similarly, the norms expressed in General Assembly Resolutions 2444 and 2675 are a further elaboration of such principles.[19] The categorization of these resolutions as declaratory of customary international law is significant, because to the extent that they provide rules to govern military conduct, they are an additional source of prescriptions applicable to internal armed conflicts. They exist independently of common Article 3. In this regard, the observation of the Chamber that there exist customary norms and principles of which common Article 3 is only a part is entirely correct.

3.2. The provisions of Protocol II as customary law

International criminal liability requires the existence of prescriptions containing penal characteristics.[20] While the rules of common Article 3 and several of the principles in Resolutions 2444 and 2675 provide a primary set of prohibitive norms, they fail to provide an extensive set of regulations applicable to internal conflicts. Here, the Chamber envisioned a role for Additional Protocol II.[21] The Chamber identified many provisions of

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of America) (Merits), 1986 ICJ Rep. 114. The Court stated "Article 3 [...] defines certain rules to be applied in armed conflicts of a non-international character. [I]n the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' *(Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22; paragraph 215 above)."

18. R. Abi-Saab, *The "General Principles" of Humanitarian Law According to the International Court of Justice,* 1987 International Review of the Red Cross 367, at 370-371.
19. GA Res. 2444, UN Doc. A/7218 (1968). The relevant part states the following principles for observance by all governmental and other authorities responsible for action in armed conflict: "a) [t]hat the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; b) [t]hat it is prohibited to launch attacks against the civilian population as such; c) [t]hat distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible". GA Res. 2675, UN Doc. A/8028 (1970).
20. M.C. Bassiouni, *Characteristics of International Criminal Law, in* M.C. Bassiouni (Ed.), I International Criminal Law: Crimes 1 (1986); and Meron, *supra* note 11, at 562.
21. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, reproduced *in* 16 ILM 1442 (1977).

that Protocol as enjoying some degree of customary character and stated that

> [a]ttention must also be drawn to Additional Protocol II to the Geneva Conventions. Many of the provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.[22]

In light of this conclusion it must be noted that the customary status of the provisions of Protocol II has long been contentious. The extent to which they expressed customary international law at the time of their adoption was disputed,[23] and some uncertainty as to their status appears to have remained.[24] Although the Chamber presented declarations from the United States and El Salvador, few other states have made declarations supporting customary status. No member of the Security Council expressed such a view at the adoption of the Tribunal's Statute. The statements which were presented, appear to indicate that the Protocol was viewed as having only instrumental applicability.[25] This lack of additional confirmation as well as the absence of Protocol II in the military manuals of states[26] damages the Court's implicit assertion that the Protocol exists as a customary source of penal rules. In addition, the Draft Statute for the International Criminal Court fails to include the Protocol as a source of international offences.[27] Thus, there remains significant uncertainty as to

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22. Case No. IT-94-1-AR72, *supra* note 1, at 63, para. 117.
23. *See* Greenwood, *supra* note 6, at 112-113; and Workshop, *supra* note 6.
24. Meron, *supra* note 6, at 74-78; and Meron, *supra* note 11, at 568.
25. Case No. IT-94-1-AR72, *supra* note 1, at 50, para. 88, citing Provisional Verbatim Record of the 3217th Meeting, UN Doc. S/PV.3217, at 11 (1993): "the expression 'laws and customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian agreements in force on the territory of the former Yugoslavia at the time when the offenses were committed." *See also* the statement of the American delegate, *in id.*, "it is understood that the 'laws and customs of war' referred to in Article 3 include all the obligations under humanitarian law agreements in force in the territory of the former Yugoslavia".
26. Meron, *supra* note 6, at 73-74.
27. United Nations International Law Commission (ILC), Report of the Working Group on a Draft Statute for an International Criminal Court, Art. 22 (1993), reproduced *in* 33 ILM 253, at 272-273 (1994). According to the commentary, Protocol II was excluded from the Statute because the Protocol contains no provisions on grave breaches. Meron has suggested that the exclusion is to facilitate the acceptance of the proposed court and is not concerned with the codification of international crimes. *See* Meron, *supra* note 11, at 559-560. Although discussed as a conventional source of international crime, if such a classification is conten-

the customary status of the Protocol. The ambiguity of the Chamber's assertion, presented above, also appears to reflect some degree of incertitude.

3.3. International criminal liability in internal conflicts

Another important aspect of the Decision under review here is the establishment of international criminal liability for violations of the law of internal armed conflicts. While liability exists with regard to international conflict, such responsibility has never been established in the context of an internal armed struggle. As indicated above, the obligation to employ penal measures to suppress violations of common Article 3 is uncertain and Protocol II contains no enforcement provisions.[28] Yet, as the Chamber indicated, states have begun to criminalize violations of common Article 3 in their military manuals.[29] In addition, strong confirmation for such liability is found in the Statute of the Rwanda Tribunal which explicitly provides individual criminal responsibility for violations of common Article 3 and Protocol II.[30] Although not classified as 'grave breaches', these assertions represent that there is significant state practice that violations of the rules of internal conflict result in criminal liability.

3.4. Prohibitions concerning the means and methods of warfare

Perhaps the most notable development in the Chamber's opinion is its conclusion that prohibitions concerning the means and methods of warfare in international armed conflict are also applicable to internal conflict.[31] The instruments regulating such matters are addressed solely to international armed conflicts. In the absence of revised customary rules, those

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tious under treaty law, it is likely to remain so in relation to customary law.

28. *See* note 13, *supra*.
29. Federal Ministry of Defence of the Federal Republic of Germany, Humanitarian Law in Armed Conflicts 122-123 (German Service Manual) (1992). The Chamber also mentions the military manuals of the United States, Great Britain, and New Zealand. Case No. IT-94-1-AR72, *supra* note 1, at 69.
30. *See* Art. 4 Rwanda Tribunal Statute, annexed to UN Doc. S/RES/955 (1994), reproduced *in* 33 ILM 1600 (1994).
31. Case No. IT-94-1-AR72, *supra* note 1, at 67-68. Although the Chamber notes that not all the regulations of international warfare are applicable to internal conflicts, it does not identify those rules which it does consider applicable.

prohibitions would be inapplicable to internal hostilities. Few scholars have addressed the topic, but those who have provide little concrete evidence of modified customary norms.[32] While the prescriptions of common Article 3 imply some limitations, their scope is confined to conduct directed against civilians.[33] Those rules do not protect combatants nor regulate indirect attacks upon the civilian population.

However, the Chamber cites little difficulty in establishing customary restrictions on the conduct of internal warfare. Its analysis centres on the reaction of states to the claim that Iraq employed chemical weapons against Kurdish civilians in 1988. The United States, the European Union, and several European states declared the attack illegal and a violation of the Geneva Protocol of 1925.[34]

While the UN resolutions, mentioned above, indicate general principles restricting the conduct of warfare, it is doubtful that specific rules to make them operational exist. One study concluded that while developments concerning chemical and biological weapons have transpired, there remain substantial difficulties in identifying customary prescriptions on the conduct of internal hostilities.[35] The condemnation of Iraq and the invocation of the 1925 Geneva Protocol are significant developments in the formulation of a customary rule. However, it can be questioned whether these statements are sufficient to constitute a general practice accepted as law. The limited extent of the criticism and the lack of condemnation from UN organs undermine their evidential value. In addition, few military manuals confront the issue. The Military Service Manual of Germany, a state condemning the gas attack, does not explicitly declare such conduct illegal.[36]

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32. *See* F. Kalshoven, *Arms, Armament and International Law,* 191 HR 295 (1985); and H. Fischer, *Limitation and Prohibition of the Use of Certain Weapons in Non-International Armed Conflicts, in* 1992 Yearbook International Institute of Humanitarian Law 1989-1990, at 117.
33. Cassese, *supra* note 6, at 107.
34. 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, reproduced *in* 25 AJIL Supp. 94-96 (1931).
35. Fischer, *supra* note 32.
36. "The use of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or similar devices in *war* is prohibited." German Service Manual, *supra* note 29, at 43 (emphasis added).

Even if a more contemporary view on the formation of customary international law is adopted, the conclusion of the Chamber appears tenuous. Such views have suggested that customary international law can be formulated by the widespread acceptance of a treaty and *opinio iuris,*[37] or through the consensus and declarations of states in near universal diplomatic forums.[38] These positions do not readily support the customary prohibitions on conduct asserted by the Chamber. Irrespective of universality, the terms of the relevant conventions exclude their application to internal conflicts and as indicated above, there is sparse evidence of modified state practice. Further, although the Chamber refers to the Turku Declaration of Minimum Humanitarian Standards,[39] which is slowly making its way before international bodies, there is scant evidence of rules originating from governmental or diplomatic forums. Thus, while substantial developments have occurred in the formation of new customary prescriptions, in the absence of additional confirmation the Chamber's conclusion on this issue seems fragile.

4. CRIMES AGAINST HUMANITY

Finally, the Chamber addressed the customary status of crimes against humanity. As drafted, the Article applies to all armed conflicts. The defendant claimed that this formulation constituted *ex post facto* law since earlier definitions of the offence required an association with a war crime or a crime against peace, and thus could only occur in an international armed conflict.[40] Although the defendant abandoned this claim during the proceedings, the Chamber took the opportunity to clarify the status of the offence. It determined that: "[i]t is now a settled rule of customary law that crimes against humanity do not require a connection to international

37. Meron, *supra* note 6, at 50-54.
38. J.I. Charney, *Universal International Law*, 87 AJIL 529, at 543-546 (1993).
39. Declaration of Minimum Humanitarian Standards, 282 International Review of the Red Cross 330 (1991).
40. *See* Charter of the International Military Tribunal Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed 8 August 1945, reproduced *in* 39 AJIL Supp. 258 (1945); and The Work of the International Law Commission 140-141, 4th ed. (1988).

armed conflict."[41] In addition, the opinion inferentially supported the thesis that customary law does not require an armed conflict for the offence to occur. Consequently, this crime may be committed during times of peace.[42]

5. THE EXTENSION OF INTERNATIONAL HUMANITARIAN NORMS UNDER CUSTOMARY LAW

One final comment concerning the Chamber's opinion is warranted. In its analysis, the Chamber refers to the difficulty of identifying state practice in relation to customary humanitarian norms. Although also referring to the contents of several military manuals and the decisions of national courts, the analysis of the Chamber relied heavily upon the declarations and assertions of states. The reliance upon such declarations to determine the customary status of international humanitarian norms is not a methodology unique to this Tribunal. Previous international tribunals have similarly declared the existence of customary norms without conducting an exhaustive analysis of the transformation from conventional to customary law.[43]

However, there is a significant distinction between those instances and parts of the analysis conducted by the Appeals Chamber. The earlier tribunals determined the customary status of conventional obligations. In these cases the issue focused on the existence of an independent customary rule binding non-party states. The issues before the Appeals Chamber were

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41. Case No. IT-94-1-AR72, *supra* note 1, at 73, para. 141. *See also* D. Thiam, Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, 2 YBILC 56 (1986).
42. The Statute of the Tribunal requires that crimes against humanity occur in an armed conflict (Art. 5). The prosecution contended that customary law may not require an armed conflict for violative behaviour to be an offence. Although not expressly embracing such a characterization, the Tribunal responded: "[i]ndeed, as the Prosecutor points out customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law." Case No. IT-94-1-AR72, *supra* note 1, at 73, para. 141.
43. Specifically, the International Military Tribunal at Nuremberg and other post-World War II tribunals, and the ICJ in the Nicaragua case, *supra* note 17. *See* Meron, *supra* note 6, at 37-41. *See also* J.I. Charney, *Customary International Law in the Nicaragua Case, Judgment on the Merits*, *in* 1 Hague Yearbook of International Law 16 (1988).

notably different. Two of the issues concerned the customary extension of generally accepted treaty rules to situations not intended by the instruments. Although the Chamber agreed with one of the defence arguments, its opinion reflects a willingness to extend the rules of international armed conflict in the absence of substantial state practice and *opinio iuris.* The basis for this approach appears to be the Chamber's belief that most of the customary rules of international humanitarian law constitute *ius cogens.*[44] As such, the thesis that the basic rules of international humanitarian law apply to all armed conflict is strengthened even without abundant evidence of modified customary rules.

6. CONCLUDING COMMENTS

The opinion of the Chamber, as categorized in the foregoing pages, indicates that substantial developments concerning the customary status of international humanitarian norms has occurred in recent years. From a humanitarian viewpoint, these are welcome advancements. They indicate that customary law recognizes a nucleus of norms, both general principles and rules, which underlie all armed conflict. Additionally, their violation entails individual criminal liability. This is an important step in diminishing the artificiality created by the international armed conflict-non-international armed conflict distinction. The classification of violations of the law of internal conflicts as war crimes and, potentially, as grave breaches, will hopefully facilitate compliance with, and enforcement of, humanitarian norms. Although pervasive evidence supporting the Chamber's broad conclusion concerning restrictions on the means and methods of warfare appears to be lacking, this does not indicate a comprehensive absence of such restrictions in internal conflicts. It must be noted that the instruments and declarations of states, presented by the Chamber, strengthen the existing customary prohibition on indiscriminate attacks. These declarations, while also supporting the formulation of a modified customary rule, indicate that some states consider the internal employment of chemical weapons as a violation of the principle. Therefore, states continue to furnish that axiom with specific content. Finally, it has been briefly noted that the

44. Case No. IT-94-1-AR72, *supra* note 1, at 74.

methodology employed by the Chamber continues a pattern utilized by earlier tribunals in the identification of customary humanitarian norms. However, its utilization in this instance results in a substantially different extension of norms. Although not elaborated upon in this article, this may have future implications for the identification and extension of customary humanitarian norms, particularly those norms considered to constitute *ius cogens.*

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