The Fragmentation of the International Legal System and the Role for a Formal Approach to Law in the Context of International Human Rights Law, International Humanitarian Law and International Criminal Law.

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I hereby acknowledge that this thesis is my own work.

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Abstract

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This thesis considers the fragmentation of international law as it affects the international human rights law, international humanitarian law and international criminal law regimes. It does this by examining the approaches of the three regimes to specific violations of the regimes' law. These are torture, enforced disappearance, sexual violence and the destruction of property. By this approach it is possible to see that while fragmentation is a very real phenomenon, the operation of the individual regimes is not impeded as some commentators have suggested. One way this is achieved is by each regime making a conscious effort to use legal rules particular to that regime in a formalised fashion. This seemingly restricts the operation of a policy-orientated approach to rule ascertainment, leading to a stronger and more cohesive body of international law.

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AJIL – *American Journal of International Law*

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AP II - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609, entered into force 7 December 1979

BWCC – Bosnian War Crimes Chamber

CEDAW - Convention on the Elimination of Discrimination Against Women (18 December 1979) 1249 UNTS 13, entered into force 3 September 1981

CUP – Cambridge University Press

ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953ECtHR – European Court of Human Rights

EJIL – *European Journal of International Law*

GC I - Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 35, entered into force 21 October 1950

GC II - Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 81, entered into force 21 October 1950

GC III - Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, entered into force 21 October 1950

GC IV - Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, entered into force 21 October 1950

IACHR – Inter-American Convention on Human Rights

ICC – International Criminal Court

ICCPED - International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, UN Doc.A/61/488

ICCPR – International Covenant on Civil and Political Rights (16 December 1966, entered into force 23 March 1976) 999 UNTS 171

ICESCR – International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3, entered into force 3 January 1976

ICL – International Criminal Law

ICLQ – *International and Comparative Law Quarterly*

ICRC – International Committee of the Red Cross

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former-Yugoslavia

IHL – International Humanitarian Law

IHRL – International Human Rights Law

IMT – International Military Tribunal

JICJ – *Journal of International Criminal Justice*

JCSL – *Journal of Conflict and Security Law*

LJIL – *Leiden Journal of International Law*

MLR – *Modern Law Review*

OUP – Oxford University Press

SCSL – Special Court for Sierra Leone

UDHR – Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)

UN – United Nations

UNCAT – Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, entered into force 26 June 1987

UNGA – UN General Assembly

UNSC Res – UN Security Council Resolution

Introduction

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The fragmentation of international law is one of the key areas of international legal debate in the early 21st Century.[1] It has generated a voluminous amount of literature,[2] a study by the International Law Commission (ILC)[3] and comment from members of the international judiciary.[4] Fragmentation touches many aspects of international law from human rights to trade, environmental law to criminal law. Given such a proliferation of international law it is perhaps unsurprising that the different areas appear to touch and interact with one another. In turn this has inspired much debate as to the desirability of fragmentation and its potential to cause uncertainty and confusion between and within the different areas.

Fragmentation can be defined by its causes and effects, the impact it has on the operation of international law and how international actors respond to it. The international legal order has become more specialised than it once was due to the 'creation of special regimes of knowledge and expertise' such as trade, human rights and international criminal law.[5] This has led to the emergence of a diverse number of

[1] Jan Klabbers, 'Setting the Scene' *in* Jan Klabbers et al, *The Constitutionalization of International Law* (OUP 2011) 1. Here fragmentation is listed alongside 'constitutionalization' and 'verticalization' as being the 'Holy Trinity' of debate.

[2] See for example Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *Journal of International Law and Politics* 919; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Post-modern Anxieties' (2002) 15 *LJIL* 553; Christian Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?' (2007) 40 *New York University Journal of International Law & Politics* 259; Shane Spelliscy, 'The Proliferation of International Tribunals: A Chink in the Armor' 40 *Columbia Journal of Transnational Law* 143 (2001).

[3] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc. A/CN.4/L.682.

[4] See the remarks of HE Judge Guillaume. Available at <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1> last accessed 21st April 2013; and of HE Judge Schwebel. Available at: <http://www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1> last accessed 21st April 2013.

[5] Martti Koskenniemi, 'The Politics of International Law 20 Years Later' (2009) 20 *EJIL* 7, 9.

legal regimes within the international legal system. Each of these regimes has its own norms and rules that seek to regulate the behaviour of their subjects.[6] In some instances multiple regimes prohibit similar fact conduct but how this conduct is legally defined varies between the regimes. For example, torture is prohibited by IHRL, IHL, and ICL but its definition differs across the three regimes because of their functional differences. Such divergence in approaches could potentially compromise legal certainty and lead to a weakening of international law.[7]

The thesis compares and contrasts four violations - torture, enforced disappearance, sexual violence and the wanton destruction of property - in relation to the operation of the international human rights law (IHRL), international humanitarian law (IHL) and international criminal law (ICL). The thesis demonstrates that with respect to these violations and regimes the notion that international law is fragmented and is in danger of being rendered incoherent is misconceived. Instead, the thesis emphasises the relative autonomy of IHRL, IHL and ICL with respect to torture, enforced disappearance, sexual violence and the wanton destruction of property.

The introduction is structured so as to provide the reader with an outline of the hypothesis employed in this thesis and an understanding of the principal issues to be examined. As such, it presents an overview of the fragmentation of international law, introduces and justifies the subject area of the thesis and highlights the key areas of concern and debate. It also provides a brief historical account of post-Second World War developments in international law and how these have contributed to the fragmentation of international law.

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[6] For example, as evidenced by the creation of treaties specific to the regimes.

[7] On some of the challenges posed by fragmentation see Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2003) 25 *Michigan Journal of International Law* 849, 856-860; Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1998) 31 *New York University Journal of International Law and Politics* 791, 795-798.

The hypothesis and its contribution to knowledge

The IHRL, IHL and ICL regimes prohibit torture, the enforced disappearance of individuals, sexual violence and wanton destruction of property. The definition of these acts varies across the three regimes. For example, torture as a violation of IHRL requires a physical act (e.g. the pulling of fingernails) coupled with the involvement of state officials (directly or indirectly).[8] As a violation of IHL the physical act must occur within the context of an armed conflict (international or non-international). For ICL, the act must either be a war crime, crime against humanity or act of genocide. These factors can be seen as integral to the definition of the violation as the occurrence of the physical act itself. Consequently, an examination of the three regimes' definitions reveals both a shared bond and divergence.

Fragmentation cannot be viewed as a binary issue in which there is either unity or discord. There are many positives to come from the phenomenon. For example, the way in which the three regimes define the physical act of torture helps to underscore the collective revulsion to the commission of such acts. The aim of this thesis is to highlight some of these shared bonds while also emphasising the differences between the IHRL, IHL and ICL regimes. Such differences are largely functional in nature meaning that they assist the operation of the definition in the regime. For example, the requirement that an armed conflict exists can be seen as a functional element of the definition of torture in the IHL regime; the involvement of State agents is often required for the commission of a human rights violation.

The existence of three different legal definitions relating to the same physical act has resulted in commentators raising concerns as to whether this causes legal

[8] E.g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, entered into force 26 June 1987, entered into force 26 June 1987, art 1(1).

uncertainty and conflict between the three regimes.[9] For example, an act of enforced disappearance committed in the context of Chechnya could potentially amount to a violation of IHRL, IHL and ICL. However, the next stage would be to identify which of the three regimes could operate in practice. For ICL to take effect it would have to be shown that the act was a war crime and thus requiring a connection to an armed conflict, part of a widespread or systematic attack against a civilian population, or an act of genocide. The operation of IHL would again require proof of the existence of an armed conflict. IHRL would require that the acts were committed by State agents or individuals operating, by some means, with the consent or acquiescence of the State. In the case of enforced disappearances in Chechnya the families of victims have made applications to the ECtHR for violations of the ECHR, a human rights Convention. Academic opinion on this subject is, however, divided. One school of thought claims IHRL is universal and is thus breached when IHL is violated.[10] Another approach is that IHL acts as the *lex specialis* (i.e. the special law) of IHRL in such instances and thus it is IHL which is violated.[11] This divergence results in uncertainty as to which regime is applicable in a given scenario, potentially resulting in damage to the international legal order.[12]

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[9] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 *EJIL* 161; Anthony E. Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International law' (2007) 56 *ICLQ* 623.

[10] Theodor Meron has argued that the two systems of IHRL and IHL could converge: Theodor Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' (1983) 77 *AJIL* 589. For an analysis of the arguments see Noam Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate' (2007) 40 *Israel Law Review* 648.

[11] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Reports 136, para.106; William Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum' (2007) 40 *Israel Law Review* 592, 597.

[12] See Hafner (n 7); Dupuy (n 7).

This thesis approaches the issue of fragmentation from a different perspective. Instead of adhering to the view that the IHRL, IHL and ICL regimes are in conflict with one another, it argues the purposes for which the regimes exist are different and each is governed by its own distinctive characteristics. The IHRL regime exists to safeguard individual rights against the State (although it is recognised that this is becoming a contested view with the advent of human rights obligations of non-State actors);[13] the IHL regime seeks to protect and indeed restrain combatants in times of armed conflict whether or not they are affiliated with the State;[14] and the ICL regime seeks to curb impunity and protect individuals from war crimes, crimes against humanity and genocide.[15] This divergence necessarily results in three separate definitions of torture, enforced disappearance, sexual violence and wanton destruction of property. This perspective on fragmentation concerns itself with the law in operation. Such a 'bottom up' viewpoint has been chosen because it offers a fresher perspective on the fragmentation phenomenon which is often concerned with the effects fragmentation has on the systemic operation of international law.

In approaching the analysis of the relevant definitions, the thesis adopts an approach that distinguishes between 'formal' and 'informal' approaches to the ascertainment of legal rules.[16] The legal definition of similar fact conduct peculiar to one regime cannot be transplanted from one regime to the other because the definition incorporates elements specific only to the regime in question. Each regime's existence becomes independent from the other regimes. Therefore there is potential for the

[13] See Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006); Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 *ICRC* 491 522-523.
[14] Annyssa Bellal et al, 'International Law and Armed Non-State Actors in Afghanistan' (2011) 93 *ICRC* 47.
[15] See Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, entered into force 1 July 2002, arts 6-8
[16] See Jean d'Aspremont, *Formalism and the Sources of International Law* (OUP 2011).

problems associated with fragmentation to be mitigated by the demarcation of the regimes' boundaries. This would increase the ability of the law to be more certain with the possibility of strengthening the operation of the three regimes.

Methodology

The present enquiry focuses on the emergence of discrete definitions in each of the three regimes studied. It draws upon a range of sources and material but is primarily focused on the jurisprudence of international tribunals, notably the ICTY, ICTR, ECtHR and Inter-American Court. The initial identification of the rules to be examined namely, torture, enforced disappearance, sexual violence and destruction of property is based on the shared condemnation of such acts by each of the three regimes. By choosing to examine issues with *prima facie* similarities it is anticipated that deeper and more subtle differences between the regimes' approaches will emerge. This will lend support to the argument advanced by the thesis that the regimes, while sharing certain bonds, can now function independently of one another. In turn, this lends greater support for the increased use of formally ascertainable rules of law which underpin the operation of the three regimes.

Fragmentation is analysed from a formal, rule-bound perspective rather than perceived from the position of a policy-orientated approach to international law. A formal approach has been adopted because it best recognises the boundaries between the three regimes and permits them to be viewed as separate legal entities. This approach has the potential to improve legal certainty and also to generate greater clarity as to which legal regime is to apply in any given scenario. Thus there exists the possibility to mitigate the effects of fragmentation on the international legal system. It also recognises that there is the potential for separate legal systems to co-exist at the international level while minimising the effects of overlap and conflict between them.

A brief history of the fragmentation of international law

It was apparent to the Allied Powers (Britain, France, the USA and the USSR) during the Second World War that in order to prevent such wars occurring in future the international community needed strong institutions underpinned by widespread respect for international law. One way in which they sought to achieve this was by holding individuals responsible for violations of international law at the Nuremberg Trial. In addition to finding individuals guilty for the crime of aggression it was also tasked with bringing to justice those responsible for war crimes and crimes against humanity. In its final judgment the IMT held that 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[17] Thus, the 1946 judgment represents a fundamental shift in international law. Prior to Nuremberg only states could be liable for violations of international law and, because enforcement was weak, they were able to act with impunity. For the historian Richard Overy 'the central purpose of the Tribunal was not to conform to existing principles in international law but to establish new rules of international conduct and agreed boundaries in the violation of human rights.'[18] As such, the indictment of the Nazi leadership was 'accepted as a necessary underpinning for the construction of a new moral and political order.'[19] Nuremberg made it possible to hold individuals liable for violations of international law, and could help to curb impunity.

[17] Judgment of the International Military Tribunal, *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg*, Germany, vol.22, London, 1950, 447.
[18] Richard Overy, 'The Nuremberg trials: international law in the making' *in* Philippe Sands (ed) *From Nuremberg to the Hague: The Future of International Criminal Justice* (CUP 2003) 23.
[19] ibid 27.

The Second World War also led to the creation of the United Nations in 1945,[20] a substantially improved incarnation of the League of Nations.[21] The UN Charter is considered to be one of the foundations of modern international law.[22] Article 1 of the Charter establishes that the purpose of the UN is to 'maintain international peace and security' and to bring about 'by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.[23] This builds on the aims of the League,[24] but provides a more effective enforcement method through the creation of the UN Security Council, which acts as a coordinating and executive body for the maintenance of international peace and security.[25] Article 1 provides for the promotion of 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.[26] Article 1 of the UN Charter can be seen as one of the first signs of the fragmenting legal system in that it charges the UN with a range of functions not limited to ensuring international comity.

The creation of the UN system however was not an immediate success, nor did it appear that the liberal institutionalism espoused by the UN system had triumphed finally over the realist school of international relations. From 1945 onwards, tensions rose between the USSR in the East and the other Allied-Powers in the West.[27] Following the Allied victory, the international system was effectively split between communist and capitalist, East and West. It seemed that the Thucydidean conception

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[20] Charter of the United Nations (26 June 1945) 59 Stat 1031; TS 993; 3 Bevans 1153, entered into force 24 October 1945 ('UN Charter').
[21] See the Covenant of the League of Nations, 28 April 1919.
[22] Bardo Fassbender, 'The United Nations Charter As Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529, 532.
[23] UN Charter, art 1(1).
[24] Covenant of the League of Nations, 28 April 1919, Preamble and arts 8-13.
[25] UN Charter, art 23.
[26] UN Charter, art 1(3).
[27] See John L. Gaddis, *The Cold War* (Penguin 2007); Jeremy Isaacs & Taylor Downing, *Cold War: For Forty Five Years the World Held its Breath* (Abacus 2008).

of hegemony prevailed over the ideals of the United Nations.[28] However, despite the fighting of proxy wars around the globe, for example in Indo-China (c.1955-1975), and Central and Southern America (c.1965-1990), a head-to-head conflict between East and West was averted.

Throughout the Cold War several international treaties and instruments were adopted which aimed to protect human dignity and to promote human rights. The first such instrument was the Universal Declaration of Human Rights (UDHR) by the UN General Assembly in 1948.[29] The UDHR is sometimes viewed as the foundation of modern human rights protection.[30] This was followed by the Genocide Convention 1948 criminalising acts of genocide.[31] There were also the Geneva Conventions which, while they built upon pre-war treaties regarding international humanitarian law, seemed to find renewed vigour and acceptance post-Nuremberg.[32] In Europe, the Council of Europe created the European Convention on Human Rights (ECHR).[33] This was the first comprehensive treaty organisation aimed at actively promoting human rights. Although the ECHR does not explicitly refer to the protection of human dignity an

[28] See Robert Gilpin, 'The Theory of Hegemonic War' *in* Thucydides, *The Peloponnesian War* (W.W. Norton 1998).
[29] *Universal Declaration of Human Rights*, Resolution 217 A(III); UN Doc A/810 91, UN General Assembly, 1948.
[30] Philip Alston and Ryan Goodman, 'International Human Rights' (OUP 2013) 142.
[31] *Convention on the Prevention and Punishment of the Crime of Genocide* (9 December 1948) 78 UNTS 227, entered into force 12 January 1951.
[32] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (12 August 1949) 75 UNTS 35, entered into force 21 October 1950; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (12 August 1949) 75 UNTS 81, entered into force 21 October 1950; *Geneva Convention relative to the Treatment of Prisoners of War* (12 August 1949) 75 UNTS 135, entered into force 21 October 1950; *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (12 August 1949) 75 UNTS 287, entered into force 21 October 1950 (Known respectively as Geneva Convention I, II, III and IV).
[33] *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953.

examination of the provisions of the treaty and the jurisprudence of the ECtHR reveals that the protection of human dignity is an important feature of the ECHR regime.[34]

The end of the Cold War in 1991 and the dissolution of the USSR was a major change for the international geopolitical system.[35] The immediate period following the Cold War did not, however, usher in a new era of peace and stability. Indeed, the opposite was true with conflicts raging in the Balkans following the break-up of Yugoslavia and in the Caucasus.[36] These conflicts again placed pressure upon international law which many regarded as being ineffective in both stemming conflicts and protecting human dignity. This led to calls that international law be used to further the protection of individuals affected by conflict. As a result, two international criminal tribunals were created in 1993[37] and 1994[38] for specific outrages committed in the former-Yugoslavia (the ICTY) and in Rwanda (the ICTR). After nearly 50 years, international criminal tribunals had been established for the prosecution of individuals accused of grave violations of international law. Subsequently, there was a growth in the number of tribunals established to prosecute individuals suspected of violating international law. This was followed by calls for the establishment of a permanent international criminal court similar to the permanence of the UN's International Court of Justice.

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[34] *S.W. v United Kingdom* (Application no. 20166/92) Judgment 22 November 1995, para.44. Here the Court notes of that the very essence of the Convention is 'respect for human dignity and human freedom.
[35] Jeremy Isaacs & Taylor Downing, *Cold War: For Forty Five Years the World Held its Breath* (Abacus 2008).
[36] On the Balkans see Misha Glenny, *The Balkans 1804-1999: Nationalism, War and the Great Powers* (Granta 2000); On Chechnya see Carlotta Gall and Thomas de Waal, *Chechnya: A Small Victorious War* (Pan 1997).
[37] *Statute of the International Criminal Tribunal for the former Yugoslavia*, UN Doc S/RES/827, UN Security Council, 1994.
[38] *Statute of the International Criminal Tribunal for Rwanda*, UN Doc S/RES/955, UN Security Council, 1994.

At the same time international law continued to expand. Abi-Saab has noted that this expansion into new areas has led, inevitably, to increased specialisation.[39] The European Union has become the best example of the power and ability of international law to create a stable supranational organisation aimed ultimately at ensuring regional peace and cooperation.[40] Environmental concerns have led to the creation of a multifaceted international treaty system aimed variously at curbing the pollution of the environment and the reduction of carbon emissions.[41] International trade has likewise spurred on the creation of highly sophisticated developments of international law.[42] The World Trade Organisation, the World Bank and the International Monetary fund all have specific roles to play in coordinating international development, international trade and international finance.[43]

An Introduction to the Three Regimes

The three regimes of IHRL, IHL and ICL were chosen because they each prohibit acts which are factually identical. Torture, enforced disappearance, sexual violence (including rape and sexual assault) and the wanton destruction of property are all prohibited by the three regimes. Therefore, each physical act has three legal definitions respective to the regime in which it is located. This evidently leads to a proliferation of definitions, instead of there just being four (one for each physical act) there are twelve (three for each physical act). The distinctions between the regimes' approaches to immunity (both State and individual) could have been studied but this is a procedural issue rather than a substantive violation of the law.

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[39] Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *Journal of International Law and Politics* 919, 923.
[40] See Paul Craig and Grainne de Burca, *EU Law* (OUP 2011).
[41] See Philippe Sands et al, *Principles of International Environmental Law* (CUP 2012); Daniel Bodansky et al (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008).
[42] Daniel L Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (OUP 2009).
[43] Mitsuo Matsushita et al, *The World Trade Organization: Law, Practice, and Policy* (OUP 2006).

A further reason for the selection of the three regimes and a comparative study is their shared purpose of protecting human dignity. Despite such a shared purpose, each regime differs as to how this shared purpose is attained. IHRL aims to protect individual human rights by curtailing the power of the State *vis-à-vis* the individual. As a result, the primary subjects of IHRL are frequently States rather than individuals.[44] The operation of IHL is dependent on the existence of an armed conflict.[45] This can be either an international or non-international armed conflict.[46] The subjects of IHL can be States[47] or individuals from either States or non-State groups. ICL criminalises certain specific acts as war crimes, crimes against humanity, acts of genocide or a crime of aggression.[48] Though not considered in this thesis, terrorism and piracy are included in some account of ICL.[49] Individuals are the principal subjects of ICL as the Nuremberg judgment made clear with its comment that 'crimes against international law are committed by men not by abstract entities'.[50] There is however scope for holding States liable for acts such as genocide,[51] however this does not amount to individual criminal liability reflected, for example, in the ICC Statute.[52]

In writing this thesis it has been necessary to make an arbitrary distinction between IHL and ICL because while some breaches of IHL amount to a violation of ICL (this is the case for the subjects studied), not all offences against ICL are breaches

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[44] This can be seen in the operation and procedure of the ECHR, Inter-American Court of Human Rights and UN Human Rights Council, all of which focus on the failing of States.
[45] See Common Article 2 of the Geneva Conventions 1949: 'the present Convention shall apply to all cases of declared war or of any other armed conflict'.
[46] Common Article 3 of the Geneva Conventions 1949 applies to non-international armed conflicts.
[47] Marco Sassoli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 *ICRC* 401, 401.
[48] See ICC Statute, arts 6-8.
[49] Antonio Cassese, *International Criminal Law* (OUP 2008) 162.
[50] Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg*, Germany, vol.22, London, 1950, 447.
[51] e.g. *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] Judgment, ICJ General List No. 91.
[52] ICC Statute, art 25.

of IHL. This is because ICL is broader and prohibits acts of genocide, crimes against humanity and crimes of aggression in addition to war crimes. However, war crimes necessarily have to be committed in the context of an armed conflict (international or non-international) and consequently share a link to the IHL regime. In contrast, genocide and crimes against humanity require no such connection and can be committed in times of peace.[53]

The Structure of the Thesis

The thesis is organised into five chapters. The first of these is divided into two parts. In Part One the issue of fragmentation is examined in detail. It charts the emergence of fragmentation as a burning issue in international law and discusses allied scholarship. The principal concerns about, and issues arising from, fragmentation are examined alongside an analysis of the rulings of the ICJ in *Nicaragua* and of the ICTY in *Tadić*. These have been chosen to illustrate some of the ways in which the fragmentation of international law has been misunderstood. Part One also considers fragmentation as it directly relates to the operation of the IHRL, IHL and ICL regimes. The second part of Chapter One assesses and develops the adopted analytical approach.

The remaining chapters each consider a substantive violation of the law and are grouped according to underlying similarities of the physical acts. Each chapter presents an analysis of the legal definitions as they are found in the three regimes. The IHRL sections contain subsections relating to the definitions as they are found in the UN, European and Inter-American human rights systems. The IHL sections focus on customary international humanitarian law, treaty law (notably the Geneva Conventions of 1949 and their Additional Protocols of 1977) and the case law of the international

[53] Articles 6 and 8 of the ICC Statute make no reference to the need for acts of genocide or crimes against humanity to occur in the context of an armed conflict.

tribunals as it specifically relates to the commission of violations of IHL. The ICL sections draw from the historical background of the Nuremberg Tribunal and the international criminal tribunals' jurisprudence relating to crimes against humanity and genocide.

The second chapter focuses on the prohibition of acts of torture and how the IHRL, IHL and ICL regimes have responded to torturous acts. It highlights the shared aspects of torture such as the universally condemned physical acts. On this matter there is very little, if any, difference between the three regimes. Divergence comes when the regimes consider the perpetrator of the physical acts. The IHRL regime requires the involvement of the State either in the commission of torturous acts or because the State has failed to afford adequate protection to the victims from private citizens and non-State actors. In contrast, the IHL and ICL regimes now no longer require such a connection, torture can be committed by State and non-State actors alike. Vital to the definition of torture under IHL is that the acts be committed in the context of an international or non-international armed conflict. This is not a requirement of the IHRL or ICL regimes.

Enforced disappearance is the subject of Chapter Three with the different approaches to the offence being considered. As with torture, there is broad agreement across the regimes as to how the physical aspect of enforced disappearance is defined. It includes acts such as abducting and then causing an individual to be removed from the protection of the law. Often such acts result in the torture and death of the victim. Differences emerge when the responses of the regimes are considered. For example, the IHRL regime has been willing to find that the rights of victims' relatives have been violated, an issue that the IHL and ICL regimes are seemingly unable to acknowledge. Enforced disappearance as a violation of ICL must occur in the context of either

genocide or a crime against humanity, while IHRL casts a wider net and operates in a range of circumstances not covered by IHL or ICL.

The fourth chapter concerns the emotive subject of sexual violence and particularly the issue rape. The elements of the IHRL regime studied in this thesis, such as the ECHR, lack specific prohibitions against sexual violence and instead rely upon categorising such acts as torture, inhuman or degrading treatment. Consideration of such acts in IHRL has been limited when compared to IHL and ICL. Both of these latter regimes have given extensive room in their jurisprudence to acts of rape and sexual violence. The definition of rape used by ICL has been the subject of much debate both in academic discussion and in the jurisprudence of the international criminal tribunals. This chapter examines the differences between the regimes and between the various courts.

The final chapter in this thesis considers the destruction of property and how such acts are prohibited under the IHRL, IHL and ICL regimes. As with the other regimes, the destruction of property is prohibited by each of the regimes. However, unlike torture, enforced disappearance and sexual violence, the prohibition is qualified. The IHRL and IHL regimes both permit the destruction of property in certain circumstances. These regimes are both governed by proportionality tests and the IHL regime also includes a military necessity consideration. Unlike the other three offences, the ICL regime as it relates to genocide and crimes against humanity provides relatively weak protection of property.

Chapter One – Fragmentation

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Introduction

Fragmentation has been described as the establishment of new institutions created to 'manage particular problem areas...by reference to interests and preferences that differ from those represented in the institutions of general law.'[1] In turn, these have produced 'firm exceptions' to the general law with the potential to 'pit particular regimes against each other'.[2] Such a multiplication of international legal regimes has led to concern that the international legal system is being weakened.[3] However, the occurrence of fragmentation is often the response to 'unacceptable features of the general law.'[4] Such a term refers to the apparent inadequacy of general international law to respond to mass atrocities and other serious violations of international norms.[5] This deficiency led, in part, to the development of the IHRL, IHL and ICL regimes studied in this thesis.

Fragmentation leads to the emergence of diverse regimes which can sometimes have divergent approaches or definitions relating to matters which are *prima facie* similar.[6] The purpose of this thesis is to challenge this underlying presumption by examining the regimes independently of one another. By doing this, a picture of a complex international legal system emerges. On the one hand there are several functionally differentiated legal regimes such as IHRL, IHL and ICL. On the other, there are similar factual scenarios such as torture, enforced disappearance,

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[1] Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197, 205.
[2] ibid.
[3] Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2003) 25 *Michigan Journal of International Law* 849, 856.
[4] Koskenniemi (n 1) 206.
[5] For an overview see Christopher Greenwood 'Human Rights and Humanitarian Law – Conflict or Convergence' (2010) 43 *Case Western Reserve Journal of International Law* 491.
[6] For example, the IHRL, IHL and ICL regimes' approaches to torture, enforced disappearance, sexual violence and the destruction of property.

sexual violence and the wanton destruction of property. It can therefore be suggested that there is harmony with respect to the factual conduct as each of the regimes prohibit the acts; but *how* these acts are prohibited varies from regime to regime. Thus, the result is the same but a sharp distinction in how these acts are prohibited is discernible.

The present chapter is divided into two parts. Part One introduces the concept of fragmentation and offers an analysis of the literature relating to the phenomenon. This will provide a foundation to the thesis by establishing what is meant by key terms such as 'fragmentation' and 'regime' alongside an exposition of fragmentation 'in action' in the form of an analysis of the *Nicaragua* and *Tadić* judgments. The second element of Part One locates the IHRL, IHL and ICL regimes within the fragmentation debate. Part Two suggests one potential method of mitigating the effects of fragmentation and relates it to the regimes of IHRL, IHL and ICL.

1.1- Part One: The fragmentation of international law

1.1.1- Defining Fragmentation

One starting point to the modern debate on fragmentation can be found in Jenks' article 'The Conflict of Law Making Treaties'.[7] In this it was noted that different treaties were developing a number of 'historical, functional and regional groups' separate from one another.[8] He argued that such treaties 'react upon each other' in a situation described as 'the conflict of law-making treaties'.[9] Such an eventuality might lead to the creation of constitutionalised norms in order to deal with the conflict between the various treaty regimes.[10] However, Jenks drew a distinction between

[7] Wilfred Jenks, 'The Conflict of Law Making Treaties' (1953) 30 *BYIL* 401.
[8] ibid 403.
[9] ibid 403.
[10] See Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (BRILL 2009).

'reaction' and 'divergence' noting that the 'divergence between treaty provisions dealing with the same subject...does not in itself constitute a conflict.'[11] This can be evidenced in the different approaches taken to similar fact conduct such as the areas examined later in this thesis. In these cases it is apparent that there is divergence in legal response even though there might be a harmonisation of subject matter.

More importantly, the existence of two or more such treaties with common parties could address the same subject but from a different perspective.[12] Indeed, he believed that conflict 'in the strict sense of direct incompatibility' would only occur when one party to the common treaties would not be able to 'simultaneously comply with its obligations under both treaties.'[13] Applying Jenks' analysis, it could be said that the IHRL, IHL and ICL regimes do not conflict because of their differing aims and purposes even though they frequently prohibit similar fact conduct, for example torture, enforced disappearance, sexual violence and wanton destruction of property. Thus, there could be divergence and perhaps competition[14] without the existence of a conflict between the three regimes. Since Jenks published his article, fragmentation has become one of the key issues in contemporary international law but there remains, as will be seen, uncertainty as to whether it is a matter of conflict or diversification and competition.

Fragmentation is not a precise term and lacks a strict legal definition. As such, it is sometimes regarded not as a legal concept but a political idea.[15] It is most often analysed through either its causes or consequences. This was the approach taken by the authors of the ILC Report on Fragmentation (the 'ILC Report'), written in

[11] Jenks (n 7) 425.
[12] ibid 426.
[13] ibid.
[14] Jean d'Aspremont and Elodie Tranchez, 'The quest for a non-conflictual coexistence of international human rights law and humanitarian law: which role for the *lex specialis* principle?' (December 17, 2012). Available at SSRN: http://ssrn.com/abstract=2195331 (Accessed 22 March 2014).
[15] Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *EJIL* 7, 9.

response to the increasing expression of concern over fragmentation and its effects on international law. The ILC Report is wide-ranging and covers several issues relating to fragmentation, not all of which are relevant for the purposes of the present work. It addresses *lex specialis*, 'self-contained' regimes, regionalism, conflicts between successive norms, the role played by Article 103 of the UN Charter, *ius cogens* and systematic integration. The ILC Report has been described as 'modest, contextual and heterogeneous'.[16] It does not focus on the 'institutional aspects of fragmentation' meaning that it does not analyse the relations between international institutions.[17] Instead, it focuses on fragmentation from the perspective of 'general' international law. Under this analysis, the ILC Report, while important, does not constitute a universal analysis of the fragmentation phenomenon and as such does not provide a definition which is similarly universal. It is, however, a prominent document in the literature on fragmentation and consequently deserves comment and analysis.

The ILC Report begins by delimiting the scope of the inquiry and laying out the substance of fragmentation. It notes 'general' international law has become divided into specialist systems, and even refers to 'exotic' systems such as investment law or refugee law.[18] The problem with such fragmentation is, the report states, that the emergence of specialised law-making institutions 'takes place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law.'[19] The result of such processes is 'conflict' between 'rules or rule-systems, deviating institutional practices and,

[16] Margaret A. Young, 'Introduction: the productive friction between regimes' *in* Margaret A. Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 3.
[17] ibid. 4.
[18] *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 13April 2006, UN Doc. A/CN.4/L.682 ('ILC Report on Fragmentation') para.8.
[19] ibid.

possibly, the loss of an overall perspective on the law.'[20] These concerns can therefore be divided into two broad categories. The first is that the specialist systems are creating an atomised international legal system wherein the regimes are separating from each other. The second is the purported alienation of the specialised regimes from 'general' international law. These two ideas will now be discussed in more detail with reference to the ILC Report, the first receiving additional attention throughout the remainder of the chapter.

One reason given for the idea of an atomised international legal system is what has been described as the 'slicing up' of international into separate 'institutional projects'.[21] As a result, the various institutions or 'specialist regimes' begin to develop their own rules, procedures and eventually case law peculiar to the regime in which it is found. This leads to the emergence of atomised regimes that can begin to operate independently of the others and deviate from the general law. According to the ILC Report, the deviation from the general law can cause the unity of the law to suffer.[22] One manifestation of this is the 'reappearance of specific terms in multiple regimes',[23] for instance multiple definitions of torture. In turn, this has been said to undermine the 'normative integrity of international law',[24] and consequently viewed as a 'serious problem' to be addressed by the international community.[25]

Linked to the idea of an atomised international legal is the supposed alienation of these regimes from general international law. This is most apparent with so-called 'self-contained regimes'. This term was used by the ICJ in *Hostages* where it was

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[20] ibid.
[21] Koskenniemi (n 15) 9.
[22] ILC Report on Fragmentation (n 18), para.15.
[23] Stephen Humphreys, 'Structural ambiguity: technology transfer in three regimes' *in* Margaret A. Young, *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 176.
[24] Eyal Benvenisti and George W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595, 597.
[25] ibid..

used to describe diplomatic law.[26] This regime establishes the receiving State's obligations relating *inter alia* to privileges and immunities in addition to the duties of the sending State.[27] In similar fashion, the ICJ in *Nicaragua* referred to human rights law as a regime possessing its own system of accountability provided by the relevant international human rights conventions.[28] Likewise, the ICTY has held in 'international law...every tribunal is a self-contained system (unless otherwise provided).'[29] The idea that regimes are 'self-contained' has been criticised because of the implication that the regimes are divorced from general principles of international law.[30] Even regimes with their own well-developed legal rules can resort to general international law if their rules prove to be inadequate.

The ILC Report concludes globalisation is 'the emergence of technically specialized cooperation networks with global scope.'[31] Networks develop their own rules and rule-systems, sometimes informally, sometimes through the harmonisation of national and regional laws.[32] Additional rules and rule-systems emerge through the creation of intergovernmental organisations.[33] These rules and systems are tailored to the needs and interests of the networks, rarely taking into account the outside world.[34] In essence, the lack of relationships between the regimes is the root of concern over fragmentation, where answers to legal questions depend on the regime in which the

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[26] *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* I.C.J. Reports 1980 p. 41, para.86.
[27] ibid..
[28] *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] I.C.J. Reports 1986, p. 14, paras.267-268.
[29] *Prosecutor v. Tadić* (IT-94-1) AC, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para.11.
[30] Daniel H. Joyner and Marco Roscini, 'Introduction' *in* Daniel H. Joyner and Marco Roscini (eds) *Non-Proliferation Law as a Special Regime* (CUP 2012) 1-2.
[31] ILC Report on Fragmentation (n 18) para.481.
[32] ibid. para.482.
[33] ibid. para.482.
[34] ibid.

question was originally asked.[35] International law therefore becomes subjective, varying from regime to regime having shed its previous (supposed) universal nature.[36]

According to the ILC Report, conflict between norms is endemic to international law due to its decentralised nature.[37] By now it has become routine for courts and tribunals to resolve conflicts between overlapping laws by reference to a diverse range of legal material.[38] The ILC Report calls for 'substantive emptiness' where legal technique is to replace 'legal-political' preferences.[39] This is termed 'formalism' by the Report but notes that this approach is not without its own agenda, an attempt to 'canvass a coherent legal-professional technique on a fragmented world' expressing 'the conviction that conflicts between specialized regimes may be overcome by law'.[40] In effect, the very effort of depoliticising international law becomes a policy preference albeit one closely tied to a 'formal' conception of law.[41]

The emergence of specialist regimes leading to 'deviations' from general law should not be construed as 'legal-technical "mistakes"' but are viewed instead as indicators of a pluralistic global society reflecting different 'pursuits and perspectives'.[42] In this sense, international law again becomes political where a choice has to be made between the pursuits and perspectives. Politics also plays a factor when deciding if fragmentation is a vice or virtue, with 'fragmentation' and 'coherence' not being 'aspects of the world' but lying in the 'eye of the beholder'.[43] Thus, the causes and consequences of fragmentation become politicised. Despite this, the functional specialisation of regimes provides the international legal system with

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[35] ibid. para.483.
[36] See Mario Prost, *The Concept of Unity in Public International Law* (Hart 2012) 69.
[37] ILC Report on Fragmentation (n 18) para.486.
[38] ibid.
[39] ibid para.487
[40] ibid.
[41] ibid; see also Martti Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2002) 496.
[42] ILC Report on Fragmentation (n 18) para.16.
[43] ibid para.20.

tools with which to address rules that pull in different directions, which suggests to the authors of the Report, the fragmentation of international law 'are of relatively minor significance to the operation of legal reasoning.'[44]

The ILC Report on Fragmentation defines a 'self-contained'[45] regime as being a regime which has 'a special set of secondary rules that determine the consequences of a breach of certain primary rules (including the procedure of such determination)' and 'any inter-related cluster (set, regime, subsystem) of rules on a limited problem together with the rules for the creation, interpretation, application, modification, or termination [i.e. the administration]' of primary rules.[46]

Further clarification of the term 'specialist regime' can be found in a range of public international law literature. Simma in his influential article 'Self-contained Regimes' defined such a regime as designating a 'certain category of subsystems' that embrace 'a full (exhaustive and definite) set of secondary rules'.[47] In defining such regimes as he does, Simma drew from the *Hostages* ruling which described diplomatic law as operating as a 'self-contained regime'.[48] This was because it establishes the receiving State's obligations relating *inter alia* to privileges and immunities in addition to the duties of the sending State.[49] In similar fashion, the ICJ in *Nicaragua* referred to human rights law as a regime possessing its own system of accountability provided by the relevant international human rights conventions.[50]

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[44] ibid.

[45] 'Self-contained' as a term is criticised by the ILC Report as being 'misleading' instead it proposes the term 'special regime': ILC Report on Fragmentation, para.152(5); For further commentary on this distinction see Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *EJIL* 483: a self-contained regime is one which totally excludes the application of general international law (at 495) while a special regime remain conceptually related to general international law (at 500).

[46] ILC Report on Fragmentation (n 18) para.152(1).

[47] Bruno Simma, 'Self-contained regimes' (1985) 16 *Netherlands Yearbook of International Law* 111, 117.

[48] *Case concerning the United States Diplomatic and Consular Staff in Tehran* (n 26) para.86.

[49] ibid.

[50] *Nicaragua* (n 28) paras.267-268.

Likewise, the ICTY held that in 'international law...every tribunal is a self-contained system (unless otherwise provided).'[51]

Other definitions of a 'special regime' have been given by Krasner and Ratner. The former notes that a special regime contains 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations.'[52] Ratner, meanwhile, defines a regime as a 'self-identified field of international law comprising norms to regulate a certain type of conduct and institutions to make decisions within it.'[53] The aims and purposes of a regime in conjunction with its structures and procedures 'shape and control the judicial functions of international courts belonging to that regime to a considerable degree.'[54] These definitions confirm the idea that special regimes can be governed by a range of secondary rules.

Specialised regimes with secondary rules can be viewed as 'enhancing the effectiveness of international law at large'.[55] Wellens questions whether the emergence of special regimes can lead to international law being viewed as 'compartmentalized'.[56] For Dworkin, the 'compartmentalization' of law is a sign of 'competent interpretation', meaning that regimes become more effective in interpreting the law.[57] The process of compartmentalising the law aids interpretation by the removal of redundant or unnecessary interpretations. The relative autonomy of special regimes permits the use of secondary rules to promote and guarantee the

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[51] *Tadić* (n 29) para.11.
[52] Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *International Organization* 185, 186.
[53] Steven R. Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 *AJIL* 475, 485.
[54] Yuval Shany, 'One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?' *in* Ole Fauchald and Andre Nollkaemper (eds) *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 20.
[55] K.C. Wellens, 'Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends' (1994) 25 *Netherlands Yearbook of International Law* 3, 8.
[56] ibid 28.
[57] Ronald Dworkin, *Law's Empire* (Hart 1998) 251.

primary rules of international law.[58] Secondly, such regimes can 'co-exist' with general international law which 'provides every opportunity for [creating] a powerful tool towards an overall increase in the effectiveness of primary rules' and, implicitly, the overall effectiveness of international law.[59] Thus it is possible to conclude that specialised regimes are an 'integral' element of international law.[60]

The apparent reason for the proliferation of specialised regimes has been attributed to a number of factors by various authors. Critics such as Eric Posner write that fragmentation is the result of a 'collision between the ambitions of global legalism and the realities of politics.'[61] For Posner, the most plausible explanation of the proliferation of courts is that states become unhappy with an existing international court and work around it by establishing a new court.[62] Posner's concerns are echoed by Benvenisti and Downs who believe that the fragmentation of international law allows powerful States to create legal orders from which they benefit,[63] in part because it gives them a great degree of 'flexibility'.[64]

In contrast to this position is that taken by Worster who has written of the benefits of competition between the various tribunals.[65] He notes that fragmentation might 'not be a problem to be solved' but instead 'a sign that the international legal system needs to consider a variety of legal norms.'[66] Rather than reflecting the needs of powerful States, Worster believes that fragmentation might actually create a 'bottom-up, vigorous system where different legal actors compete for the best

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[58] K.C. Wellens, 'Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends' (1994) 25 *Netherlands Yearbook of International Law* 3, 28.
[59] ibid.
[60] ibid.
[61] Eric Posner, *The Perils of Global Legalism* (University of Chicago Press 2009) 151.
[62] ibid 167.
[63] Benvenisti (n24) 597-598.
[64] ibid. 627.
[65] W.T. Worster, 'Competition and Comity in the Fragmentation of International Law' (2008) 34 *Brooklyn Journal of International Law* 119, 120.
[66] ibid 148.

realization of justice.'[67] Whilst fragmentation has the potential to create a system for powerful States to advance their own best interests, it also offers the possibility of more numerous fora and regimes in which violations of international law can be addressed as Rao notes: the 'ultimate justification for the existence of a diversity of international tribunals is to achieve unity of the international legal system...dedicated to justice and equity in international relations.'[68]

Koskenniemi was responsible for finalising the ILC Report which reflects many of his own views on fragmentation. New regimes emerge in response to unacceptable features of general international law.[69] The 'general' law is unable to provide a remedy to particular issues. Examples include the absence of measures to protect the environment or to address mass atrocities. The new regimes seek to respond to new 'challenges' not by replacing the old rules but by creating exceptions.[70] These exceptions become 'institutionalised' into general law by different functional regimes.[71] This leads to the reversal of traditional established legal hierarchies 'in favour of the structural bias in the relevant functional expertise.'[72]

The emergence of functional regimes affects Koskenniemi's conception of the interpretation of law. For instance, they have led to departures from the 'normal' interpretation of treaties under the Vienna Convention of the Law of Treaties (VCLT) to an interpretation 'justified by the "object and purpose" of [human rights] treaties of their *effet utile* over the strict formalism of traditional law.'[73] The emergence of the

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[67] ibid 149.
[68] Pemmaraju Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?' (2003) 25 *Michigan Journal of International Law* 929, 961.
[69] Koskenniemi (n 1) 205.
[70] Koskenniemi (n 15) 10; see also Martti Koskenniemi, 'The Fate of International Law. Between Technique and Politics' (2007) 70 *MLR* 1,4.
[71] Koskenniemi (n 1) 205; see also Simma (n 45).
[72] Koskenniemi (n 70) 4.
[73] Koskenniemi (n 71), 205.

'object and purpose test' permit the 'creation of a systemic bias in favour of the protected individuals that could be difficult to justify under traditional law.'[74] As a consequence, there emerges what Koskenniemi terms 'contextual ad hocism'.[75]

The very application of law, therefore, requires recognition of a secondary, interpretative, rule. Article 31, in particular, has been described as a tool which permits the harmonisation of the law,[76] and is important because interpretation occupies a 'prime position on the crossroads between law and politics'.[77] Thus it is an instrument for measuring the coherence of the law.[78] Article 31 provides in the first instance a treaty is to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.' Further elements of Article 31 permit the use of the context (including the preamble and annexes).[79] Article 31 favours a textual approach to treaty interpretation;[80] a point firmly underscored by the ICJ in *Guinea-Bissau v. Senegal* where it was held that only if words are ambiguous or a textual interpretation would lead to an unreasonable result would the textual approach be abandoned.[81] This is based in part of Article 32 which provides an 'escape clause' permitting supplementary means of interpretation.[82]

Political factors loom large in international law, a point recognised by Koskenniemi who tends towards viewing much of the fragmentation debate as

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[74] Martti Koskenniemi, 'What is International Law For?' *in* Malcolm D. Evans (ed) *International Law* (OUP 2006) 76.
[75] Koskenniemi (n 70) 9.
[76] Jean-Marc Sorel and Valerie Bore-Eveno, 'art 31 (1969)' *in* Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 807.
[77] ibid.
[78] Serge Sur, *L'interprétation en droit international public* (LGDJ 1974) 237; cited ibid. 807.
[79] Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331, art 31(2).
[80] Sorel (n 76) 818.
[81] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (Judgment) [1991] ICJ Rep 53, para.48.
[82] VCLT (n79, art 32.

'politics'.[83] This is evidenced in the language of fragmentation articulating nostalgia and a 'sense of loss of the secure ground of tradition', at a time where 'everything still seemed somehow coherent'.[84] Such nostalgia for a unified international legal system (even if one never truly existed) leads to hegemonic struggle in which a representation of universality is claimed by various subjects and values.[85] This struggle manifests itself where regimes attempt to 'occupy the space of the whole'.[86] The multiplicity of regimes forces actors to 'struggle' over the 'description and re-description' of rules so they fall under the jurisdiction of a particular institution.[87] Conflict will therefore be a matter of a clash of jurisdiction.

Other commentators have similarly drawn attention to the idea of fragmentation being a political concept. For instance, Young describes the wrangling between different fisheries regimes as 'political', suggesting that the debate has taken on an extra-legal character.[88] Such political tension between the regimes presents the 'danger' of reducing regimes to a single set of characteristics.[89] This reductionism is apparent in the fields studied in this thesis, particularly when considering the IHRL and IHL fields where a union between the two is frequently advocated, thereby ignoring factors which make each regime unique.[90] In a balanced piece outlining the positive and negative aspects of fragmentation, Hafner comments that fragmentation has led to the emergence of specialised systems that best fit the problem.[91] In the case

[83] Koskenniemi (n 15) 9.
[84] Martti Koskenniemi, 'Miserable Comforters. International Relations as a New Natural Law' (2009) 15 *European Journal of International Relations* 395, 404.
[85] Martti Koskenniemi (n 74) 75.
[86] ibid 77.
[87] Martti Koskenniemi (n 70) 7.
[88] Margaret Young, 'New Voices I: Global Health, Trade, and Common Resource Regimes' (2011) 105 ASIL Proc 107, 108.
[89] ibid.
[90] See below §1.1.4, 51.
[91] Hafner (n 3) 859.

of IHRL, IHL and ICL, such an approach can be used to ensure that individuals receive access to justice in a range of different circumstances.[92]

One method of mitigating the effects of fragmentation is for the greater or total constitutionalisation of international law.[93] The international system, it is said, could be 'defragmented' by greater constitutionalisation[94] because there is a broad consensus that every legal order including the international should be as 'coherent and unified as possible.'[95] Questions remain as to what extent such coherence and unity is achievable across separate legal regimes. Other writers note that the introduction of universal law, i.e. a constitution, would 'settle the debate on fragmentation' and grant perspective to the law.[96] However, attempts to create a constitutionalised form of international law could be seen as an essentially a political project,[97] departing from the core competencies of international lawyers, i.e. the analysis and application of legal rules.[98] In turn, this potentially leads to a loss of clarity and certainty of the scope of international law.[99] Many solutions are focused on restoring unity or bringing unity to the international legal system through greater federation and

[92] This can be seen in the approaches of the different regimes to torture, enforced disappearance, sexual violence and the destruction of property in the following chapters.
[93] Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 *LJIL* 1, 25.
[94] Anna van Aaken, 'Defragmentation of Public International Law Through Interpretation: A Methodological Proposal' (2009) 16 *Indiana Journal of Global Legal Studies* 483, 485 & 487.
[95] ibid 485.
[96] Christine Schwobel, 'The Appeal of the Project of Global Constitutionalism to Public International Lawyers' (2012) 13 *German Law Journal* 1, 9-10.
[97] see Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 *Indiana Journal of Global Legal Studies* 397, 398.
[98] Hedley Bull commented 'if international lawyers become so preoccupied with the sociology, the ethics or the politics of international relations that they lose sight of what has been in the past part of their essential business, that is the interpretation of existing legal rules, the only result must be the decline in the role of international law in international relations.' Cited by Benedict Kingsbury, 'Grotius, Law, and Moral Scepticism: Theory and Practice in the Thought of Hedley Bull' *in* Clark, I. and Neumann, I.B. (eds) *Classical Theories of International Relations* (Macmillan 1996) 51.
[99] Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 *EJIL* 1075, in particular from 1088.

constitutionalisation.[100] Those who promote regional or specialised regimes are 'denounced for pushing aside universal mechanisms' and 'jeopardising the federating project.'[101]

Koskenniemi views attempts to constitutionalise the international legal system with scepticism. He believes that such attempts aim to 'depoliticise' the law by moving away from either the 'politics of sovereignty' or the 'politics of functional diversification'.[102] Neither of these, to him, appears possible. Constitutionalism at the international level requires a definition of the 'common good' that is lacking except for the language of diplomacy and the positive law, but it was these that led to fragmentation in the first place.[103] Thus, constitutionalisation becomes a matter of selecting values when it is impossible to determine which values are most important, leading to the situation where each of the functional regimes promotes its own values ahead of the others. The project of global constitutionalism lacks a response to fragmentation which has often been the result of a 'conscious challenge to the unacceptable features of general law' such as the lack of protection of human rights.[104] A return to a general unified legal system will not necessarily be able to address matters as effectively as can the functional regimes. One example of this would be the definition of torture. Does the definition include only State actors as in the case of IHRL or non-State actors as in the case of IHL and ICL? If the definition only includes the substantive conduct, e.g. the pulling of fingernails, does this not render the definition too wide to be effectively applied by any regime?

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[100] See for example Fassbender (n 10); Jeffrey L. Dunoff and Joel P. Trachtman, 'A Functional Approach to International Constitutionalization' *in* Jeffrey L. Dunoff and Joel P. Trachtman (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) 4.
[101] Martineau (n93) 8-9.
[102] Koskenniemi (n 70) 15.
[103] ibid 16.
[104] Koskenniemi (n 1) 206.

Constitutionalism leads the debate back to the question of jurisdiction. To decide which regime operates in situations where there is a multiplicity of choices, a 'regime of regimes' would be needed in order to provide regulation of the various regimes. However no such regime exists causing regimes to 'continue to deal with whatever they can lay their hands on.'[105] In such a scenario, the 'winning' regime will be the regime whose application of the law cannot be challenged.[106] Such an outcome has been highlighted by Sands who notes that the future poses greater problems for the unity of international law.[107] However, as will be seen in the later chapters, the existence of a genuine choice between IHRL, IHL and ICL is often illusory. For instance in Chechnya, no choice could be made between IHRL, IHL and ICL even though acts *could* in theory fall under the jurisdiction of each regime. This choice between regimes can become a choice of vocabulary providing the 'basis for the application of a particular kind of law and legal expertise.'[108] However, the appearance of choice does not recognise the fact that the regimes will apply the law differently even if the application relates to similar factual scenarios.[109] This is what Koskenniemi terms the 'context sensitive' professional technique of law.[110] Under this approach to international law the definition of each act differs between the functional regimes because they incorporate aspects of law peculiar to each regime.

The fragmentation phenomenon has also prompted responses from members of the international judiciary. For example, HE Judge Guillaume gave a speech in

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[105] Koskenniemi (n 84) 407.
[106] ibid.
[107] For example in cases of forum shopping: see Philippe Sands, 'Torturers and Turtles: The Transformation of International Law' (2001) 33 *New York Journal of International Law and Politics* 527, 549 & 555.
[108] Martti Koskenniemi (n15) 11.
[109] *MOX Plant Case (Ireland v United Kingdom)* ITLOS, Request for Provisional Measures, Order, 3 December 2001, para.51.
[110] Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International as Practice' in Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law (United Nations 1999) cited in Martti Koskenniemi, *The Politics of International Law* (Hart 2011).

which he said 'the proliferation of courts presents us with risks, the seriousness of which it would be unwise to underestimate'.[111] A remedy for this would be to examine the position of the various regimes in the international legal system and establish connections between them.[112] This is essential, Guillaume reasons, if 'the law is to remain coherent, and to continue to operate to the benefit of all members of the international community'.[113] Similar concerns are shared by HE Judge Schwebel who has suggested there might be 'be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before' tribunals of specialised regimes where questions of importance to the unity of international law are raised.[114] This approach would 'minimize such possibility as may occur of significant conflicting interpretations of international law'.[115] This approach would however, signal that the ICJ rests at the apex of the international legal system, a view that would be strongly contested. Not all members of the international judiciary are as sceptical as Judges Guillaume and Schwebel. For instance, HE Judge Patrick Robinson calls for judges to exercise 'mutual respect' and 'good faith', while noting that an eventual merger on certain grounds, such as matters considered *ius cogens*, may be desirable.[116]

Fragmentation has also been referred to as 'regime complexity' which, by its very nature, 'reduces the clarity of legal obligation' by the introduction of overlapping rules and jurisdictions governing an issue.[117] Consequently, this leads to 'rule

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[111] Available at <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1> last accessed 11 May 2013.
[112] ibid.
[113] ibid.
[114] Available at <http://www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1> last accessed 11 May 2013.
[115] ibid.
[116] Available at <http://www.echr.coe.int/NR/rdonlyres/851247E2-0E9A-4CB3-B81B-F72482E26E3B/0/30012009PresidentRobinsonSeminar_eng_.pdf> last accessed 11 May 2013.
[117] Karen J. Alter & Sophie Meunir, 'The Politics of International Regime Complexity' (2009) 7 *Perspectives on Politics* 13, 16.

ambiguity' further increasing the fragmentation of international law.[118] It also increases the scope for 'unintentional reverberations' where changes in one institution have effects in parallel domains.[119] Concern over fragmentation is encapsulated by Michaels and Pauwelyn who have noted that there is a widespread normative preference for 'coherence over fragmentation, order over disorder.'[120]

A further concern of fragmentation is how and whether international law will deal with fragmentation. Cogan has noted that 'sophisticated' legal systems frequently resolve issues of fragmentation, and in such systems it poses little danger to what can be considered 'unity'.[121] Koskenniemi has written of the 'centre' of international law 'collapsing' leading to the emergence of a number of specialised bodies.[122] Elsewhere, however, he has questioned whether the international legal system was ever unified, noting that the 'ICJ never stood at the apex of some universal judicial hierarchy'.[123] This is linked to the notion that the 'general' is being replaced by the 'special': what was 'once regulated by public international law is now governed by specialist systems' including IHRL, IHL and ICL.[124] However, reconciling such a viewpoint with the reality of the international legal system appears difficult. For instance, statements such as public international law once 'regulated' matters of human rights and IHL are questionable. IHRL emerged after the Second World War at about the same time fragmentation first became noticeable. Similarly, IHL has long co-existed with public international law as opposed to issues of armed conflict being

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[118] ibid.
[119] ibid.
[120] Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2012) 22 *Duke Journal of Comparative and International Law* 349, 350.
[121] Jacob Cogan, 'Fragmentation of International Legal Orders and International Law: Ways Forward?' (2011) 105 *ASIL Proc* 123, 123.
[122] Martti Koskenniemi (n 15) 10.
[123] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Post-modern Anxieties' (2002) 15 *LJIL* 553, 576.
[124] Joyner (n 30) 1.

'regulated' by public international law. Therefore, the postulated 'collapse' can be viewed instead as an expansion of law seeking to address and correct deficiencies in general public international law.

1.1.2 - A comparison of the *Nicaragua* and *Tadić* judgments

The two cases of *Nicaragua*[125] and *Tadić*[126] are found in the fragmentation literature as a leading example of fragmentation in action and how international law is endangered.[127] The two cases serve as good examples because they are both ostensibly concerned with the definition of 'control' for the purposes of attributing to a State certain acts committed by armed groups supported by that State. In *Nicaragua*, the ICJ found that the definition was that of 'effective control'; while the ICTY in *Tadić* adopted the looser 'overall control' test. It is not difficult to understand how such a divergence in judicial opinion comes to be cited as evidence as fragmentation in action. However, as this section will explain, the 'fragmentation' evidenced in the jurisprudence of these cases is more imagined than real, and based on a fundamental misconception of the international legal system. This section begins by outlining the principles set forth in *Nicaragua* and *Tadić* before considering whether they can truly be considered evidence of a fragmenting legal system. It links to the overall theme of the thesis by establishing a foundation for demonstrating that although regimes may consider identical factual issues, the legal response can and does vary from regime to regime.

The factual basis of *Nicaragua* lies in the support given by the US to the *contra* rebels opposed to the socialist Sandinista regime in Nicaragua. It is therefore

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[125] *Nicaragua* (n 28).
[126] *Tadić* (n 29).
[127] e.g. Prost (n 36); Harlan G. Cohen, 'The Global Impact and Implementation of Human Rights Norms' (2012) 25 *Pacific McGeorge Global Business and Development Law Journal* 381; ILC Report on Fragmentation (n 18), para.49.

linked to the Iran-Contra affair[128] and the wider strategic activities of the US in opposing leftwing governments in Central and Southern America.[129] Between 1981 and 1984 the US Government provided funds for the military and paramilitary activities of the *contras*. After this period the funding was termed 'humanitarian assistance'.[130] The Court heard from witnesses as to how the *contras* received training from the CIA on topics such as guerrilla warfare, sabotage and communications, in addition to the CIA providing them with intelligence.[131] Furthermore, while *contra* operations did not 'at every stage' of the conflict reflect the strategy and tactics devised by the US, CIA advisers did contribute to the planning of some operations.[132] As a result of these actions the ICJ had to consider whether, as a matter of public international law, the US could be held liable for the actions of the *contras*.

In light of the evidence, the Court found that although the *contras* had been reliant, at least in the early stages of their campaign, on the US for funding and advice, it could not be said the US exercised 'effective control' over the *contras*.[133] Consequently, violations of international humanitarian law could not be attributed to the US.[134] Such a test amounts to a high standard of control, a point made more apparent when one considers the fact that the *contras* could not have conducted crucial and significant military or paramilitary actions 'without the multi-faceted support' of the US.[135] The effective control standard was directly challenged in the *Tadić* case at the ICTY.

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[128] Ann Wroe, *Lives, Lies and the Iran-Contra Affair* (I.B. Tauris 1991); Lawrence E. Walsh, *Firewall: The Iran-Contra Conspiracy and Cover-up* (W.W. Norton 1997).
[129] For an overview of US involvement in Latin America see Robert Dallek, *Nixon and Kissinger* (Penguin 2008); Howard J. Wiarda, *American Foreign Policy Toward Latin America in the 80s and 90s: Issues and Controversies from Reagan to Bush* (New York University Press 1992),
[130] *Nicaragua* (n 28) para.99.
[131] ibid para.101.
[132] ibid para.106.
[133] ibid para.115.
[134] ibid para.116.
[135] ibid.

Tadić was a seminal case for the ICTY in many respects. The decision in the *Interlocutory Appeal on Jurisdiction* established that the ICTY was legally founded,[136] had primacy over domestic courts[137] and had sufficient *ratione materiae* jurisdiction.[138] In addition to these contributions to international law, the judgment of the Appeal Chamber provided a definition of control that ostensibly placed the ICTY at variance with the ICJ's *Nicaragua* judgment. The ICTY Trial Chamber had found that the conflict in Bosnia was an internal armed conflict which meant that certain provisions relating to the protection of victims in an international armed conflict could not be said to apply.[139] The acts were committed by Republika Srpska forces (Bosnian Serbs) in a non-international armed conflict; and thus any charges which were dependent on the existence of an *international* armed conflict could not be sustained. Accordingly, Dusko *Tadić* was acquitted on charges relating to those offences. The Prosecutor appealed, arguing that the conflict was indeed international in nature because the Federal Republic of Yugoslavia (Serbia and Montenegro) exercised overall control of Republika Srpska forces. Thus, the latter's actions could be imputed to the former. If this was the case, the conflict was international in nature and *Tadić* could be found guilty of crimes committed in an international armed conflict.[140]

The Appeals Chamber held that in order to find a State responsible for the acts of a military or paramilitary group it was necessary to establish that the State had equipped and financed the group, in addition to coordinating and helping it to plan its military activity.[141] However, in order for liability to be attributed, it was not

[136] *Tadić* – interlocutory appeal (n 29), para.64.
[137] ibid para.60.
[138] ibid 142.
[139] *Prosecutor v. Tadić* (IT-94-1-T) TC, Judgment, 7 May 1997.
[140] On the issue of distinguishing between international and non-international armed conflicts and the significance of this matter see Dino Kritsiotis, 'The Tremors of Tadić' (2010) 43 *Israel Law Review* 262, 274.
[141] *Prosecutor v. Tadić* (IT-94-1-A) AC, Judgment, 15 July 1999, para.131.

necessary for the Court to determine if the State had issued specific orders to the group to commit violations of international law.[142] This latter point differs from the findings set down in *Nicaragua* by the ICJ where it was held that liability for violations of IHL by the *contras* could only be attributed to the US if the latter had ordered that such acts be conducted.[143] Accordingly, the standard in *Tadić* was of 'overall control'. The result of the *Tadić* judgment therefore appears to put the ICTY and ICJ at variance over the definition of 'control', thereby fuelling fears over the fragmentation and its effects on international law.

Despite the apparent similarities of *Tadić* and *Nicaragua* in respect of control, there exist some fundamental differences which lead to the two cases being readily distinguishable. Most obvious is the difference in judicial setting. *Nicaragua* was heard by the ICJ while *Tadić* was heard by the ICTY Appeals Chamber. Another fundamental distinction is the purpose of the two judgments. *Nicaragua* was brought by one State in order to impute liability on another, and to hold the latter accountable (in the civil law) for IHL violations. *Tadić* was concerned with establishing the criminal liability of an individual for violations of international criminal law (which in this case incorporated violations of international humanitarian law).

Koskenniemi speculates that the *Tadić* decision was a 'perhaps failed' attempt to change international law in support of the fight against impunity.[144] Evidence of this failure can be seen in the ICJ's judgment in the case of *Bosnia v Serbia*[145] concerning the application of the Genocide Convention 1948.[146] It began by outlining

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[142] ibid para.131.
[143] *Nicaragua* (n 28) para.116.
[144] Koskenniemi (n 15) 9.
[145] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, I.C.J. Reports 2007, p. 43.
[146] Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 227, entered into force 12 January 1951.

the position taken in *Nicaragua* and by the ICTY in *Tadić*.[147] The Court then turned to the specific points made by Appeals Chamber in *Tadić*, noting the ICTY was not called on to rule on questions of State responsibility because 'its jurisdiction is criminal and extends over persons only.'[148] In respect of criminal liability the ICJ noted that it attached the 'utmost importance' to the ICTY's findings, but stressed that questions of general international law 'do not lie within the specific purview of its jurisdiction'.[149]

Furthermore, the ICJ found that the 'overall control' test, advocated by the ICTY, in respect of State responsibility broadened its scope 'well beyond' the fundamental principle governing State responsibility that a State is only to be held liable for its own conduct and those acting on its behalf. Responsibility for internationally wrongful acts can only be attributed to a State under customary international law, and here the Court relied on the Draft Articles on State Responsibility.[150] If the State gave instructions or directed that those acting on its behalf commit such an internationally wrongful act, then liability can be imputed to the State.[151] Consequently, the 'overall control' test in *Tadić* is unsuitable because it stretches too far the connection that must be present between a State and its agents for the State to be held responsible for the actions of the latter.[152] Prior to the ruling in *Bosnia v. Serbia*, it had been remarked by Joost Pauwelyn that the divergence between *Nicaragua* and *Tadić* might have been explained by seeing the latter test as

[147] *Bosnia v. Serbia* (n 145) paras.399-402.
[148] ibid para.403.
[149] ibid para.403.
[150] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, (UN Doc A/56/10); See James Crawford, *The International Law Commission's Draft Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002).
[151] *Bosnia v. Serbia* (n 145) para.406.
[152] ibid para.406.

evidence of developments in international law.[153] Evidently, the rejection by the ICJ of the *Tadić* approach towards State responsibility is strong evidence that, insofar as the ICJ was concerned, the definition of control for the attribution of State responsibility in general public international law was fixed as being the 'effective control' test.

When considered in such a fashion, it is possible to conclude that the *Nicaragua* and *Tadić* tests provide evidence of a conflict between norms of international law. By examining the two judgments in light of the *Bosnia v. Serbia* ruling it would appear that the appropriate test would depend on the particular jurisdiction of the court in question, in addition to the subject matter of the particular case. The jurisdiction of the ICTY is limited to the criminal prosecution of individuals for acts committed since 1991 in the territory of the former-Yugoslavia.[154] Similar criminal jurisdiction can be found in the Statutes of the ICTR[155] and the ICC.[156] The jurisdiction of the ICJ is limited to inter-State complaints[157] and the issuing of advisory opinions,[158] in the expectation that disputes between States might be settled peacefully without recourse to hostile action. By examining the functions of each court it is apparent that their purposes are, and were intended to be, completely separate. The *Tadić* and *Nicaragua* judgments present an example of how the fragmentation debate has been framed. One approach to control is viewed as being correct while the other is seen as wrong. There is no scope for viewing both as being

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[153] Joost Pauwelyn, *Conflict of Norms in Public International Law - How WTO Law Relates to Other Rules of International Law* (CUP 2003) 124.
[154] Statute of the International Criminal Tribunal for the former Yugoslavia ('ICTY Statute'), UN Doc S/RES/827, UN Security Council, 1994, art 1.
[155] Statute of the International Criminal Tribunal for Rwanda ('ICTR Statute'), UN Doc S/RES/955, UN Security Council, 1994, art 1.
[156] Rome Statute of the International Criminal Court ('ICC Statute') (17 July 1998) UN Doc A/CONF.183/9, entered into force 1 July 2002, art 1.
[157] Statute of the International Court of Justice (26 June 1945) 3 Bevans 1179; 59 Stat 1055; TS No 993, entered into force 24 October 1945, art 34(1).
[158] ibid arts 65-69.

correct. However, by examining the question of jurisdiction in even superficial detail, it can be seen that how a particular concept is defined is highly dependent on the particular jurisdiction of an international court.

The differences between the *Nicaragua* and *Tadić* judgments provide an excellent opportunity to assess how divergent court rulings are viewed by scholars considering the fragmentation of international law. It also affords an analysis of how fragmentation is sometimes seen as perilous to the functioning of the international legal system. Understanding the criticisms of those who see the *Nicaragua* and *Tadić* judgments as conflicting is important to understanding how the criticisms of the divergence between the IHRL, IHL and ICL regimes come to be seen as problematic. Koskenniemi states the difference between the ICJ and ICTY judgments as stemming from the desire of the latter court to increase accountability 'in pursuit of the struggle against "impunity"'.[159] An additional consequence of the *Tadić* decision was that the accountability of States was 'enhanced', again potentially posing a conflict with the ICJ's decision in Nicaragua.[160] However, these differences can be seen as possible evidence for the functional differentiation of the two regimes (in this case the 'special' regime of the ICTY and the 'general' regime of the ICJ).

The apparent conflict existing between *Nicaragua* and *Tadić* has been described as an example of 'fragmentation par excellence',[161] with the inference being that fragmentation leads to conflict, in turn threatening to compromise the unity of international law.[162] Prost continues to analyse the two judgments, and concludes that they do indeed allow for a 'margin of compatibility'.[163] The *Nicaragua* test is to apply in situations where prohibited acts are committed by individuals operating alone, and

[159] Koskenniemi (n 1) 205.
[160] Koskenniemi (n 74).
[161] Prost (n 36) 194.
[162] ibid 195.
[163] ibid 197.

the *Tadić* test is to apply where acts are perpetrated by organised groups.[164] He reasons this interpretation of the two tests results in 'both tests [being] valid and applicable simultaneously' and therefore not mutually exclusive.[165] Prost then asserts that a conflict exists when 'two norms get in each other's way', and given such a perspective he concludes that 'there is little doubt that a conflict exists between *Tadić* and *Nicaragua*'.[166] The two decisions work at 'cross-purposes' with the *Tadić* decision seeking to undo the position that the *Nicaragua* decision seeks to sustain.[167]

Such arguments advanced by Prost fail to take into account the different jurisdictional basis of the two courts. The ICJ is primarily, if not solely, concerned with inter-State claims, while the ICTY is concerned with imposing criminal sanction on those alleged to have committed serious violations of international law during the conflict in the former-Yugoslavia. Prost seemingly fails to appreciate the difference between the two regimes. Rosalyn Higgins has described this as 'different relevant contexts' meaning that the contextual basis of each of the two tests is different,[168] highlighting the differences between the jurisdictions.

Delving further into Prost's analysis it can be seen that he makes a number of assumptions which when viewed from the position taken by Higgins are revealed to be false. For example, his idea that there exists a 'margin of compatibility' between the ICJ and ICTY is evidence of a desire to reconcile the two cases.[169] Such desire to remove the conflict is based on the idea that there exists a conflict between the two in the first place. His statement is that the two tests are both 'valid and applicable

[164] ibid 197.
[165] ibid.
[166] ibid.
[167] ibid 198.
[168] Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *ICLQ* 791, 795.
[169] Prost (n 36) 197.

simultaneously'[170] is in itself true. The two tests are indeed valid and applicable simultaneously but the validity and applicability is dependent on the context of the regime in which they operate, the so-called 'different relevant contexts' highlighted by Higgins.[171]

The final criticism of the *Nicaragua* and *Tadić* judgments levelled by Prost is that the former seeks to uphold a 'Westphalian logic' centred upon the sovereign autonomy of States. [172] *Tadić* meanwhile pursues a 'post-Westphalian logic' aimed at maximising accountability for international crimes.[173] In itself, none of this is remarkable. The jurisdiction of the ICJ is founded upon the notion of Westphalian logic, as does the whole system of public international law where States are seen as the primary actors.[174] In contrast the jurisdictional remit of the ICTY is to hold individuals accountable for their crimes, a line of reasoning followed from Nuremberg where individuals were made subject to international law. However, Prost interprets such differences as being evidence of a conflict *per se* rather than a contextual difference between the regimes of international criminal law and public international law. His very use of the term 'post-Westphalian logic' is founded on the assumption that international law has moved beyond the traditional Westphalian notions of State sovereignty and autonomy. While there have undoubtedly been developments in international law so that individuals now have greater standing,[175] the jurisdiction of

[170] ibid.
[171] Higgins (n 168) 795.
[172] Prost (n 36) 198.
[173] ibid.
[174] See any public international law textbook e.g. James Crawford, ***Brownlie's Principles of Public International Law*** (OUP 2012) 12; Although for a counterpoint see A. Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133.
[175] For instance, individuals now have the right to bring cases before international human rights courts such as the ECHR.

the ICJ remains firmly situated in the Westphalian international legal system[176] as it remains a forum for States with individuals having no standing.[177]

Other critics of the divergence between the *Nicaragua* and *Tadić* judgments have written about the ICTY 'overruling' the ICJ.[178] However, such an interpretation of the two judgments rests on a misunderstanding of the international legal system. The ICTY Appeal Chamber in *Tadić* had no power to 'overrule' the ICJ, its power to overrule was limited in application to the Trial Chamber of the ICTY.[179] This misunderstanding is based on a misreading of the Appeal Chamber's judgment and a simultaneous confusion as to how courts interact. It is true that the Appeal Chamber refers to the *Nicaragua* test as being potentially 'unpersuasive'[180] but this must be taken as meaning 'unpersuasive' within the framework of the ICTY Appeal Chamber's own jurisdictional competence and not within the framework of public international law. Indeed, given the jurisdictional context of the ICTY as a whole,[181] any attempt to alter the rules established by the ICJ as they relate to *general public international law* could be seen as *ultra vires* because it lies well outside the competence of the ICTY as established by UN Security Council resolution 827.[182]

In its final report on the issue of fragmentation the International Law Commission (ILC) noted that the conflict between *Nicaragua* and *Tadić* is an example of a normative conflict between an earlier and later rule on international law.[183] It also highlights the fact that in *Tadić* the ICTY did not suggest that the two tests of control were to co-exist but that it sought to replace the *Nicaragua* test

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[176] ICJ Statute (n 157), art 34(1).
[177] ibid.
[178] Shane Spelliscy, 'The Proliferation of International Tribunals: A Chink in the Armor' (2001) 40 *Columbia Journal of Transnational Law* 143, 164.
[179] ICTY Statute (n 154), art 25.
[180] *Tadić* (n 141) para.124.
[181] ICTY Statute (n 154), art 1.
[182] UNSC Res 827 (25 May 1993) UN Doc S/RES/827.
[183] ILC Fragmentation Report (n 18), para.50.

altogether.[184] This reflects the view that the regimes are engaged in a conflict with one another, and in order to gain hegemony each 'seeks to makes its special rationality govern the whole' by transforming 'its preference into the general preference'.[185] However, Koskenniemi has expressed the view that regimes seek to avoid conflict with one another by introducing exceptions to the general rule.[186] One possible interpretation of *Tadić* is that the ICTY *did* replace the *Nicaragua* test altogether *but only* in the context of ICL. This would create an exception to the general rule outlined by Koskenniemi, with the general rule of international law remaining that which was established by the ICJ in *Nicaragua* and confirmed in *Bosnia v. Serbia.*[187]

The *Nicaragua/Tadić* issue gives rise to the appearance of a choice that has to be made between two conflicting definitions stemming from two different regimes. However, on closer examination this choice, and the conflict that is said to result from it, appears to be a false choice between two definitions that arise from two functionally different legal regimes. In this regard, there is no 'choice' between the overall and effective control tests as each is peculiar to the legal regime in which it is found. This is illustrative of the subjects examined in later chapters. The following section examines the idea of conflict in more detail.

1.1.3 Fragmentation and the three regimes

The broad focus of this thesis is the operation of the IHRL, IHL and ICL regimes within the context of fragmentation. The following section highlights the similarities and differences between the three regimes. It argues that although each is located within the international legal system they remain functionally separate from one

[184] ibid.
[185] Koskenniemi (n 70) 23.
[186] ibid 18.
[187] *Bosnia v. Serbia* (n 145) para.406.

another. Evidence of this can be found in subsequent chapters. In contrast to this position are those who believe that either the regimes *have* merged or that they *should* merge into a 'super regime'.[188] This section begins by providing an overview of the regimes' functional differences. It then proceeds to examine the idea that the three regimes have or should merge, before considering the concept of *lex specialis* as it relates to the three regimes.

1.1.3(a) - IHRL as a regime of international law

Human rights have been described as emanating from the period immediately after the Second World War.[189] Other commentators, such as Bowring, believe that any story concerning international human rights can only begin with the French and American revolutions in the late 18th Century.[190] Indeed, Bowring believes that 'IHRL did not exist in any form before the eighteenth century, in the declaration and bills of the French and American Revolutions.'[191] He does not explain his reasoning for this assertion which is unfortunate because there is no clear differentiation made between the American and French declarations, and the English Bill of Rights. The latter of which predates both of these events by nearly a century, and is a source from which American constitutional rights are drawn.[192] These bills of rights, while proclaiming universal rights, cannot really be said to be 'international human rights law' as they focus primarily on the rights of citizens living *within* the state in question, and do not create any form of law binding on the State *within* in the international community i.e. on the international plane.

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[188] See section below §1.1.4, 51.
[189] Christian Tomuschat, 'Human Rights and International Humanitarian Law' (2010) 21 *EJIL* 15, 16.
[190] Bill Bowring, 'Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights' (2009) 13 *JCSL* 1, 5.
[191] ibid.
[192] See Gordon S. Wood, *The Radicalism of the American Revolution* (Vintage Books 1991) 13-14, where Wood outlines the liberties of Englishmen, liberties evident in the US Bill of Rights.

Raz believes the human rights discourse has acquired the status of an ethical *lingua franca*, or in other words it is a discourse that cuts across national borders and is widely understood by many people who do not share the same legal or cultural background.[193] This position is much more credible if one has regard to international law as it is found in treaties and other international instruments. The UN Charter states the purpose of the UN is both to ensure international peace and security and to encourage respect for human rights,[194] creating a framework within which respect for human rights could be formulated at an international level.

While the IHRL regime can be considered a 'special regime', it is apparent that it is itself fragmenting into several universal and regional human rights regimes.[195] This is particularly noticeable when considering the functional and jurisdictional differences that exist, for example, between the ECHR and Inter-American human rights regimes (for the sake of clarity these are termed 'sub-regimes'). Each of the sub-regimes has its own rules of adjudication and interpretative methods. They also have their own judicial or, in the case of the UNHRC, quasi-judicial organs responsible for the interpretation of the law. Importantly, there is a link to a treaty which gives rise to state responsibility and demands the application of the principle *pacta sunt servanda* in order for the regime to remain effective.

1.1.3(b) - IHL as a regime of international law

International humanitarian law is perhaps the oldest of the legal regimes under examination in this thesis, at least insofar as there are rules pertaining to combat and the conduct of hostilities. A degree of restraint in combat has been accepted since

[193] Joseph Raz, 'Human Rights without Foundations' *in* Samantha Besson and John Tasioulas, (eds) *The Philosophy of international law* (OUP 2010) 321.
[194] Charter of the United Nations (26 June 1945) 59 Stat 1031; TS 993; 3 Bevans 1153, entered into force 24 October 1945, art 1(1) and (3).
[195] Cohen (n 127) 383.

ancient times.[196] This developed into chivalrous conduct between knights, although such a code was not applicable between commoners or between commoners and knights.[197] From the mid-19th Century, States became preoccupied with the conduct of hostilities and there was a renewed effort to minimise suffering. For example, the St Petersburg Declaration 1868[198] prohibited the use of exploding munitions which weighed less than 400g in addition to what would now be classed as hollow point or expanding rounds of ammunition. However, this Declaration only applied to the Great Powers and did not prevent the use of such munitions against those who were sometimes derisively called 'savages'.[199] IHL did gradually become more inclusive with the signing of the Hague Conventions in the early 20th Century. These were followed after the Second World War by the Geneva Conventions of 1949 which, along with their Additional Protocols (1977), stand as the most comprehensive set of laws regulating armed conflict.

IHL achieves 'special regime' status in a way that is not as immediately obvious as the IHRL regime. While IHL does have at its core a number of treaties (primarily the Geneva Conventions) a substantial body of the relevant law is to be found in customary international humanitarian law as evidenced through State practice, military manuals etc. The means of enforcement is also different with much of it occurring at the domestic level through military legal systems. Such diffusion *vis-à-vis* enforcement does not make the IHL less special than the other regimes

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[196] Lesley C. Green, *The Contemporary Law of Armed Conflict* (Manchester University Press 2008) 26.
[197] ibid 31
[198] Available at: http://www.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/3C02BAF088A50F61C12563CD002D663B/FULLTEXT/IHL-6-EN.pdf (Accessed 16 March 2014).
[199] Barbara Tuchman, *The Proud Tower: A Portrait of the World before the War, 1890-1914* (Ballantine 1996) 261-262. This was also the case with chemical weapons after World War I where their use was limited to what was termed 'uncivilised' quarters of the world (i.e. not in warfare between 'European' States). For example, Spiers states that gas was proposed, if not used, against 'recalcitrant Arabs' in Egypt and Mesopotamia. See Edward M. Spiers, *A History of Chemical and Biological Weapons* (Reaktion Books 2010) 70-71.

studied. A State's primary obligations are still engaged, leading to State responsibility for the violation IHL[200] and thus secondary rules are required to give effect to the law.

1.1.3(c) - ICL as a regime of international law

International criminal law focuses on holding those who commit serious violations of international law criminally responsible for their acts. The Nuremberg IMT after the Second World War saw the prosecution of major Nazi war criminals for crimes deemed to be offences against international law. It marks the beginning of international criminal law as it is understood today. The IMT took as its starting point the idea that individuals can be criminally responsible for violations of international law. It held that 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[201] This cornerstone of international criminal law removed the protection of immunity from government officials, ministers and those serving in the armed forces, thereby confirming that immunity was no longer available to shield individuals from prosecution.[202]

Modern international criminal law is enforced through a mixture of international and domestic courts and tribunals. For example the International Criminal Tribunal for the former-Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created in the early 1990s by the UN Security Council[203] as *ad hoc* courts in response to specific violations of international law. Such proliferation of tribunals at the international level gave fresh impetus to the

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[200] *Nicaragua* (n 28).
[201] Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg*, Germany, vol.22, London, 1950, 447.
[202] This continues today see ICC Statute (n 156), art 27.
[203] see UNSC Res 827 (n 182); and UNSC Res 955 (8 November 1994) UN Doc S/RES/955 respectively.

creation of a permanent International Criminal Court (ICC) in which those suspected of ICL violations can be prosecuted. The ICC operates under the complementarity principle meaning that the enforcement of the ICC Statute and the prosecution of individuals lie primarily with the States Parties. The ICC will only act if a state party is unable or unwilling to prosecute,[204] although there are mechanisms to permit the ICC Prosecutor to undertake his own investigations,[205] and to allow the UN Security Council to refer situations to the ICC.[206] International criminal law has therefore become an important and distinct element of international law since the creation of the ICTY in 1993. There are some however who believe that international criminal tribunals will always be subject to politics. Meernik comments that they will 'never escape the political interests which lead to their creation'.[207] This view accords with the idea that the entire body of international law is subject to political considerations and, most importantly, that international law is a tool, in the realist mould,[208] for states to further their own interests at the expense of others.

The history of international criminal law's growth has meant that it has had 'to develop like a parasitic plant, by seizing on all opportunities and latching onto anything that gives it the possibility of moving upwards towards the light'.[209] Whilst this is a rather stark assessment of international criminal law, it does appear to be reflective of how the regime has developed from the creation of the ICTY to the ICC. Indeed, the conduct covered by ICL 'involves both [IHL] and [IHRL]; the once-clear

[204] ICC Statute (n 156), art 17(1)(b).
[205] ibid art 15.
[206] ibid art 13(b).
[207] James Meernik, 'Victor's Justice or the Law: Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia' (2003) 47 *Journal of Conflict Resolution* 140, 145.
[208] Realist is used here in the sense of international relations theory, not jurisprudence.
[209] Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *International Law and Politics* 919, 921.

boundaries between the two have faded over the decades.'[210] This becomes even more apparent when one considers how the tribunals have approached the law as highlighted in their case law and procedures which will be discussed in more detail below. It remains to be said that ICL has been variously defined in the past,[211] however with the development of the doctrine in the 1990s and 2000s it is clear that it has moved beyond simply criminalising acts of piracy[212] and terrorism.[213]

As with IHRL and IHL, ICL has its own secondary rules relating to the enforcement of primary obligations. The ICL regime is heavily driven by the prominent role played by its treaties.[214] One possible reason for this is the modern demand for 'careful coordination' of technical issues.[215] In particular is the requirement that the criminal be certain enough to avoid miscarriages of justice. This is apparent with the ICC Statute (a treaty) and the Statutes of the UN international criminal tribunals (created by UN Security Council resolutions). The ICL regime has led to a well-developed body of secondary rules relating to interpretation, procedure and jurisdiction.[216] Given this, ICL could be poised to become a 'strong' special regime which has to rely less on general principles of international law because of its well-developed secondary rules.[217]

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[210] Henry J. Steiner, 'International Protection of Human Rights' *in* Malcolm D. Evans (ed) *International Law* (OUP 2006) 766.
[211] See George Schwarzenberger, 'The Problem of an International Criminal Law' (1953) 3 *Current Legal Problems* 263; M. Cherif Bassiouni, *The Legislative History of the International Criminal Court* (Kluwer 2005); Antonio Cassese, *International Criminal Law* (OUP 2008) 4-10.
[212] Gehard von Glahn, *Law Among Nations: An Introduction to Public International Law* (Macmillan 1981) 287.
[213] ibid 297.
[214] Jonathan Charney, 'Universal International Law' (1993) 87 *AJIL* 529, 550.
[215] ibid.
[216] As evidenced by the volume of case law and interlocutory appeals.
[217] This is similar to the development of European Union law which has been recognised as 'strong' special regime. See Joyner (n 30).

1.1.4 - The merging of the three regimes

Some scholars write of a 'shared purpose' of the IHRL and IHL regimes. For example, Kleffner and Zegveld state that the two regimes 'share the same purpose', namely the 'protection of individuals and human dignity, and there is [consequently] a substantial material overlap between the two systems.'[218] Doswald-Beck describes conceptual similarities between the IHL and IHRL, most notably the respect due to each human being without discrimination.[219] Hampson and Salama, in a report to the UN, state that the regimes 'emanate from the same basic concern: ensuring respect for human dignity in all times, places and circumstances.'[220] These are just some examples from the literature that are illustrative of a desire to merge, partially or totally, the two regimes of IHRL and IHL

The idea that IHRL and IHL have now merged together to form a 'super-regime' is one that is, *prima facie*, quite appealing. If, as the argument goes, IHRL and IHL share the same goals why should the international system recognise a difference? Expressed another way, should shared ends give rise to shared means? Indeed, Rene Provost has written that the 'human interests which humanitarian law seeks to protect are largely similar to those safeguarded by human rights law.'[221] For example, it has been claimed that the ECtHR has applied, obliquely, IHL in its judgments relating to Russia and Turkey. Orakhelashvili comments that the Court's approach 'should be based, as it mostly is, on the implicit application of the standards of humanitarian law, albeit cloaked in the [ECHR]-specific categories of legitimacy,

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[218] Jann Kleffner and Liesbeth Zegveld, 'Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law' (2000) 3 *Yearbook of International Humanitarian Law* 384, 385-386.
[219] Louise Doswald-Beck, 'International Humanitarian Law: A Means of Protecting Human Rights in Time of Armed Conflict' (1989) 1 *African Journal of International and Comparative Law* 595, 603.
[220] Francoise Hampson and Ibrahim Salama (2005) 'Working paper by Ms Hampson and Mr Salama on the relationship between human rights law and international humanitarian law' UN Doc: E/CN.4/sub.2/2005/14, para.3.
[221] Rene Provost, *International Human Rights and Humanitarian Law* (CUP 2002) 26.

necessity and proportionality.'[222] This approach, he argues, permits the Court to 'secure the legal outcomes required under both human rights law and humanitarian law.'[223] He describes this earlier in his article as the 'interchangeability' of international humanitarian law and international human rights law.[224] Such a view is however at variance with the principle that the ECtHR only has jurisdiction to examine violations of IHRL, and more specifically the IHRL contained in the ECHR. An examination of the ECHR reveals that the Court does not have jurisdiction to adjudicate matters of IHL.[225] Furthermore, as will be shown in subsequent chapters, IHL and IHRL, not to mention ICL, are far from 'interchangeable' concepts.

Hampson and Salama write that those 'defenders of the solemn promise of "never again" can and should support the increasing tendency for the two traditions, [IHRL] and IHL, to converge in a technically sound and practically useful and feasible manner.'[226] It has been argued that the ECtHR should simply apply the rules and principles of IHL 'when deciding whether a particular instance of deprivation of life in the context of an armed conflict resulted from a "lawful act of war", or was instead a violation of the right to life.'[227] Likewise, Abresch asks, in an article concerning the Chechen cases before the ECtHR, whether the Court made a mistake 'in disregarding humanitarian law'.[228] However, any application of IHL by the Court

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[222] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 *EJIL* 161, 174.
[223] ibid.
[224] ibid 169.
[225] Bowring (n 190).
[226] Hampson (n 220) para.31 .
[227] Giulia Pinzauti, 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law' (2008) 6 *JICJ* 1043, 1059.
[228] William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *EJIL* 741, 746.

would in all likelihood be *ultra vires* if one views the ECtHR's jurisdiction as limited to assessing violations of the ECHR.[229]

A move towards a unified body of international law would inevitably lead to a lack of specificity in the application of the law. For instance, would such a 'new' body of law apply to only states or to individuals, or to both? If it applied to only individuals could states be ordered to pay reparations for the acts of its agents? If it applied to only states would this not be violating the principles of individual responsibility set down at Nuremberg?[230] Other questions relate to how specific violations are defined, for example how should torture be defined in this unified system, as a violation of citizen's rights by a state (traditional IHRL), or as a violation of an individual's rights by the enemy (traditional IHL)?

Several criticisms can be levelled at the 'super-regime' theory. The first as advanced by Bowring is that the systems have different histories[231] although he fails to mention how this prevents the two systems from merging in the present. The second argument, also advanced by Bowring is that IHL and IHRL have different normative structures. IHL is very conservative in its application while IHRL is, he believes, more liberal in its application.[232] However, perhaps the strongest argument that can be levelled at the super-regime theory is that its proponents have confused the aims of the IHRL and IHL regimes with their processes and substantive law. As the European Union's *Guidelines on Promoting Compliance with International Humanitarian Law* state quite categorically IHL and IHRL 'are distinct bodies of law

[229] An analogous example is given by Akehurst when discussing the application of equity and general principles of international law. He reasons that parties may believe courts that apply such principles act *ultra vires* because they have no legal competence (in the sense that they do not form part of the relevant treaty). Michael Akehurst, 'Equity and General Principles of Law' (1976) 25 *ICLQ* 801, 811.
[230] Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, UN GA Res 95 (I) (11 Dec 1946) UN Doc A/Res/1/95.
[231] Bill Bowring (n190) 5.
[232] ibid.

and, while both are principally aimed at protecting individuals, there are important differences between them.'[233] Those who advocate such a 'super-regime' appear to be ignoring the legal realities surrounding these areas of law, ignorance which is ultimately harmful to international law because it would inevitably lead to the blurring of what are now distinctly demarcated legal boundaries.

There is also the issue of IHRL being aimed at restricting states rather than sanctioning the conduct of individuals. Ratner *et al* note that regional human rights courts 'are not for determining individual accountability for international crimes' as they have neither criminal nor penal sanction nor jurisdiction over individuals.[234] This is a common feature of the IHRL regime because it binds states *vis-à-vis* their citizens, not their citizens *vis-à-vis* other citizens.[235] Further explanation on this can be found in the report of the ILC on fragmentation which notes that '"Human rights law" aims to protect the interests of individuals while "international criminal law" gives legal expression to the "fight against impunity".'[236] The simple idea that the three regimes should be, or have been, fused cannot overcome the immense functional differences that exist between the regimes, a point to which this thesis returns in later chapters.

1.1.5 - The doctrine of *lex specialis* and the three regimes

The legal maxim *lex specialis derogat generali* holds that the specific law will prevail over the general law if both could be applied to the same scenario.[237] *Lex specialis* has been referred to by the ICJ to illustrate the operation of the doctrine in international

[233] *European Union Guidelines on Promoting Compliance with International Humanitarian Law* (2009) 15th December 2009, c 303/12, para.12.
[234] Steven Ratner et al, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (OUP 2009) 256.
[235] Although, especially in the ECHR, there is much discussion as to the 'horizontal application' of human rights norms see Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 *MLR* 878 for a discussion on this matter.
[236] ILC Report on Fragmentation (n 18) 15.
[237] Simma (n 45) 488.

law. In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* in 1996,[238] the court faced the problem of reconciling IHRL and IHL. The Court's response was to resort to the principle of *lex specialis*. It determined that the protection afforded under the ICCPR did not cease in times war (except for derogable provisions under Article 4). It noted that in principle the right not to be *arbitrarily* deprived of life applies during hostilities.[239] However, the definition of 'arbitrary' was to be determined by reference to the law of armed conflict which operates as *lex specialis* 'designed to regulate the conduct of hostilities.'[240] Thus, it would appear, the 'special' law of armed conflict was to be used to interpret IHRL. The ICJ revisited the *lex specialis* IHRL/IHL issue in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.*[241] The Court considered the issues and determined that human rights protection does not cease in times of armed conflict.[242]

Other purported examples of the operation of the *lex specialis* doctrine can be found in the jurisprudence of the ECHR in regard to several cases relating to the situation in the Russian Republic of Chechnya. Abresch notes that while the Court has not 'openly relied on humanitarian law in its decisions it has long been possible to argue that the *lex specialis* approach was being followed.'[243] Despite such a bold statement, there is no evidence to suggest that the ECHR has adopted a *lex specialis* approach in its judgments. Bowring has noted that raising IHL before the Court was discussed by lawyers representing claimants but a decision was taken not to do so

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[238] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 I.C.J. Rep 1996, p. 226.
[239] ibid para.25.
[240] ibid para.25.
[241] *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004, General List No. 131, ICJ Rep 2004.
[242] ibid para.106.
[243] Abresch (n 228) 742.

because the Court only has jurisdiction over matters relating to human rights law as specified in the ECHR.[244]

It is also possible that prohibited conduct under one legal regime is also prohibited under another. With regard to the problems outlined above regarding *lex specialis* and parallelism, Schabas believes that '*lex specialis* is not invoked if both bodies of law are applicable.'[245] For example, the use of torture is prohibited under international humanitarian law via the Geneva Conventions and customary international law, and under international human rights law through, for example, the UDHR, the ICCPR, and (where relevant) the ECHR. This is in addition to it being prohibited under public international law as a peremptory norm. As such, according to Schabas, the doctrine of *lex specialis* would not apply and the norms would apply in parallel. This was displayed in the *Uganda* case at the ICJ where the Court held that Uganda had violated both international human rights law *and* international humanitarian law with regard to the same conduct.[246] This is significant to Orakhelashvili because it constitutes 'a warning that even if the protection in one of the fields is found to be less than in the other field, the applicability of the latter will not thus be prevented.'[247]

The interaction of IHRL and IHL is frequently viewed through the prism of *lex specialis*. However, questions remain as to whether or not *lex specialis* is an appropriate methodology for resolving the apparent conflict between the two regimes. First, if *lex specialis* is a method of resolving a conflict between two regimes does this presuppose a conflict exists? Second, does the operation of IHL as the *lex specialis* to

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[244] Bowring (n 190).
[245] William Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum' (2007) 40 *Israel Law Review* 592, 597.
[246] *Case Concerning the Armed Activities on the Territory of the Congo (DRC v. Uganda)* Judgment, 19 December 2005, ICJ Reports 2005.
[247] Orakhelashvili (n 222) 163.

IHRL imply a hierarchical relationship between the two and if so when was this hierarchy created? Third, is the use of lex specialis an appropriate doctrine when the three regimes can be considered functionally separate? These three questions form a framework around which the remainder of this section is built.

1.1.6 - Does a conflict exist?

If *lex specialis* is a method of resolving conflicts between regimes it stands to reason that a conflict must first be said to exist. This subsection begins by examining what is meant by 'conflict'. It begins by examining the theory behind conflicts of norms (and by extension their regimes) before progressing to an analysis of how these theories coincide with contemporary thinking of conflict between norms and regimes in international law. The nature of conflict between norms is a very broad concept.[248] Examples include 'logical contradiction',[249] lack of consistency,[250] the validity or invalidity of norms,[251] 'soundness'[252] and coherence or incoherence,[253] to name just a handful. The position taken in the present analysis is that of functional conflict as identified by H. Hamner Hill.[254] This is where a conflict rests on the 'goals or purposes which underlie norms',[255] with the additional requirement that a particular norm is valid only within the legal regime in which it is found.

One example of a conflict offered by Hill is when two permissory norms designed to implement a particular policy are either opposed to one another or where 'availing oneself of one of the permissions makes it impossible to avail oneself of the

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[248] H. Hamner Hill, 'A Functional Taxonomy of Normative Conflict' (1987) 6 *Law and Philosophy* 227, 239.
[249] Stephen Munzer, 'Validity and Legal Conflicts' 82 *Yale Law Journal* 1140, 1140.
[250] Jaap Haag, 'Rule Consistency' (2000) 19 *Law and Philosophy* 369, 371-372.
[251] Hans Kelsen, *General Theory of Law and the State* (The Lawbook Exchange 1999) 410.
[252] Roger Shiner, *Norm and Nature: The Movements of Legal Thought* (Clarendon 1992) 192.
[253] Ole Fauchald and Andre Nollkaemper, 'Introduction' *in* Ole Fauchald and Andre Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 8.
[254] Hill (n 248) 229.
[255] ibid.

other permission.'[256] The example given is that of a norm which states that one must open a window and simultaneously close a window: it is impossible to do one without violating the other.[257] In essence, the position outlined by Hill and Kelsen can be described as norms 'getting in each other's way'[258] leading to 'contradiction, collision, and competition'.[259] The parallels between this idea and that of the fragmentation of international law are readily apparent. Different norms and, in particular, normative regimes in international law pull the same concept in different directions leading to the inevitable and damaging fragmentation of international law.[260]

Rule consistency, therefore, is of practical interest in the development of any legal system, with a corollary being the idea of normative compatibility.[261] Haag believes that such compatibility 'is always relative to some background of constraints.'[262] He uses the idea that it is impossible for a person to both be a thief and not a thief, noting that there exists an incompatibility if the ideas simultaneously exist because, as a matter of logic, such a state of affairs cannot exist.[263] This is termed the 'conceptual impossibility' constraint.[264] Stephen Munzer illustrates this further writing that joint conformity to two rules (or norms) is logically impossible.[265] He also notes that while talk of collision and conflict is merely metaphorical, it 'suggests the idea of a sharp disagreement or opposition implicit in the etymology of

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[256] ibid 236.
[257] ibid.
[258] ibid 239.
[259] ibid.
[260] This was discussed in more detail above in respect of *Nicaragua* and *Tadić*, and the IHRL/IHL/ICL regimes in general: §1.1.2, 34.
[261] Haag (n 250) 373.
[262] ibid 373.
[263] ibid 373.
[264] ibid 374.
[265] Munzer (n 249) 1144.

"conflict."'[266] Such disagreements lead to a 'quandary' in which those who are subject to the norms, 'norm-subjects', are placed by rules that require or allow 'incompatible courses of behaviour'.[267]

Incompatible courses of behaviour, according to Munzer, result in a clash or collision only if any act by a norm-subject violates a duty-imposing rule.[268] Despite such a definition, the various regimes studied in subsequent chapters do not give rise to a 'permissory conflict' as none of the regimes permits torture, enforced disappearance or rape, with the destruction of property being permissible in only certain circumstances. The norms of each regime are equally valid in the sense that they 'may not legally be ignored or overthrown'; that is to do so would be to violate a legal duty or obligation to conform to the rule.[269] Should a conflict exist then it follows that a judge deciding a case cannot conform to both rules and therefore needs to resolve the conflict before issuing a judgment.[270] Ultimately, guidance cannot be sought from both applicable norms and a decision is to be made as to which is to be deemed valid in a given set of circumstances.[271]

However, where the legal system lacks the doctrine of *stare decisis*, (as is sometimes said to be the case with international law[272]) 'nothing logically prevents both [conflicting] rules from continuing to be valid, with their range of application unaltered.'[273] This point is also highlighted by Romano who has written that due to the lack of hierarchy in international judicial structures 'no international judge feels

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[266] ibid.
[267] ibid.
[268] ibid.
[269] ibid 1148.
[270] ibid 1151.
[271] ibid 1164.
[272] Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' 2 Journal of International Dispute Settlement 5, 8-9.
[273] Munzer (n 249) 1151-52.

bound by the jurisprudence of another court.'[274] He also suggests one reason international courts develop jurisprudence independently of one another is because, in addition to being 'self-contained legal islands',[275] there is a sense of judicial pride which prevents judges from paying too much deference to the benches of other courts.[276]

The views of Munzer are a development of Hans Kelsen's own ideas about normative conflict. For Kelsen, if two norms exist that are contradictory, then one is true and the other is false.[277] Without such a concept his vision of law as a system of non-contradictory norms breaks down.[278] Kelsen also defined conflict as existing where norm is contrary to norm,[279] a point he explained further when he noted 'one cannot claim that two norms whose content is, logically speaking, mutually exclusive are valid at the same time.'[280] The differentiation between true and false norms is a symptom of any given norm's validity which should not be confused with whether or not a norm is in itself effective.[281]

The efficacy of a norm and its validity are linked, with the former being dependent on the latter but not *vice versa.*[282] For Kelsen a norm 'is not valid *because* it is efficacious; it is valid *if* the order to which it belongs is, on the whole, efficacious.'[283] Kelsen's doctrine of validity is also contingent upon an existence in a certain time and a certain space.[284] In other words, a norm's validity, and thus its

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[274] Cesare P.R. Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2008) 41 *New York University Journal of International Law & Politics* 755, 758.
[275] ibid.
[276] ibid.
[277] Hans Kelsen, 'What is the Pure Theory of Law?' (1959) 34 *Tulane Law Review* 269, 270.
[278] ibid.
[279] Hans Kelsen, *Introduction to the Problems of Legal Theory* [The Pure Theory of Law or Reine Rechtslehre] (Clarendon Press 1992) 71.
[280] ibid 112.
[281] Kelsen (n 277) 272.
[282] Kelsen (n 251) 41-2.
[283] ibid 42.
[284] ibid.

efficacy, is finite and subject to boundaries, a concept which is readily identifiable in the international sphere if one considers, for example, the subject-matter jurisdiction of the ICJ which is to settle disputes between States.[285]

If *lex specialis* can be seen as a method for resolving conflicts, it stands that there must firstly be a conflict to resolve. The preceding section has considered how conflicts could be construed as illusory with regard to the operation of the IHRL, IHL and ICL regimes. This is of particular note in the case of torture, enforced disappearance, sexual violence and the wanton destruction of property. In these instances, each regime prohibits identical physical acts but the legal methods differ on account of the functional differences between the regimes.

1.1.7 - Do the regimes exist in a hierarchy?

If *lex specialis* is to be used to reconcile the three regimes this could imply the emergence of a hierarchy of regimes in international law. For instance, if IHL (or ICL) is a 'special' regime of IHRL it could be implied that IHRL exists as a higher form of law. The general existence of hierarchies in international law has been doubted in the case of both States[286] and legal regimes.[287] A limited hierarchy is recognised in relation to peremptory norms of general international law.[288] However, these are limited in scope and their contents highly contested. Without such a hierarchy one regime does not (and cannot) take precedence over the others.

Perhaps the only exception to this rule, and thus the only hierarchy that exists, in the international legal system, is that between the 'general' law (of which

[285] ICJ Statute (n 157) art 34(1) provides that 'Only States may be parties in cases before the Court.'
[286] The 'traditional' Westphalian notion of sovereignty precludes a legal hierarchy of States. This of course, does not exclude the possibility of a political hierarchy. See A. Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133.
[287] d'Aspremont (n 14).
[288] VCLT, art 53.

peremptory norms are to be considered a part[289]) and the 'special' regimes. This relationship could be bilateral in nature. For example, the general would have a relationship with IHRL, IHL or ICL on an individual basis. However, the special regimes would not have a relationship with each other, except for the possibility of an indirect relationship with one another through the general law. The continual presence of the general law would be essential for the operation of the international legal system. It provides a 'fall back' set of legal principles should the law of the special regime fail.[290]

One problem that results from viewing IHL as *lex specialis* of IHRL is what happens if the IHL regime fails and has to fall back on a set of legal principles? If IHL is the *lex specialis* of IHRL, this implies the first method of resolving the problem would be to defer to the 'general' rules of IHRL. Only if the rules of the IHRL regime failed as well would recourse be made to the general rules of international law. Such a scenario is potentially troubling given the functional differentiation between the two regimes.

1.1.8 - Is *lex specialis* appropriate?

Lastly, this section turns to the question of whether the *lex specialis* doctrine is appropriate in the context of functionally separate regimes? One perspective on the separateness of the regimes is that they have always been separate and therefore fragmentation does not apply because there was never unity in the first place.[291] Comparing the two is like comparing chalk with cheese according to Bowring who notes that often the two are mixed together with disastrous results: 'chalky cheese is horribly indigestible, while cheesy chalk is no good at all for writing on

[289] ibid.
[290] ILC Report on Fragmentation (n 18) para.82.
[291] Bowring (n 190) 2.

blackboards.'[292] While this outlines a strict separateness of the regimes it also denies the existence of fragmentation by stating that there was no unity between the IHRL and IHL regimes.

As has been seen with the *Nicaragua* and *Tadić* cases, it is clear that superficial similarities may exist between the two, it is also apparent on closer inspection that the two cases relate to entirely separate legal regimes namely the regime established by the ICJ and the regime established by the ICTY. This approach can be followed when considering the application of IHL, ICL and IHRL. If the case falls within the jurisdiction of the ICC or a State exercising its powers under the complementarity provisions of the ICC Statute then the legal regime and the consequent body of rules governing it would be either ICL or national law. On the other hand should the matter be brought before the ECHR, for example, the legal rules governing this case will be those that are found in the ECHR and the subsequent interpretative jurisprudence of the ECtHR. In this fashion, clearly demarcated lines are established between the legal regimes, and normative conflict can be thus avoided by reliance on the formal distinctions that already exist between the two, or more, regimes. For Hans Kelsen 'normative conflict' is 'as senseless as a logical contradiction because neither can exist.'[293] There needs to be 'logical consistency'.[294] However, *within* the individual regimes of IHRL, IHL and ICL, there is a trend towards consistency as will be shown in the following chapters. *Within* the differing legal regimes, there is 'logical consistency', or at the very least an understanding that such consistency is vital for the effective operation of the regime. In turn this compels actors within the individual systems to strive towards consistency.

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[292] ibid.
[293] Jorg Kammerhofer, 'Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law' (2009) 22 *LJIL* 225, 235.
[294] ibid.

1.1.9 - Conclusion to Part One

The purpose of the preceding sections has been to introduce the concept of fragmentation and to outline some of the main trends and themes within the literature. It began by considering the definition of fragmentation, noting that the term is essentially political in nature. Linked to this was the idea that fragmentation has come to be seen in the literature as a threat to international law which can be reversed by greater constitutionalisation. It was argued that this would not be appropriate given the functional differences between the regimes that exist in the international legal system. To illustrate this, the *Nicaragua* and *Tadić* cases before the ICJ and ICTY were studied. This was followed by an examination of the concept in relation to the IHRL, IHL and ICL regimes and how each possesses a separate function to the others. Lastly, the doctrine of *lex specialis* was considered in relation to the IHRL, IHL and ICL regimes. The fragmentation of international law, however that is defined, has lead to a profound change in the operation of international law. Instead of legal 'power' being held by one or two institutions e.g. the ICJ, the ability to adjudicate issues has been granted to several judicial institutions. Each of these institutions has the ability to appoint judges and issue judgments on subjects *within* its jurisdiction. This leads to the creation, via secondary rules, of specialised regimes of international law.

1.2.1 - Part Two: Mitigating fragmentation – a role for a formal approach to law?

The validity of a particular legal norm has been said to be reliant upon whether or not that norm meets the formal criteria of identification of norms peculiar to that particular legal system.[295] If it does then the norm can be said to be legally valid, if not then it is invalid. For Gaustini, this requires the existence of rules which permit norms to be described as constituting a source of law.[296] As a consequence, this necessitates the existence of a distinction between 'law' and 'non-law', legal and extra-legal norms. This raises questions as to whether, in the context of the present international legal system, a policy-orientated approach to law is appropriate or achievable. In the wide definition, the policy-orientated approach views all institutional pronouncements as 'law', putting them on equal footing with treaties. However, according to D'Amato 'law is not everything' and a policy-orientated approach, by its very nature, contains the possibility of including contradictory positions weakening the validity of legal rules.[297] Such a point is also linked to the content of the law which depends on 'the interpretation of formally established sources.'[298] Under this position, interpretation can only occur if there is something concrete to interpret.

The policy-orientated approach was principally advocated by Myres McDougal and others in several works spanning the second-half of the 20th Century.[299] The work of these scholars has been influential in several fields of

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[295] Riccardo Guastini, 'Normativism or the Normative Theory of Legal Science: Some Epistemological Problems' *in* Stanley L. Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon 1998) 329.
[296] ibid.
[297] Anthony D'Amato, 'Is International Law Really "Law"?' (1984) 79 *North Western University Law Review* 1293, 1302.
[298] Ota Weinburger, 'Formalism or Anti-formalism' *in* Werner Krawietz et al (eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (Dunker and Humbolt 1994) 690.
[299] e.g. Myres S. McDougal et al, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (Martinus Nijhoff 1994); Myres S. McDougal and Harold D. Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 *AJIL* 1;

international law.[300] Such an approach aims to guide decision-makers and affords them the opportunity to relate 'the decisions that they make to the basic goal values of preferred public order.'[301] An appeal to goals and the authority of 'universal values' implicit in the term 'preferred public order' can be said to be the hallmark of the policy-orientated approach to international law.[302] McDougal *et al* remark the public order they envisage is founded on the notion of 'human dignity',[303] a notion undermined by 'arbitrary formalism'.[304]

The formal, traditional approach to international law, namely treaties and their interpretation by courts, has been described as the 'least flexible' and least sensitive to the 'political and economic reality of law-making'.[305] It is from the 'shackles of traditionalism' that the policy-orientated approach seeks to free international law.[306] To this latter approach, international agreements are best understood 'not as mere texts' but as 'continuous processes of communication and collaboration in a larger community context', with the text of any given treaty merely being one outcome of such processes.[307] However, a positivistic approach to international law prevents jeopardising the neutrality inherent in international law which ultimately regulates relations between sovereign entities.[308]

The policy-orientated approach contrasts sharply with traditional methods of law-ascertainment and validity. When carried to its extreme the policy-orientated

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Myres S. McDougal, 'The Hydrogen Bomb Tests and the International Law of the Sea' (1955) 49 *AJIL* 356.

[300] An overview of the operation of the New Haven School and its influence on international law can be found in Iain Scobbie, 'Wicked Heresies or Legitimate Perspectives? Theory and International Law' *in* Malcolm D. Evans (ed) *International Law* (OUP 2006) 83.

[301] McDougal (n 299) xi.

[302] Nigel Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 *Harvard Journal of International Law* 81, 85.

[303] McDougal and Lasswell (n 299) 1.

[304] McDougal (n 299) xvii.

[305] Douglas M. Johnston, *The International Law of Fisheries* (Martinus Nijhoff 1987) lxv.

[306] ibid. xxv.

[307] McDougal (n 299) xxix.

[308] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *AJIL* 413, 421.

approach permits the existence of contradictory 'laws' regarded as impossible by writers such as Kelsen. Fitzmaurice has described the policy-orientated approach as being a plea for an 'open-ended' technique of interpretation.[309] This point was conceded earlier by McDougal who wrote that the prescriptions and technical terms of the law are not to be seen as 'absolute inelastic dogmas but rather flexible policy preferences, permitting decision-makers a very broad discretion...for promoting major policies.'[310]

The policy approach leads to a situation where judges (or 'decision makers' as they are known in the language of the policy-orientated approach) have considerable latitude as to how they interpret the law. For Alexander Hamilton, writing as Publius in Federalist 78, it was crucial to avoid such exercising of arbitrary discretion by the judiciary. Accordingly, he wrote 'it is indispensable that they [judges] should be bound down by strict rules and precedents'.[311] Such rules and precedents would serve to 'define and point out their duty in every particular case that comes before them'.[312]

The policy-orientated approach has been described as the denial of the normative quality of legal rules and as deciding questions of legality 'by primary reference to extra-legal sources'.[313] Anderson used the example of the legality of the atomic bomb tests as analysed by McDougal[314] as an example of the policy-orientated approach to international law. McDougal had described the tests as a means of ensuring world peace, and thus the legality of such tests became 'a factor of end and efficacy'.[315] To Anderson this was clearly 'extra-legal' and most importantly could be

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[309] Gerald Fitzmaurice, 'Vae Victis or Woe to the Negotiators! Your Treaty or Our Interpretation of it?' (1971) 65 *AJIL* 358, 367.
[310] McDougal, 'The Hydrogen Bomb Tests...' (n 299) 358-359.
[311] Federalist 78, in James Madison et al, *The Federalist Papers* (Penguin 1987 [1788]) at 442.
[312] ibid.
[313] Stanley V. Anderson, 'A Critique of Professor Myres S. McDougal's Doctrine of Interpretation by Major Purposes' (1963) 57 *AJIL* 378, 378.
[314] McDougal, 'The Hydrogen Bomb Tests...' (n 299).
[315] Anderson (n 313) 380.

'easily applied...without reference to the legal system they originally set out to interpret.'[316] Once this happens the law ceases to exist as a normative order.[317] As a consequence, the analysis of the law becomes detached from the legal system, and questions of legality are not answered by reference to law.[318]

The policy-orientated approach has been criticised by Fitzmaurice who wrote there exists an 'overriding preponderance...to certain notions of a very general, wide and far-reaching character' namely notions of public order founded on human dignity.[319] This permits the 'indiscriminate' application of a collection of statements not adequately related to weight or precedence.[320] Indeed, the very notion of 'human dignity' was viewed by Fitzmaurice as being vague and 'too subjective to be of practical value to the adjudicator'.[321] He ultimately dismissed the nebulous and open nature of the policy-orientated approach, concluding while it aimed 'at order and liberality, its concepts, by their very breadth, open the door to anarchy and abuse.'[322]

Philip Allott has also criticised the open nature of the policy-orientated approach, noting that if it lies open to each State to define legal terms as it wishes while an opposing State demonstrates that its own interpretation is equally valid, 'the specifically legal character of the law would have ceased to exist' and all law would simply become a matter of politics.[323] Should international law become dependent on the perception of its subjects for its own validity it would 'evaporate into pure subjectivism'.[324] The policy-orientated approach has been described as 'indiscriminate' in that all decisions by all international decision makers can be seen

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[316] ibid.
[317] ibid.
[318] ibid 382.
[319] Fitzmaurice (n 309) 368.
[320] ibid 368.
[321] ibid 370.
[322] ibid 373.
[323] Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 *BYIL* 79, 127.
[324] ibid 102.

as international law, leading to uncertainty, and in turn, causing a loss of accountability.[325]

According to the policy-orientated approach, the decision-maker is necessarily empowered to supplement the binding law applicable to, and agreed upon by, the parties (for example treaties) with wider, extra-legal concepts founded upon the 'basic constitutive policies of the larger community'.[326] However, this assumes that either the 'basic constitutive policies of the larger community' are readily apparent to the adjudicator, or that the adjudicator is free to define and determine what these policies and values are to be.[327] Indeed, at a fundamental level, the policy-orientated approach relies on the agreement between the author and the reader on fundamental issues of international law and to the 'corrective relative weights to be given to the conflicting interests of the States involved.'[328] Expressed another way, the policy-orientated approach knows the answer before it has done the working out, what remains is to make the law fit the policy goal. Such a viewpoint turns the idea of law on its head, instead of guiding policy law is directed by it.

For McDougal et al, international law is a means to ensure 'the eventual organization of security and freedom in a peaceful and abundant world community' with the only other choice being 'indignity' and possible 'human annihilation'.[329] However, as Allott makes clear, the policy-orientated approach is an absolutist and idealistic approach to international law, unashamedly and intentionally value-laden, and heavily reliant on subjective terms such as 'fair', 'reasonable', 'right' as well as

[325] Jean d'Aspremont, *Formalism and the Sources of International Law* (OUP 2012) 108.
[326] Fitzmaurice (n 309) 372.
[327] Allott (n 323) 125.
[328] ibid 80.
[329] Myres S. McDougal, 'Law as a Process of Decision: A Policy Orientated Approach to Legal Study' (1956) 1 *Natural Law Forum* 53, 72.

the trinity of 'ought', 'should' and 'may'.[330] Consequently, there is an implicit, and often explicit, claim by scholars who adhere to the policy-orientated approach that not only is their approach to international law one of several possible interpretations but that it is *only* approach to international law worth considering. McDougal reveals his position on this matter noting there is a choice between human dignity, guaranteed by the policy-orientated approach, and human indignity which will occur should such an approach to international law not be taken.[331]

The reliance of the policy-orientated approach on extra-legal sources for its validity raises questions as to what is and what is not to be considered law. Reisman notes that the policy-orientated approach focuses on a range of centralised and decentralised settings in which decisions are made.[332] This distinguishes the approach from 'conventional' legal analyses that focus on texts that are characterised solely as 'legal' and 'the events to which the rules draw attention.'[333] Here the analysis returns to the criticisms levelled against McDougal by Anderson who described the former's analysis of the law as being 'not legalistic',[334] an analysis in which the word 'law' is used only in an 'honorific sense'.[335] If this is the case then there is little to separate law from non-law, law from politics and, as Fitzmaurice has noted, order and anarchy.[336]

For any given norm or rule to be legally valid it must be possible to discern what is and what is not law, which is not possible with the policy-orientated approach

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[330] Allott (n 323) 123.
[331] see McDougal's comment on the role of international lawyers where he writes of the 'social role and responsibility' of the legal scholars which is essentially to bring their skills and resources 'to bear upon clarification and recommendation of the policies and procedure' that will lead to a utopian vision of international society. McDougal (n 329) 72 .
[332] W. Michael Reisman, 'The View from the New Haven School of International Law' (1992) 86 *ASIL Proc* 118, 122.
[333] ibid. 121.
[334] Anderson (n 313) 382.
[335] ibid.
[336] Fitzmaurice (n 309) 373.

to international law. For McDougal, law is viewed as being not merely about texts and treaties but instead as a 'process of decision'[337] where lawyers, legal scholars and adjudicators weigh up not only the law but also policy choices and their own individual social roles and responsibilities.[338] d'Aspremont condemns this, writing that policy-orientated approach tends towards the idea that international law is a form of 'social engineering' in order to achieve certain societal goals.[339]

There is a tendency towards instrumentalism where international law is to be regarded not as a defined set of rules and obligations, but 'a comprehensive process of decision-making'.[340] Such a view is possible because of the notion that international law is a product of a social process rather than a ruled-based system.[341] However, such an approach necessarily replaces the 'is' of law with the 'ought' of politics as highlighted by Allott,[342] with what is law being derived from the formula 'fact x policy = law'.[343] Thus it relies on constructing law rather than establishing law by a deductive process in the sense of moving from premise to premise to a conclusion.[344] The policy-orientated approach also downplays the traditional legitimacy of international law as a legal system which has been said to rest 'largely on the viability of treaties as a source of law.'[345]

Identifying 'law' from 'non-law' has become more difficult over time.[346] d'Aspremont has written that law 'constitutes a set of *rules* which, at times, and for

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[337] McDougal (n 329) 56.
[338] ibid 72; see also McDougal and Lasswell (n 299) 28.
[339] d'Aspremont (n 325) 105.
[340] ibid.
[341] ibid 106.
[342] Allott (n 323) 123.
[343] ibid 121.
[344] ibid 80.
[345] Christopher J. Borgen, 'Resolving Treaty Conflicts' (2005) 37 *George Washington International Law Review* 573.
[346] Weil (n 308).

multiple purposes, need to be ascertained.'[347] He attributes the decline in sensitivity 'to the necessity of rigorously distinguishing law from non-law'.[348] For Koskenniemi the identification of international law has become merely a matter of 'more or less'.[349] Indeed, according to Koskenniemi, the anti-formalists have dressed their doctrine in a 'culture of dynamism' in which questions such as 'why bother with rules and forms' are asked,[350] reminiscent of the 'openness and liberality' that the policy-orientated approach apparently tends towards.[351] The appearance of liberty permits the use of several 'looser law identification criteria'[352] meaning international law has moved away from the identification of legal rules 'by virtue of the formal sources from which they emanate'.[353]

The changes in law-ascertainment have led, d'Aspremont believes, to 'uncertainty regarding the existence of legal rules' that in turn prevents such rules from providing meaningful commands.[354] Furthermore, a failure to distinguish between law and non-law strips international law of its normative character[355] that ultimately undermines the authority of international law.[356] The deformalisation of international law has led to the belief that there is a grey area where it is impossible to distinguish law from non-law. For d'Aspremont, this leads many to conclude that all international law is 'soft'.[357] Deformalisation also leads to the potential for regime conflict in the fragmented international legal system. If all laws (however they are defined) apply equally everywhere then there is no possibility to escape conflict.

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[347] d'Aspremont (n 325) 1.
[348] ibid.
[349] Koskenniemi (n 41) 496; a sentiment earlier expressed by Weil (n 308) 421.
[350] ibid; see also d'Aspremont (n 325) 106.
[351] Fitzmaurice (n 309) 373.
[352] d'Aspremont (n 325) 1.
[353] ibid 3.
[354] ibid 29-30.
[355] ibid 30.
[356] ibid 31.
[357] ibid 128.

In a positivistic understanding of international law, the law is limited to legal texts, judgments and other documents which posit the law as objectively given fact.[358] Weil has defined 'hard law' as being the statement of precise legal rights and obligations.[359] If provisions of hard law lack precision they can be made precise by adjudication or the 'issuance of detailed regulations'.[360] Compare this to the difficulty in defining 'soft law' given by Blutman who identified two definitions of the term.[361] These are either 'laws' that do not appear in a form of a legal source identified by international law or are unenforceable due to a lack of specifity, their vague normative content or their subjective nature.[362] An additional means of distinguishing between hard and soft law is offered by Shelton who notes that legal consequences flow from the violation of the former while violating the latter leads to political consequences.[363]

Examples of soft law include declarations, directives and General Assembly resolutions.[364] Blutman argues that due to the difficulties in even defining soft law its use may not be justified and cannot hope to withstand Ockham's razor.[365] The distinction between 'hard' and 'soft' law acts as a line of demarcation between, for example, treaties and General Assembly resolutions. Without such a distinction, Blutman concludes, it is impossible for a court to know what is and is not legal, thereby hindering the determination of legal disputes in light of established legal rules.[366] Boyle and Chinkin provide a definition of 'soft law' as being distinct from

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[358] Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 *EJIL* 305, 306-7.
[359] Weil (n 308) 414-415.
[360] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421, 421.
[361] László Blutman, 'In the Trap of a Legal Metaphor: International Soft Law' (2010) 59 *ICLQ* 605, 606.
[362] ibid.
[363] Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *AJIL* 291, 319.
[364] Blutman (n 361) 607; other examples can be found in Alan Boyle, 'Soft Law in International Law-Making' *in* Malcolm D. Evans (ed) *International Law* (CUP 2006) 142-143.
[365] Blutman (n 361) 606-607.
[366] ibid. 617.

'hard law' because the former, along with UN Security Council Resolutions, are binding on States Parties.[367]

Despite the uncertainty surrounding soft law, Blutman recognises that it might be of use in determining the content of customary international law or *opinio iuris*.[368] Reisman offers a further analysis of the benefits of soft law, noting that it can be of use for scholars and students who seek to 'understand and manipulate' the processes of international law making and for NGOs seeking to draft new laws.[369] However, he cautions that for those who *apply* the law it is 'not a useful notion'[370] due to its indeterminacy and potentially subjective nature.[371] Boyle also notes the benefits of soft law especially in the field of international environmental law,[372] and his analysis of the distinctions between hard and soft law revolve around the binding nature of the former.[373] Another interpretation of the hard and soft law distinction is provided by d'Aspremont who notes that in the field of environmental law so-called framework treaties, for example the UN Framework Convention on Climate Change,[374] require complementary instruments for their scope to be fully defined and therefore are not deemed 'self-sufficient'.[375]

Soft law leads to the blurring of the 'normative threshold' between law and non-law,[376] yet the validity of a legal rule (or norm) rests upon it being formally ascertainable according to set of objective standards.[377] This is reminiscent of Hart's view that law's function is to guide and control the behaviour of its subjects by setting

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[367] Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 213.
[368] ibid.
[369] W. Michael Reisman, 'Soft Law and Law Jobs' (2011) 2 *Journal of International Dispute Settlement* 25, 40.
[370] ibid.
[371] ibid.
[372] Boyle (n 364) 147.
[373] ibid 143.
[374] UN Framework Convention on Climate Change (9 May 1992) 1771 UNTS 107.
[375] d'Aspremont (n 99).
[376] Weil (n 308) 415.
[377] d'Aspremont (n 325) 49-50.

out certain standards and rules of conduct.[378] The validity of a rule or norm is also important for the avoidance of regime conflict.

Similar depictions of the certainty requirement can be found in the work of F.A. Hayek who wrote the 'life of man in society...is made possible by the individuals acting according to certain rules.'[379] In order for this to be so, laws must be known and certain. Indeed, so vital was this requirement for the functioning of a free society, he commented that its importance 'can hardly be exaggerated'.[380] Hayek, like Tamanaha,[381] recognised that the law could never be entirely certain, but argued that the tendency to over-emphasise the uncertain nature of law was part of the 'campaign against the rule of law'.[382] In a footnote, he added that if the law was as 'uncertain' as many legal commentators would have the reader believe there would be no legal science 'whatsoever'.[383] A point which can be applied as readily to international law as it can to domestic law.

A rule or norm can be valid in a given system only if it conforms to the method that that particular system uses to identify rules or norms. If it fails to conform to that method then it cannot be said to be valid in the context of the respective legal system. Therefore, a conflict can only be said occur where two or more rules or norms are simultaneously valid within the *same* legal system. For instance, if legal system A says that rule x is valid, and legal system B says that rule y is valid, it does not necessarily follow that rule y is valid in legal system A and *vice versa.* If rule x is valid in legal system A but invalid in legal system B then there can be no conflict

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[378] H.L.A. Hart, *The Concept of Law* (OUP 1997) 27.
[379] F.A. Hayek, *The Constitution of Liberty* (Routledge 1990) 148.
[380] ibid 208; Hayek also discusses legal certainty and the rule of law in *The Road to Serfdom* (Routledge 2001 [1944]) 75-90.
[381] Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2010) 190.
[382] Hayek (n 379) 208.
[383] ibid at fn.15.

between rule x and y because one is valid while the other is invalid. In this sense, the validity of a given rule is dependent on, and confined to, the regime in which it is found.

One situation approximately analogous to the fragmentation of public international law is that which is found in private international law (also known as the conflict of laws). Pauwelyn and Michaels have noted that viewing fragmentation through this lens could offer a vital insight as to how its effects could be mitigated.[384] Despite this, the use of private international law techniques in this field remains an under-explored area,[385] and deserves a brief discussion. Of particular relevance to this thesis is what have been termed 'true and false conflicts'.[386] In deciding which jurisdiction's laws are to be applied to a given case, there is an assumption made that there are in fact two or more jurisdictions with competing claims. This is referred to as a 'true conflict'.[387] A 'false conflict' occurs where, although there might appear to multiple jurisdictions with equal claim, only one jurisdiction is legally competent to hear the claim and as a result no conflict exists.[388]

Some parallels to the fragmentation of public international law can be seen even from this brief exposition. The first issue to resolve where fragmentation appears to lead to conflict is which of the two (or more) regimes is competent to adjudicate. This can be further divided into *de iure* (i.e. what is technically possible) and *de facto* (i.e. what is feasible) jurisdiction. Take for example, the matter of human rights violations committed in Chechnya. If the relevant threshold was crossed then the situation in Chechnya could amount to a non-international armed conflict which

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[384] Michaels (n 120).
[385] ibid.
[386] James Fawcett and Janeen M. Carruthers, *Cheshire, North and Fawcett Private International Law* (OUP 2008) 28.
[387] ibid 28.
[388] ibid.

would engage the protections afforded by common Article 3 of the Geneva Conventions.[389] This could amount to *de iure* jurisdiction for the IHL regime. However, if there was no competent body able to adjudicate the issue, de facto jurisdiction would be lacking. However, faced with this scenario, the victims (or their families) still have the option of issuing proceedings against Russia at the ECtHR. The ECtHR possesses both *de facto* and *de iure* jurisdiction but only over human rights matters to the exclusion of IHL. Thus, the prima facie conflict between IHL and IHRL could be revealed as being analogous to a 'false conflict' under private international law.

Autopoiesis theory can also shed some light on the fragmentation of international law. In brief, autopoiesis (as it relates to law) is the idea that a legal system is closed to external influences.[390] In turn this gives rise to the idea that an autopoietic legal system is 'autonomous' and thus able to act without reference to external factors.[391] Applying such a definition (albeit brief) to the situation that is presented by the international legal system, it is apparent that neither the international legal system nor its regimes can be regarded as autopoietic. The former is informed by concerns other than law in much the same way the domestic legal system is informed by matters other than law (e.g. environmental issues). As for the regimes, they rely on principles of general international law in case of failure. They also make reference to each other's judgments by making use of persuasive precedents. Both of these factors can be construed as denying that the regimes are themselves autopoietic systems. Consequently, an autopoietic approach to analysing the problems identified in this thesis would not be particularly enlightening.

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[389] Common Art 3 to the Geneva Conventions 1948.
[390] Adrian James, 'An Open or Shut Case? Law as an Autopoietic System' (1992) 19 *Journal of Law and Society* 275.
[391] Michael King, 'The "Truth" About Autopoiesis' (1993) 20 Journal of Law and Society 218, 219.

1.2.2 - Conclusion to Part Two

Part two has examined the need for a formal approach to rule ascertainment in the international legal system. 'Formal' in this context was taken to be contrasted with the policy-orientated approach to international law. The policy-orientated approach, it was argued, is insufficient when it comes to demarcating the boundaries of the regimes studied. Such a methodology fails to distinguish between the IHRL, IHL and ICL regimes, leaving those who might apply or interpret the law uncertain as to which law is in fact applicable. This, it is suggested, is not appropriate when attempting to define violations that are peculiar to functionally different regimes. Recognition of the benefits a formal approach to rule ascertainment can bring to the field of fragmentation is perhaps one method of mitigating the associated risks and concerns over conflict.

Conclusion to Chapter One

Martti Koskenniemi has commented there is no longer a single hegemonic answer to the question 'what is international law?'[392] This is due to the emergence of several specialised regimes such as IHRL, ICL, international trade law etc. Each of these regimes has its own secondary rules which are used to interpret the primary rules of international law. Such a phenomenon is frequently referred to as the 'fragmentation' of international law. Fragmentation is often characterised in a negative light especially because of its apparent potential to cause conflict and disunity within the international legal system. The converse of such a position is the emergence of several separate regimes each with the purpose of correcting the deficiencies of the general international law. With such a multiplicity of regimes focusing on the shortcomings of

[392] Martti Koskenniemi, 'A History of International Law Histories' in Bardo Fassbender et al (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 970.

the law, a stronger and, perhaps ironically, more coherent framework of international law could be said to have emerged.

Each regime has a specific, functional purpose. If a regime had no purpose it would not exist. Regimes are created to solve a particular problem. This could be the problem of excessive State power (IHRL), the need to protect combatants and non-combatants alike from unnecessary suffering in times of armed conflict (IHL) or to curb impunity and to ensure that those who commit mass atrocities or war crimes are held accountable for their actions (ICL). In brief, these are the basic functional purposes of the three regimes studied in this thesis. From this a picture emerges of an international legal system that is comprised not of one set of rules (i.e. the 'general' rules) but a multiplicity of rules and regimes. Managing this 'fragmentation' into a coherent whole is likely to be impossible with the current institutional framework of international law. Instead, what is required is to recognise that several regimes exist to perform different functions, in much the same way that different types of hammers exist to hammer different objects. Each hammer has the same overarching purpose (to hit things) but this does not mean that they are identical and should (or could) be replaced by a single multifunctional hammer. So too with the international legal system.

At the same time as the phenomenon of fragmentation has been developing, a growing trend in international law has been the shift away from formally ascertainable legal rules to a softer policy-focused conception of rule ascertainment. This causes problems in a fragmented international legal system because the exact scope and competence of any given functional regime depends on the formal rules by which it

was created.[393] By adopting flexible policy-orientated approaches to international law where the formal rules governing the demarcation of regime boundaries can be freely dispensed, the very functionality created by the various regimes could be imperilled. By recognising the benefits that a formal rule ascertainment could bring to the identification of regime boundaries, the concerns of those such as HE Judge Guillaume could be assuaged, particularly in the fields studied in this thesis.

The following chapters of this thesis will show how the IHRL, IHL and ICL regimes each define a particular violation (torture, enforced disappearance, sexual violence and the destruction of property). It will be demonstrated that despite each regime being concerned with the same violation, each has its own particular definition that cannot be transplanted into the other regimes. This is because of the functional separation of the three regimes caused by the emergence of three (or more) discretely identifiable bodies of secondary rules.

[393] Philippe Sands, 'Article 39 (1969)' *in* Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 975.

Chapter Two – Torture

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Introduction

The prohibition of torture is one of the few norms widely considered to have attained peremptory status.[1] It is also one most nations have accepted as law.[2] The prohibition of the commission of acts of torture is common to all regimes studied in this chapter. The definition of the physical acts constituting torture is common to each of the three regimes. For instance, the physical administration of electric shocks would be sufficient to constitute a physical act of torture under the IHRL, IHL and ICL regimes. The regimes differ in how they define the other elements necessary for determining whether the physical amounts to torture in each regime. In IHRL, for example, the widely accepted definition of torture requires the involvement of a State official,[3] whilst neither the IHL nor ICL regime requires the involvement of a State official for any purpose.[4] Despite this, a concrete and clear definition of torture has eluded the international community, leaving the term open-ended.[5]

The purpose of this chapter is to highlight both the common bonds between the three regimes and their differences. By approaching the subject in such a fashion, this thesis seeks to demonstrate that the effects of fragmentation can potentially be mitigated. One method of achieving this is by recognising the formal distinctions between the regimes and realising how such a distinction can help to differentiate

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[1] Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implication for National and Customary Law' (2004) 15 *EJIL* 97, 97; M. Cherif Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"' (1996) 59 *Law and Contemporary Legal Problems* 63, 68.
[2] David Weissbrodt & Cheryl Heilman, 'Defining Torture and Cruel, Inhuman, and Degrading Treatment' (2011) 29 *Law and Inequality* 343, 347.
[3] UNCAT, art 1; this has been criticised by some writers and is discussed in more detail below. See Alice Edwards, 'The "Feminizing" of Torture under International Human Rights Law' (2006) 19 *LJIL* 349, 349-350.
[4] e.g. *Prosecutor v. Mucić et al* (IT-96-21) TC, Judgment, 9 October 2001, para.1268; torture was administered in this case for sadistic pleasure.
[5] David Sussman, 'Defining Torture' (2005) 37 *Case Western Reserve Journal of International Law* 225, 225.

between them. In contrast, a policy-orientated approach in which 'everything is law' might not be an appropriate method for establishing the regimes' boundaries. This latter approach could, due to the lack of distinction between the different functional regimes, exaggerate to a greater extent the effects of fragmentation than might the more formal approach.

The functionality of each regime is important to the central arguments of this thesis. As will be seen in this chapter, the IHRL, IHL and ICL regimes continue to function despite their existence in a fragmented international legal system. Consequently, even if there is conflict between the regimes as some have suggested,[6] the regimes' judicial organs do manage, to a greater or lesser extent, to deliver rulings and judgments on matters arising as a result of the violation of *their* regime's legal rules. As will be seen, the regimes may draw from the rulings and law of other regimes *but*, importantly, they do not consider themselves to be bound by their counterparts in the other regimes. There is therefore an additional dimension to this thesis, namely that, although the risk of conflict can never be wholly removed, the regimes remain functionally separate from one another.

This chapter is divided into three main sections. The first considers the position of the IHRL regimes with regard to torture. It examines torture as it is defined under the UN regime, notably the UN Convention Against Torture (UNCAT), the ECHR system and the Inter-American system. It will be seen that each regime approaches the definition of torture differently but ultimately there are several similarities. The second section looks at the definition of torture under the IHL regime. Due to the nature of this regime, customary law forms part of the analysis, followed by the definitions provided by IHL treaties such as the Geneva Conventions,

[6] See Chapter One: §1.1.6, 57

and lastly the jurisprudence of international criminal tribunals as they relate to the definition of torture as a war crime. The third section is concerned with the definition of torture under ICL, principally genocide and crimes against humanity. It draws on the Statutes and jurisprudence of the ICTY/R and ICC, in addition to the judgments of the Nuremberg and Tokyo tribunals.

2.1 - Defining torture in the IHRL regime

Torture is prohibited by all the IHRL systems studied in this chapter. The state-centric nature of human rights law ensures that for the purposes of the present enquiry State actors must be involved, directly or indirectly, in the administration of torture. Some commentators have called for non-State actors to be held accountable for violations of human rights that would, if they had been perpetrated by State agents, constitute torture.[7] This is in accordance with the mounting call that non-State actors, ranging from corporate bodies to insurgent or terrorist groups, should be bound by human rights obligations.[8] However, despite such mounting concern over such lack of accountability, IHRL appears to remain largely rooted in the state-centric model of international justice.[9]

The restriction of human rights law to State actors has also been criticised by some feminist writers.[10] Their argument is that men are predominantly affected by

[7] Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 *Human Rights Quarterly* 56, 79; Robert McCorquodale and Rebecca La Forgia 'Taking Off the Blindfolds: Torture by Non-State Actors' (2001) 1 *Human Rights Law Review* 189, 217.

[8] Jan A. Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 *Buffalo Human Rights Law Review* 21, 88; Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 *IRRC* 491. 523.

[9] This can be seen from the State-centric operation of many IHRL regimes such as the ECHR, Inter-American system and the UN Human Rights Council, all of which focus on the liability of States and not individuals.

[10] For an overview see Edwards (n 3); Catherine MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', in Kathleen. E. Mahoney and Paul Mahoney (eds) *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff 1993); Rhonda Copelon, 'Recognising the Egregious in the Everyday: Domestic Violence as Torture', (1994) 25 *Columbia Human Rights Law Review* 291.

State conducted torture, while women are mostly affected by private acts of 'torture', for example domestic violence in the household.[11] While the ultimate aim of such writers is laudable, the methods they advance fail to take into account a number of factors. First, on the subject of public/private torture, no evidence is offered to support the assertion that men are disproportionately affected by State-backed human rights violations. Women have been targeted by regimes across the world from Chile and Argentina to Burma, and during atrocities such as in Rwanda they were actively targeted because they were women.[12]

Second, private abuse would (or should) be criminalised under criminal law as domestic violence. As will be seen, the involvement of a State official is an integral element of the definition of torture, extending to include acts by private citizens destroys this aspect of the offence. Third, feminist writers have noted that because the UN Convention Against Torture (UNCAT) uses only male pronouns, a situation is created wherein a 'man is sure that he is included; a woman is uncertain'.[13] However, such writers fail to acknowledge that the purpose of human rights is that they are supposed to be universal, applicable to all individuals but not necessarily in all situations. The policy-orientated approach, wherein formal distinctions of the law can be simply discarded, conforms to the desire to found a legal order based on 'human dignity'[14] shielded from notions of 'arbitrary formalism'.[15] However, as this section

[11] Edwards (n 3) 353.
[12] Lisa Sharlach, 'Gender and genocide in Rwanda: Women as agents and objects of Genocide' (1999) 1 *Journal of Genocide Research* 387.
[13] Edwards (n 310) 354 citing Helen B. Holmes, 'A Feminist Analysis of the Universal Declaration of Human Rights', in C. Gould (ed) *Beyond Domination: New Perspectives on Women and Philosophy* (Rowman and Allanheld 1983) 250.
[14] Myres S. McDougal and Harold D. Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 *AJIL* 1, 1.
[15] Myres S. McDougal, Harold D. Lasswell, James C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (Martinus Nijhoff 1994) xvii.

will show, 'arbitrary formalism' can strengthen the application and enforceability of the law.

2.1.1 - Torture in the UN human rights system

The use of torture has been widely condemned in the UN system by both the Security Council[16] and the General Assembly,[17] in addition to several UN specialised bodies.[18] Any discussion of the UN system's definition of torture should begin with Article 5 of the UDHR: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' The wording of this provision has formed the basis for several international human rights treaties such as the ECHR, the IACHR, and the ICCPR. Hannum notes that while it would be 'misleading to conclude that there is agreement as to the precise extent of any legal obligations that might flow from the Declaration',[19] the literature he surveys indicates some of the provisions of the UDHR constitute an element of customary international law. The UDHR arguably has contributed to the customary international law of IHRL,[20] and that in the absence of universal subscription to human rights treaties it is to the UDHR 'that most people will look to find the minimum rights to which they are entitled.'[21]

The preamble of UNGA Resolution 3452 (XXX) of 1975 (known as the 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment') highlights 'the inherent dignity and of the equal and inalienable rights of all members of the human family'. It also notes States have an obligation under the UN Charter 'to Promote

[16] e.g. UNSC Res 770 (13 August 1992) UN Doc S/RES/770; UNSC Res 771 (12 August 1992) UN Doc S/RES/771 both of which described 'abuses' committed against individuals.
[17] UNGA Res 2547 (XXIV) (11 Dec 1969) UN Doc A/RES/24/2547.
[18] e.g. the UN Committee Against Torture.
[19] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' 25 *Georgia Journal of International and Comparative Law* (1995-1996) 287, 329.
[20] Hannum (n 19) 353.
[21] ibid 354.

universal respect for, and observance of, human rights and fundamental freedoms.' Annexed to the Declaration are a series of Articles which formed the basis of UNCAT.[22] These declarations have been criticised on the basis that such declarations assist the 'emergence of international law rules, but do nothing to enforce them.'[23] Thus they help to guide the development of international law but leave the enforcement of that law to one side.

Article 1 provides that 'torture means any act [including] severe pain or suffering, whether physical or mental' when it is 'intentionally inflicted by or at the instigation of a public official on a person' in order to obtain from him (or her) or a third party 'information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.' Furthermore, it is affirmed torture 'constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.'[24] Article 2 is formulated:

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

This goes further than the UDHR on two counts. Firstly, Article 1(2) specifies the threshold at which inhuman and degrading treatment constitutes torture. Whilst Article 1(2) does not define 'aggravated and deliberate' it is clear from the wording that torture stands above inhuman and degrading treatment in terms of its seriousness. Secondly, Article 2 affirms the principle that one of the purposes of the UN and its Charter is the protection of human rights. This lends considerable weight to claims torture is prohibited under the law of the UN Charter and by customary international

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[22] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) which notes that while the resolution is 'without binding force of law, [it] nevertheless [had] a real moral value.' 873, fn.18.
[23] Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin 2006) 265.
[24] UNGA Res 3452 (XXX) (9 Dec 1975) UN Doc A/Res/30/3452 art 1(2).

law. Concern for human dignity appears to be at the heart of the prohibition of torture.

Two hearings from the UN Committee Against Torture illustrate the threshold of torture as opposed to inhuman or degrading treatment. The first is that of *Dimitrijevic*[25] where the applicant was detained by Serbian security forces in 1999. He was subjected to severe beatings with truncheons and metal bars which left him bedridden for several days.[26] The Committee found that the treatment the complainant suffered is 'characterized as severe pain or suffering intentionally inflicted by public officials' while investigating a crime. This constituted torture.[27] The second is of *Dimitrov* and follows a similar pattern. In this case the applicant was illegally detained and beaten with a baseball bat and steel cable in addition to repeatedly being punched and kicked.[28] The applicant was left bedridden for over a week. The Committee found as it had in *Dimitrijevic* that the 'severe pain or suffering intentionally inflicted by public officials in the context of the investigation of a crime' constituted torture for the purposes of UNCAT.[29]

Acts of torture and inhumane treatment need not themselves cause permanent severe physical or mental harm. For example, beatings leading to severe bruising could constitute torture although the long-term harmful effects of such treatment might be minimal.[30] Similarly the use of electric shocks[31] or sound to torture an individual might have no permanent physical or mental effect. Indeed, the US

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[25] *Dragan Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, UN Doc. UNCAT/C/33/D/207/2002 (2004).
[26] ibid para.2.1.
[27] ibid para.5.3.
[28] *Jovica Dimitrov v. Serbia and Montenegro*, Communication No. 171/2000, UN Doc. UNCAT/C/34/D/171/2000 (2005) para.2.1.
[29] ibid para.7.1.
[30] Dimitrijević (n 25) para.2.1.
[31] Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Report of the Special Rapporteur, Mr Nigel Rodley, 14 January 1998, E/CN.4/1998/38/Add.2, para.20.

Government, in the now infamous 'torture memos', was advised by its own lawyers that providing specified acts and courses of treatment did not lead to 'organ failure or death', such acts would not constitute torture.[32] These memos have been widely discussed in the literature and have drawn much criticism.[33]

Further support for the prohibition of torture in IHRL can be found in the development of *ius cogens*. One of the leading cases on the peremptory status of torture is the ICTY case *Furundzija*.[34] The judgment draws heavily from the peremptory status of torture as part of IHRL.[35] Of particular relevance to this section is the ICTY's reference to UNCAT. The Trial Chamber noted the definition given in UNCAT explicitly provides that it is only for the 'purposes of this Convention' i.e. UNCAT. In order to apply the definition the ICTY made reference to the 'extra-conventional effect...[which] codifies, or contributes to developing or crystallising customary international law.'[36] Further reference is made to the 'broad convergence of...international instruments and international jurisprudence' demonstrating 'that there is...general acceptance of the main elements contained in the definition set out

[32] This was the case in the now infamous torture memos produced by lawyers for George Bush, then US President. In one, Assistant Attorney General Jay Bybee, writes that 'for an act to constitute torture [as defined under US law] it must inflict pain which is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.' Mental pain can only be considered torture if it is conducted over a period of months or even years. Cited in Karen J. Greenberg & Joshua L. Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (CUP 2005) 172; For further analysis see Philippe Sands, *Lawless World* (Penguin 2005) 205-240.

[33] See for example Kai Ambos, 'Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the Torture Memos Be Held Criminally Responsible on the Basis of Universal Jurisdiction.' (2009) 42 *Case Western Reserve Journal of International Law* 405, 406; Cassandra B. Robertson, 'Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity' (2009) 42 *Case Western Reserve Journal of International Law* 389, 389-390; Jonathan Canfield, 'Torture Memos: The Conflict between a Shift in US Policy towards a Condemnation of Human Rights and International Prohibitions against the Use of Torture' (2004) 33 *Hofstra Law Review* 1049, 1089-1090.

[34] *Prosecutor v. Furundžija* (IT-95-17/1) TC Judgment, 10 December 1998.

[35] ibid para.160.

[36] ibid.

in Article 1 of the Torture Convention.'[37] The judgment in *Furundžija* recognises the similarities in the material aspect of torturous acts.

Following General Assembly resolution 3452 (XXX), efforts were made by the international community to codify the customary prohibition of torture. This led to UNCAT which opened for signatures in 1984 and entered into force in 1987. UNCAT required States Parties to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction';[38] and to ensure that 'all acts of torture are offences under its criminal law.'[39] The penalties for torture shall 'take into account...[the] grave nature' of the offences.[40] The purpose of this is to ensure that individuals could not escape liability for acts of torture they either committed or ordered to be committed. Article 5 provides that each 'State Party shall...take such measures as may be necessary to establish its jurisdiction over such offences [of torture] in cases where the alleged offender is present in any territory under its jurisdiction' and does not extradite him.[41] This is a treaty obligation to either extradite or punish (*aut dedere aut punire*) those alleged to have committed acts of torture, thus codifying universal jurisdiction with respect to torture.[42]

The most significant provisions of UNCAT for the purpose of this thesis are contained in Article 1 which provides a working definition of torture. The first element is that 'the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.' The definition of torture was kept purposefully wide during the drafting process in order to ensure that

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[37] ibid para.161.
[38] UNCAT, art 2(1).
[39] UNCAT, art 4(1).
[40] UNCAT, art 4(2).
[41] UNCAT, art 5(2).
[42] M. Cherif Bassiouni, 'Universal jurisdiction for international crimes: historical perspectives and contemporary practice' (2001) 42 *Virginia Journal of International Law* 81, 115; Katherine Gallagher, 'Universal Jurisdiction in Practice Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture' (2009) *7 JICJ* 1087, 1099-1100.

it would prohibit as many different acts of torture as possible. Despite this Panama 'expressed dissatisfaction with the definition of torture, arguing that the language limited the definition'.[43] The UK delegation argued the definition 'should be made more consistent with the definition in the jurisprudence of the [ECtHR] and to this end suggested that the word "extreme" should be substituted for the word "severe".[44] This suggests an awareness of the need to harmonise definitions across the IHRL regimes.

The second operative part of Article 1 specifies torture can be committed 'for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind'. The wording of this part makes it clear not only are certain acts prohibited but also that torture cannot be committed in order to achieve particular ends, be they to extract information or to punish an individual.

The third requirement is that an act inflicts 'such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. This means private citizens who do not act under the instruction of a public official or 'other person acting in an official capacity' cannot be said to have committed acts of torture. The purpose of this requirement is that the most egregious instances of torture are most often committed by states and consequently it is states that should bear the greatest liability for their officials and agents. It is worthwhile also highlighting that UNCAT is a human rights instrument. It therefore seeks to bind states *vis-à-vis* other States Parties to the treaty in order to respect the rights of their citizens. This has been criticised, as noted in the

[43] Manfred Novak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008) 44.
[44] ibid 37.

introduction to this section, by some feminist writers who believe that torture should extend to acts committed in the 'private sphere'.[45]

Several other international human rights treaties prohibit acts of torture. Notably this includes the International Covenant on Civil and Political Rights (ICCPR) and, indirectly, provisions of the Convention Relating to the Status of Refugees (the 'Refugee Convention'). The ICCPR echoes the UDHR: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[46] The Refugee Convention,[47] although not explicitly prohibiting acts of torture, contains an important provision underscoring the international community's revulsion to acts of torture and other inhuman or degrading treatment. Article 33 of the Convention specifies that 'No Contracting Party shall expel, or return ("refouler") a refugee...to...territories where his life or freedom would be threatened.' It has been suggested by Jean Allain that the non-refoulement principle is part of *ius cogens*.[48] In particular he notes that the *ius cogens* nature of non-refoulement can act as a 'trump' card 'which places the individualized right of non-refoulement above all other considerations not meeting the threshold of ius cogens' meaning that 'individuals can challenge the actions of States and hold them accountable.'[49] Indeed, Article 33 'is of a fundamentally norm-creating character', i.e. it has created a norm of international law, 'in the sense in which that phrase' has been used by the ICJ.[50] The principle of

[45] Edwards (n 3) 353.
[46] ICCPR, art 7.
[47] Convention Relating to the Status of Refugees (28 July1951) 189 UNTS 137, entered into force 22 April 1954.
[48] Jean Allain, 'The ius cogens nature of non-refoulement' (2001) *13 International Journal of Refugee Law* 533, 538-541.
[49] ibid 557; see also Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 55.
[50] Guy S. Goodwin-Gill, *The Refugee in International Law* (Clarendon Press 1996) 168; the ICJ case referred to here is the North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) Judgment, 20 February 1969, ICJ Rep 1969, p.3, para.72.

non-refoulement can also be seen at the ECtHR in a number of cases pertaining to potential breaches of Article 3.[51]

2.1.2 - Torture and the ECHR

Article 3 of the ECHR provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment', an absolute ban on the use of torture, inhuman or degrading treatment. The precise definition of 'torture, inhuman or degrading treatment' is not found in the ECHR itself but developed through the ECtHR's jurisprudence. Development of formally recognised law by the judiciary is recognised as permissible in order to clarify both the intent and the meaning of the drafters of the ECHR.[52] Given the broad definition provided under Article 3, it is unsurprising that the definition has expanded to include corporal punishment[53] and poor prison conditions.[54]

The ECtHR has had to deal with several scenarios involving human rights violations in the context of either an armed conflict or in the face of combating terrorism, whence some of the most egregious violations stem. This section therefore considers the response of the Court to such violations beginning with the interstate case of *Ireland v. UK.*[55] Ireland brought its claim before the ECtHR in response to allegations of the torture of Irish citizens at the hands of British security services operating in Northern Ireland during the Troubles. Amongst the methods used during

[51] *Soering v. United Kingdom* (Application no.14038/88) Judgment, 7 July 1989; *Chahal v. United Kingdom* (Application no. 22414/93) Grand Chamber Judgment, 15 November 1996.
[52] This is implicit in the establishment of the ECtHR.
[53] *Campbell & Cosans v. United Kingdom* (Application nos. 7511/76 & 7743/76) Judgment, 25 February 1982; Although this case did not concern the application of corporal punishment but rather the threat of such treatment the ECtHR did hold such threats could in themselves constitute inhuman treatment. (para.26).
[54] *Kalashnikov v. Russia* (Application no. 47095/99) Judgment, 15 July 2002.
[55] *Ireland v. United Kingdom* (Application no. 5310/71) Judgment, 18 January 1978; see David Bonner, '*Ireland v. United Kingdom*' (1978) 27 *ICLQ* 897; Colm Campbell, '"Wars on Terror" and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict' (2005) 54 *ICLQ* 321, 335.

in interrogations were the 'five techniques' consisting of wall-standing, hooding, subjection to noise, sleep deprivation and deprivation of food and drink.[56] The Commission determined the five techniques did constitute torture.[57] However, the British government disputed this, stressing the value of such techniques in the fight against terrorism. Indeed, the Court did recognise the apparent intelligence value of the techniques noting that interrogation by 'means of the five techniques led to the obtaining of a considerable quantity of intelligence information, including the identification of 700 members of both IRA factions and the discovery of individual responsibility for about 85 previously unexplained criminal incidents.'[58] Nonetheless this would not justify violating Article 3.

The Court began by explaining there existed a difference between torture and inhuman and degrading treatment, commenting that the 'distinction derives principally from a difference in the intensity of the suffering inflicted'.[59] In its determination the Court also placed reliance upon Resolution 3452 (XXX).[60] In light of this, the Court held that although the five techniques 'undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically' the techniques 'did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.'[61]

The two separate opinions of Judge Fitzmaurice and Judge Evrigenis offer interesting, and opposing, perspectives on the matter of torture and how the Court approached the matter. Judge Fitzmaurice warned against the 'watering down' of the

[56] ibid para.96.
[57] ibid para.165.
[58] ibid para.98.
[59] ibid para.167.
[60] ibid.
[61] ibid.

definitions of torture, inhuman and degrading treatment, and 'by enlarging them so as to include concepts and notions that lie outside their just and normal scope' the Convention would become discredited.[62] In contrast is the more expansive definition given by Judge Evrigenis who dissented noting the 'notion of torture which emerges from the judgment is in fact too limited.' His analysis stems from the apparent desires of the ECHR drafters who 'wished...to [prohibit] other categories of acts causing intolerable suffering to individuals or affecting their dignity rather than to exclude from the traditional notion of torture certain apparently less serious forms of torture and to place them in the category of inhuman treatment which carries less of a "stigma"'.[63] In a powerfully worded passage Judge Evrigenis comments:

> Torture no longer presupposes violence, a notion to which the judgment refers expressly and generically. Torture can be practised - and indeed is practised - by using subtle techniques developed in multidisciplinary laboratories which claim to be scientific. By means of new forms of suffering that have little in common with the physical pain caused by conventional torture it aims to bring about, even if only temporarily, the disintegration of an individual's personality, the shattering of his mental and psychological equilibrium and the crushing of his will.[64]

The ECtHR returned to the question of defining torture in *Selmouni*.[65] This case followed the entry into force of UNCAT and so the Court was able to make reference to the definition of torture offered in Article 1 of UNCAT.[66] The acts in question, beatings by police officers, caused Selmouni to feel 'fear, anguish and inferiority' potentially humiliating and debasing him to break his 'physical and moral resistance.' Consequently the Court found that the acts amounted to inhuman or degrading treatment.[67] The Court then turned to whether the pain and suffering

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[62] Dissenting Opinion of Judge Fitzmaurice, para.36 attached to *Ireland v. United Kingdom* (n 55).
[63] Separate Opinion of Judge Evrigenis attached to *Ireland v. United Kingdom* (n 55)
[64] ibid; This can be linked to the dehumanisation of individuals that 'allows the perpetrator to go beyond hatred and anger, and commit atrocious acts as if they were part of everyday life.' Michael Grodin and George Annas, 'Physicians and Torture: Lessons from the Nazi Doctors' (2007) 89 *IRRC* 635, 640.
[65] *Selmouni v. France* (Application no. 25803/94) Judgment, 28 July 1999.
[66] ibid para.97.
[67] ibid para.99.

amounted to 'severe' treatment within the meaning of Article 1 UNCAT.[68] In assessing whether the treatment of the applicant amounted to torture the Court held that it was necessary to take the treatment of the applicant as a whole and the repeated and sustained assaults committed against him. It was found therefore that the abuse amounted to torture.[69]

The *Selmouni* decision affirms the principle established in *Tyrer*[70] that the ECHR is a 'living instrument which must be interpreted in the light of present-day conditions', and as a consequence acts previously categorised as inhuman or degrading could today be classed as torture.[71] Such a position goes beyond the positivistic outlook of Judge Fitzmaurice in his *Ireland v. UK* dissent and acknowledges that the law has to develop and change in light of new circumstances.[72] Alastair Mowbray has noted that the ECtHR 'eschews abstract theorising' of rights and 'favours the incremental evolution of its principles.'[73] Despite this he believes the doctrine is 'the basis of considerable judicial creativity.'[74] Mowbray concludes noting '[c]hanging ethical standards, regarding, *inter alia*, judicial punishments and torture...have resulted in not only the evolution of societies, but also the creation of new types of problems for the Court to resolve.'[75]

Further examples of the ECtHR's evolutionary approach to defining torture are to be found in three cases concerning Turkey. In *Aydin*[76] the female applicant was detained by Turkish security services operating in the predominantly Kurdish region

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[68] ibid para.100.
[69] ibid para.105.
[70] *Tyrer v. United Kingdom* (Application no.5856/72) Judgment, 25 April 1978.
[71] *Selmouni* (n 65) para.101.
[72] Nigel S. Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (OUP 2009) 105. They note that the decision in *Selmouni* represents a departure from the judgment in *Ireland v. UK*.
[73] Alistair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *Human Rights Law Review* 57, 61.
[74] ibid.
[75] ibid 79.
[76] *Aydin v. Turkey* (57/1996/676/866) Judgment, 25 September 1997.

of Turkey. Whilst in detention the applicant was raped and sexually humiliated by an unknown official. This was held by the ECtHR to constitute torture, with the Court noting that the '[r]ape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim.' The Court also highlighted the extreme psychological suffering caused to the victim by rape and other abuses of a sexual nature.[77] This will be considered in greater detail in Chapter Four.

In *Aydin*, the Court noted that the applicant must have been detained because the security situation in Eastern Turkey warranted 'the need of the security forces to elicit information' and as such the suffering inflicted 'must also be seen as calculated to serve the same or related purposes'.[78] Thus, there was a purpose for inflicting the suffering, reflecting the purposive element of torture required by UNCAT. This point was expanded by the Court in *Salman*. It was held that the purposive element of torture was now a requirement for finding that acts constituted torture.[79] Lastly, in *Kurt* the Court considered whether the treatment of the applicant could amount to a violation of Article 3 of the ECHR.[80] This action was brought by the mother of an individual who had disappeared. The ECHR found that she was 'the victim of the authorities' complacency in the face of her anguish and distress'.[81]

The approach taken by the ECtHR has been criticised for being 'too narrow' and the definition ought to be expanded.[82] For Cullen, the threshold for torture established under *Ireland v. UK* is too high and leads to a denial of justice in certain

[77] ibid para.83.
[78] ibid para.85.
[79] *Salman v. Turkey* (Application no. 21986/93) Judgment, 27 June 2000, para.114.
[80] *Kurt v. Turkey* (15/1997/799/1002) Judgment, 25 May 1998.
[81] ibid para.134. The decision in Kurt is examined in more detail in Chapter Three, 156.
[82] Anthony Cullen, 'Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights' (2003) 34 *Californian International Law Journal* 29, 29.

cases where the treatment of the victims fails to meet the minimum level for it to be classified as torture.[83] Such a view does not take into account the growing trend of classifying a range of acts as 'inhuman or degrading' thereby widening the protection afforded to individuals while maintaining the high threshold for torture. Its approach reserves the label of torture of particularly egregious instances in much the same way that maintaining a narrow definition of genocide reserves that label for the worst of atrocities.[84] Others such as Bowring note that the definition of torture is more than just 'legal' and can be 'found at deeper levels of social and psychological reality'.[85] He justifies this position by calling for an understanding of torture that takes into account a set of 'social conditions' required to facilitate such acts.[86] The approach advocated by Bowring on its own admission departs from a legal understanding of torture. This could, as Judge Fitzmaurice feared in *Ireland*, lead to the ECHR becoming discredited by watering down the definition of torture.

2.1.3 - Torture and the IACHR

Article 5 of the IACHR contains more than just the outright prohibition of torture, inhuman or degrading treatment. It begins 'Every person has the right to have his physical, mental, and moral integrity respected'. Article 5(2) echoes Article 3 of the ECHR: 'No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.'

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[83] ibid 45.
[84] Peter Quayle, 'Unimaginable Evil: The Legislative of the Genocide Convention' (2005) 5 *International Criminal Law Review* 363; Alexander Murray, 'Does International Criminal Law Still Require a "Crime of Crimes"? A Comparative Review of Genocide and Crimes against Humanity' (2011) 3 *Göttingen Journal of International Law* 589.
[85] Bill Bowring, 'What Reparation does a Torture Survivor Obtain from International Litigation? Critical Reflections on Practice at the Strasbourg Court' (2012) 16 *International Journal of Human Rights* 755, 757.
[86] ibid 758.

In addition to the IACHR there is also the Inter-American Convention to Prevent and Punish Torture.[87] This entered into force in February 1987, and has been ratified to-date by 18 OAS member states. The preamble of the Convention reads:

> all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights.

Article 2 provides that for the purposes of the Convention 'torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person' as part of a criminal investigation, to intimidate, to punish, 'or for any other purpose.' Of particular note is the affirmation that torture 'shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.' Article 5 ensures that torture is prohibited in all circumstances including during wars, emergencies, the suspension of constitutional guarantees and domestic political instability, as such it is a non-derogable, absolute right.

The case of *Ortiz* before the Inter-American Commission concerns the detention and torture of an American nun who worked for the Catholic Church throughout the 1980s during the military dictatorship then governing Guatemala. The Commission held that her abduction and torture occurred 'presumably to punish and intimidate her as a result of her participation in certain activities and her association with certain persons and groups.'[88] Furthermore, the torture inflicted 'also closely fits

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[87] Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series, No. 67, 9 December 1985, entered into force 28 February 1987.

[88] *Dianna Ortiz v. Guatemala Case*, 10.526, Report No. 31/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 332 (1997) para.108.

the description of methods used "to obliterate the personality of the victim."'[89] These indirect effects of torture feature prominently in the Inter-American system.

Torture has also been an issue before the Inter-American Court. In *Juan Humberto Sanchez*,[90] the victim was detained in July 1992 by Honduran security forces for his alleged involvement with El Salvadorian rebels, his body was found in a river over a week after his detention 'in a state of decay...with a rope around the neck that crossed his chest and tied his hands toward the back and there were signs of torture.'[91] The case was brought before the Court by the victim's relatives who claimed that, in addition to the violation of the victim's right to life, Article 5 of the IACHR had also been violated and it was alleged by the family that the victim had been mutilated before being executed.[92]

The Court condemned the clandestine nature of the victim's detention noting the peril an unlawfully detained person faces such as the risk that other rights will be violated.[93] Interestingly, the Court also referred to the illegality of detention as constituting inhuman treatment because a 'brief period of detention is enough for it to constitute an infringement of his mental and moral integrity according' to IHRL standards.[94] Furthermore, even in the absence of evidence an inference could be drawn that the treatment experienced by the victim was inhuman and degrading.[95] Lastly, the Court found that the condition of the victim's body was enough to constitute a violation of Article 5.[96] In effect, the Court is developing a principle of *res ipsa loquitur* in relation to matters of torture. As with the cases of *Kurt* and

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[89] ibid.
[90] *Juan Humberto Sánchez Case*, Judgment of June 7, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 99 (2003).
[91] ibid para.1.
[92] ibid para.90.
[93] ibid para.96.
[94] ibid para.98.
[95] ibid para.98.
[96] ibid para.100.

Bazorkina before the ECHR, the Court also noted that the relatives of victims of disappearances and other state crimes[97] might themselves be victims of inhuman and degrading treatment, an issue to be examined in Chapter Three.

Tibi tacitly affirms the principle established in *Tyrer* regarding the evolution of international human rights law.[98] The Court held that it was required to take into account the 'system' of which the treaty is a part noting that it is 'especially important for [IHRL], which has moved forward substantially by means of an evolutive interpretation of the international protection instruments.'[99] The aim of the acts, the Court continued, visited upon the victim by agents of the state 'was to diminish his physical and mental abilities and annul his personality for him to plead guilty of a crime.'[100] Having determined that such treatment constitutes torture the Court turned to the conditions in the victim's prison during his incarceration. The Court cited the case of *Kudła*[101] before the ECtHR to support its assertion that the lack of, or poor, medical treatment whilst incarcerated constituted a violation of the victim's right to humane treatment.[102] The Court further affirmed the principle that the family of victims could also suffer degrading or inhuman treatment.[103]

2.1.4 - Conclusion on torture and the IHRL regimes

Torture can be defined under IHRL by reference to a number of cases and treaties. From these multiple sources it is possible to formulate a broad definition of torture. Central to any definition of torture is the infliction of treatment capable of amounting to torture, inhuman or degrading treatment. UNCAT sets the threshold for torture

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[97] ibid para.101.
[98] *Tibi v. Ecuador*, Judgment of September 7, 2004, Inter-Am. Ct. H.R., (Ser. C.) No. 114 (2004).
[99] ibid para.144.
[100] ibid para.149.
[101] *Kudła v. Poland* (Application No. 30210/96) Judgment, 26 October 2000, para.93-94.
[102] *Tibi* (n 98) para.157.
[103] ibid para.160.

relatively high. It requires the infliction of 'severe pain or suffering, whether physical or mental'.[104] This definition has been followed in a number of cases at both the ECtHR and Inter-American Court. In *Selmouni* the victim was subjected to repeated beatings by police officers, acts which were held to meet the threshold of torture under Article 3 of the ECHR.[105] In *Aydin* the victim was raped, treatment held to amount to torture.[106] Both of these instances were deemed serious enough to amount to 'severe pain or suffering'.

In the earlier case of *Ireland*, the ECtHR refused to categorise the five techniques as torture, insisting rather they were inhuman or degrading treatment.[107] However, in light of the *Selmouni* judgment it is likely the protection of human rights 'correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'[108] This corresponds to the dissenting opinion of Judge Evrigenis and his belief that torture represents 'the disintegration of an individual's personality, the shattering of his mental and psychological equilibrium and the crushing of his will.'[109] The Inter-American system has followed the approach of Judge Evrigenis noting that torture has been used to 'obliterate the personality of the victim'.[110]

The other element that renders an act torture under IHRL is the involvement of a State official. This is seen in several cases that have emerged from the ECtHR and Inter-American Court. This effectively prevents torture, for the purposes of IHRL, from being perpetrated by non-State actors. This introduces an important distinction between the definition of torture under IHRL *vis-à-vis* the definition of torture under

[104] UNCAT, art 1.
[105] *Selmouni* (n 65) para.105.
[106] *Aydin* (n 76).
[107] *Ireland v. UK* (n 55).
[108] *Selmouni* (n 65) para.101.
[109] Separate Opinion of Judge Evrigenis attached to *Ireland v. United Kingdom* (n 55).
[110] *Dianna Ortiz* (n 88) para.108.

IHL and ICL. The latter two regimes, as will be seen in remainder of the present chapter, have dispensed with this requirement so that torture can be committed by private or non-State actors. One of the key elements of this thesis is that formal distinctions between the regimes can help mitigate the effects of fragmentation.

The approach of the IHRL to torture can be viewed in the greater context of the fragmentation of international law. It is possible to view the IHRL regime as having created readily identifiable distinctions between it and the IHL and ICL regimes. There are similarities particularly with regard to the physical element of torture but there are also many differences as will be seen. However, while such differences might create the appearance of conflict, the actual operation of the law appears to be largely unaffected by fragmentation.

2.2 - Defining torture in the IHL regime

Torture is prohibited under IHL and the substantive definition of the physical acts considered torture, for example beating, the administration of electric shocks etc are identical to the definitions given under IHRL and ICL. As will be seen, cross-referencing between the three regimes is relatively common. However, the regimes diverge when IHL introduces the requirement that the acts occur within the context of an armed conflict. This can be in either an international or non-international armed conflict. For torture, the distinction between the two forms of conflict would appear to be irrelevant. The basic criterion would be whether the armed conflict met the threshold test outlined in Additional Protocol II to the Geneva Conventions.[111]

[111] AP II to the Geneva Conventions 1949, art 1(2). Although AP II does not receive the same level of recognition afforded to the Geneva Conventions or AP I, the threshold test itself does receive wide support from some academic writers on the subject Dieter Fleck, 'The Law of Non-International Armed Conflicts' *in* Dieter Fleck (ed), *Handbook of International Humanitarian Law* (OUP 2010) 609-610.

It would, therefore, be necessary to establish whether the actions amounted to more than 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' which are not classified as constituting 'armed conflict'.[112] The nature of the conflict however is irrelevant for the determination of whether an act constitutes torture; all that is required is the conflict's existence. Primarily, this can be attributed to the fact that torture receives universal condemnation and can occur in both international and non-international armed conflicts. However, at another level it could also be attributed to the growing convergence between IHL as it relates to international and non-international conflict, particularly regarding fundamental protections.[113] The following section outlines the way in which torture in the IHL regime can be viewed as being distinct from the IHRL and ICL regimes.

2.2.1 - Customary IHL

Custom forms the basis of much of the IHL regime as is evidenced by the voluminous ICRC study of customary IHL (referred to as 'the Study'). According to its authors, it demonstrates 'how [IHL] and human rights law reinforce each other, not only to reaffirm rules applicable in times of armed conflict, but in all situations.'[114] Despite this, the two regimes remain functionally separate. Further examples of customary IHL are found in military manuals of nations, *ius cogens* and the training offered to military personnel. Torture, inhuman or degrading treatment are also closely allied to the concept of treating civilians and persons *hors de combat* humanely, this section will therefore review the rules surrounding each.

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[112] AP II, art 1(2).
[113] The argument for fusing the two is advanced in Emily Crawford, 'Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflict' (2007) 20 *LJIL* 441.
[114] Jean-Marie Henckaerts & Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol 1 CUP 2005) 306.

Military manuals are a principal source of custom for the Study. These serve as an indicator of State practice and how they incorporate certain prohibitions into their operational law. Several military manuals contain an explicit and absolute prohibition against torture. For example, the Canadian military manual provides 'that torture is an act against humanity' and that 'torture and inhumane treatment along with wilfully causing great suffering or serious injury to the wounded, sick and shipwrecked' amounts to a grave breach of the Geneva Conventions.[115] Hungary's military manual offers a similar definition, noting that 'torture, inhumane treatment, acts causing great suffering or serious injury and degrading and inhumane practices' are likewise grave breaches of the Geneva Conventions.[116] The French military manual on the law of armed conflict references UNCAT noting that torture is 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes' as to obtain a confession, punish, intimidate 'or for any reason based on discrimination of any kind.'[117] The 'instructor's guide' from the US explains "beating a prisoner or applying electric shocks, dunking his head into a barrel of water, and putting a plastic bag over his head to make him talk' amounts to torture and inhumane treatment.[118]

Of primary importance is the reference to 'severe pain or suffering' and to 'acts causing great suffering' both of which are identical to definitions of torture offered by the IHRL regime. The position of customary IHL could be seen in similar terms to IHRL treaties in that they largely delimit and confirm that certain practices are prohibited. The Study highlights this:

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[115] Jean-Marie Henckaerts & Louise Doswald-Beck (eds) *Customary International Humanitarian Law* (vol 2 CUP 2005) 2114.
[116] ibid 2116.
[117] ibid 2152.
[118] ibid 2152.

> [a]llegations of torture, cruel or inhuman treatment, whether in international or non-international armed conflicts, have invariably been condemned by the UN Security Council, UN General Assembly and UN Commission on Human Rights, as well as by regional organizations and International Conferences of the Red Cross and Red Crescent.

This universal condemnation by several UN and NGO bodies gives the prohibition of torture under both the IHRL and IHL considerable weight, and permits judicial organs to interpret certain practices as torture and some as inhuman or degrading treatment.

On the allied matter of humane treatment, the Study notes the actual meaning of the term is not spelled out but could refer to respecting a person's dignity or prohibiting ill-treatment.[119] Humane treatment is seen as an overarching concept with IHRL and IHL giving expression to its meaning.[120] Respect for human dignity is one of the pillars on which the entire UN system is based.[121] Furthermore, the Study notes that 'these rules do not necessarily express the full meaning of what is meant by humane treatment, as this notion develops over time under the influence of changes in society.'[122] This appears to be a tacit endorsement of the 'living instrument' position set out in *Tyrer* about the ECHR adapting as society evolves.[123]

2.2.2 - IHL treaty law and case law

Treaties in the IHL regime play a vital function in codifying principles of customary international humanitarian law and demarcating the obligations of states. However,

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[119] Henckaerts (n 114) 307.
[120] ibid 307-308.
[121] This can be seen in the UDHR and art 1(3) of the UN Charter: 'To achieve international co-operation... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.
[122] Henckaerts (n 114) 308.
[123] See Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1730, 1739;The issue is analysed in detail in George Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' *in* Andreas Føllesdale *et al* (eds) *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013).

unlike IHRL, IHL has fewer 'substantive' treaties and lacks the dedicated courts found in the IHRL and ICL regimes. As such, the primary sources of law are the Geneva Conventions and their Additional Protocols, although reference will be made to the criminalisation of IHL breaches in the statutes of international criminal tribunals.

Prior to the Geneva Conventions (1949) several efforts were made to ensure that individuals who were not connected to hostilities or those rendered *hors de combat* were to be treated humanely and with dignity. For example, Article 44 of the Lieber Code 1863[124] stipulates that all 'wanton violence committed against persons in the invaded country... all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death'.[125] Whilst not explicitly prohibiting torture the Lieber Code offers a framework, namely that the idea of IHL is, ultimately, to preserve the dignity of individuals unconnected to, but affected by, the armed conflict.

After the Second World War efforts were made to prosecute individuals for war crimes. The Nuremberg Charter specified that those suspected to have committed such crimes were to be prosecuted and that the Tribunal was to have jurisdiction over acts amounting to 'violations of the laws or customs of war.'[126] Furthermore, such violations were to include 'but not be limited to, murder, ill-treatment, or deportation.'[127] Although vaguely defined, ill-treatment was held to include torture and other outrages against personal dignity. Norman Birkett, one of the two British judges at Nuremberg, wrote 'war crimes' were 'offences against the Geneva and Hague Conventions [of 1929 and 1907 respectfully]' and were not aimed at outlawing

[124] Available at http://www.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/A25AA5871A04919BC12563CD002D65C5/FULLTEXT/IHL-L-Code-EN.pdf (Accessed 16th March 2014).
[125] Lieber Code, art 44.
[126] IMT Statute.
[127] IMT Statute, art 6(b).

war but to 'mitigate its hardships and severities.'[128] Both of the Hague Regulations 1907[129] and the Geneva Conventions 1929 specify that prisoners of war are to be humanely treated with Article 2 of the latter specifying that Prisoners of War (PoWs) shall 'at all times be humanely treated.' As with the wording of the IMT Statute, any definition of torture would exclude it from categorisation as 'humane treatment.'

The Geneva Conventions 1949 created new 'conventional law' and reflected customary law.[130] All four Conventions contain common elements such as the Martens Clause and Common Article 3.[131] The provisions of Common Article 3, the grave breaches regime[132] and the fundamental guarantees contained within the Additional Protocols 1977 have been said by the ICTY to represent customary international law.[133] This is particularly so when one regards the prohibition of torture which is prohibited under each of these elements, in addition to constituting a peremptory norm of general public international law.[134] The ICJ has confirmed Common Article 3 has now has crystallised into customary law because its standards establish 'elementary considerations of humanity'.[135] The ICTY has subsequently supported the ICJ noting Common Article 3 protects values 'so fundamental...they are regarded as governing both internal and international conflicts.'[136] It offers an absolute minimum level of protection in non-international armed conflict. It provides that civilians and those deemed *hors de combat* 'shall in all circumstances be treated

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[128] Norman Birkett, 'International Legal Theories Evolved at Nuremberg' *in* Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (OUP 2008) 301.
[129] Hague Regulations, art 4 concerning PoWs notes simply that '[t]hey must be humanely treated.'
[130] Theodor Meron, 'The Geneva Conventions as Customary Law' (1987) 81 *AJIL* 348, 364.
[131] ibid 364-365.
[132] Discussed below, 108.
[133] See *Furundžija* (n 34) fn.156.
[134] The ICTY in *Furundžija* makes exactly this point where it notes that 'these treaty provisions have ripened into customary rules is evinced by various factors.' (n34) at para.138 and 153-157 where the Court discusses the peremptory status of the prohibition of torture. See also *Prosecutor v. Blagojević and Jokić* (IT-02-60) TC, Judgment, 17 January 2005, para.587.
[135] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986, p.114, para.218.
[136] *Prosecutor v. Orić* (IT-03-68) TC, Judgment, 30 June 2006, para.261.

humanely.'[137] Common Article 3 prohibits 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture'[138] and 'outrages upon personal dignity, in particular humiliating and degrading treatment'.[139] This reflects the absolute prohibition found in the IHRL regime and underscores revulsion to torture within both the IHL regime and more generally in international law.

The Geneva Conventions contain several provisions prohibiting torture and inhumane treatment. These include the prohibition of torture in the interrogation of PoWs,[140] and for punishing PoWs for violations of prison camp rules ('any form of torture or cruelty...are forbidden').[141] The Fourth Geneva Convention notes that the 'High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands.'[142] This applies to 'torture, corporal punishments, mutilation' in addition 'to any other measures of brutality whether applied by civilian or military agents.'[143]

Grave breaches of the Geneva Conventions serve to reinforce the prohibition of offences that constitute a serious breach of the Conventions.[144] The concept of 'grave breaches' has been described as 'the most serious violations of the law of armed conflict' in that they reflect 'the painful recollection of crimes committed' in the Second World War.[145] Article 130 of the Third Geneva Convention elevates acts

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[137] Common art 3(1).
[138] Common art 3(1)(a).
[139] Common art 3(1)(c).
[140] GC III, art 17.
[141] GC III, art 87.
[142] GC IV, art 32.
[143] GC IV, art 32.
[144] In contradistinction to grave breaches, for example, Sandoz notes that civilian internees not being unable to buy tobacco would not give rise to a prosecution for a war crime even though civilian internees have a right to do this (Article 87 of GC IV). Such a restriction would not amount to a 'grave breach' and the associated stigma. Yves Sandoz, 'History of the Grave Breaches Regime' 7 *JICJ* 657, 674.
[145] Gary Solis and Fred Borch, *Geneva Conventions* (Kaplan 2010) 70.

including 'torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health' to the status of a grave breach.[146] Protection to civilians and other protected persons is provided by the Fourth Geneva Convention.[147] The purpose of the grave breaches regime is to ensure that certain fundamental guarantees are afforded to persons protected by the Conventions.[148]

Following the ratification and implementation of the Geneva Conventions the international community revisited the protections in the form of the Protocols Additional to the Geneva Conventions in 1977. The first of these, known as Additional Protocol I (AP I), is to be applied in times of international armed conflict. The second, Additional Protocol II (AP II), offers certain protections in armed conflicts of a non-international character. They both include important Articles concerning the prohibition of torture. In both Protocols there are 'Fundamental Guarantees' which aim to provide a minimum standard of protection. Article 75 of Additional Protocol I prohibits 'violence to the life, health, or physical or mental well-being of persons, in particular' acts of 'torture of all kinds, whether physical or mental'.[149] It also prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment'.[150] The fundamental guarantees of Additional Protocol I 'are directly inspired by the text of Common Article 3' of the Geneva Conventions,[151] and 'very similar' to the fundamental guarantees found in AP II.[152] It applies only in non-international armed conflicts and has fewer States Parties than AP I. Its aim is to

[146] GC III, art 130.
[147] GC IV, art 147.
[148] GC IV, art 51.
[149] AP I, art 75(2)(a)(ii).
[150] ibid art 75(2)(b).
[151] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) 871.
[152] ibid 872.

establish an absolute minimum standard of treatment. Accordingly, it 'prohibits violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.'[153] Although AP II has received fewer signatures it has been seen as declarative of certain customary norms of IHL.[154]

Lastly, this section turns to the prohibition of torture by international criminal tribunals such as the ICTY and ICC. As in the other sections of this chapter care has been taken to separate the IHL elements of the ICL regime. Article 2 of the ICTY Statute criminalises the grave breaches regime and extends the Tribunal's jurisdiction to such offences. This includes the prohibition of torture.[155] In similar fashion the ICTR criminalises breaches of Common Article 3 of the Geneva Conventions noting that '[v]iolence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment' are prohibited.[156]

Article 3 of the ICTY Statute criminalises violations of the laws and customs of war and is framed in broad terms. It establishes the Court's jurisdiction and lists several violations, which are not intended to be exhaustive but merely indicative of the types of offences over which the Court can exercise its jurisdiction. This was explained in *Furundžija* where it was held that Article 3 has a 'very broad scope'[157] as previously established in *Tadic*.[158] According to *Furundzija*, Article 3 includes any 'serious violation of a rule of customary [IHL] entailing, under international

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[153] AP II, art 4(2)(a).
[154] Theodor Meron, 'The continuing role of custom in the formation of international humanitarian law' (1996) 90 *AJIL* 238, 244; For an overview of the history of AP II see Sylvie Junod, 'Additional Protocol II: History and Scope' (1983) *33 American University Law Review* 29.
[155] ICTY Statute, art 2(b).
[156] ICTR Statute, art 4(a).
[157] *Furundžija* (n 34) para.132.
[158] *Prosecutor v. Tadić* (IT-94-1) AC, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para.69; see also generally Christopher Greenwood, 'International Humanitarian Law and the Tadic Case' (1996) 7 *EJIL* 265.

customary or conventional law, the individual criminal responsibility of the person breaching the rule.'[159] In short, it is an 'umbrella rule'[160] akin to the inclusion of 'other inhuman acts' in the definition of crimes against humanity.[161]

The ICC Statute[162] largely mirrors the protections guaranteed by the ICTY, ICTR and the Geneva Conventions.[163] Article 8(2) criminalises the grave breaches regime.[164] Other serious violations are prohibited by Article 8(2) in the context of an international armed conflict. Notably this is to be done 'within the established framework of international law'.[165] In particular this approach could be used to define 'outrages upon personal dignity, in particular humiliating and degrading treatment'.[166] The Statute then arrives at the prohibition of torture in the context of a non-international armed conflict in Article 8(2)(c). This prohibits '[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture', closely mirroring provisions found within the IHL regime.

Further evidence to support this point can be found in the ICC Elements of Crimes ('the Elements'). These offer guidance as to how the crimes within the ICC's jurisdiction should be construed, but are however non-binding on the ICC.[167] For example, in relation to the 'war crime' of torture prohibited under by Article 8(2)(a)(ii) torture is defined as 'severe physical or mental pain or suffering'.[168] The Elements for Article 8(2)(a)(iii), wilfully causing great suffering, also requires that

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[159] *Furundzija* (n 34) para.132.
[160] ibid para.133.
[161] ICTY Statute, art 5(i); ICC Statute, art 7(1)(k).
[162] On the provisions of the ICC Statute on war crimes see Michael Bothe 'War Crimes' *in* Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (vol 1 OUP 2002).
[163] Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (CUP 2002) 47.
[164] ICC Statute, art 8(2)(a)(ii).
[165] ICC Statute, art 8(2)(b).
[166] ICC Statute, art 8(2)(b)(xxi).
[167] ICC Statute, art 9; Markus Wagner, 'The ICC and its Jurisdiction – Myths, Misperceptions and Realities' (2003) 7 *Max Planck Yearbook of United Nations Law* 409, 415-419.
[168] ICC Elements of Crimes, art 8(2)(a)(ii).

'severe physical or mental pain or suffering' be inflicted on an individual or individuals.[169] Article 8(2)(c)(i), torture committed in the context of a non-international armed conflict, similarly describes torture as being the infliction of 'severe physical or mental pain or suffering' on one or more persons.[170]

The Elements to Article 8(2)(c)(ii), examine the commission of outrages upon personal dignity including humiliating and degrading treatment. This states that the perpetrator 'humiliated, degraded or otherwise violated the dignity of one or more persons' and, crucially, that the 'severity of the humiliation, degradation or other violation was of such degree as to be *generally recognized* as an outrage upon personal dignity [emphasis added]'.[171] That the IHL treaty regime is vague as to the definition of torture and associated treatment should come as no surprise. The IHRL regime is likewise similarly vague. However, in respect to both areas this should be seen as a considerable boon. This matter was considered in *Aleksovski* with the ICTY outlining the fact that the Commentary to the Fourth Geneva Convention notes that the Diplomatic Conference 1949 'sought to adopt wording that allowed for flexibility, but, at the same time, was sufficiently precise without going into too much detail.'[172] It continued that in relation to the Geneva Conventions 'the general guarantee of humane treatment is not elaborated, except for the guiding principle underlying the Convention, that its object is the humanitarian one of protecting the individual *qua* human being and, therefore, it must safeguard the entitlements which flow therefrom.'[173]

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[169] ibid art 8(2)(a)(iii).
[170] ibid art 8(2)(c)(i).
[171] ibid art 8(2)(c)(ii).
[172] *Prosecutor v. Aleksovski* (IT-95-14/1) TC, Judgment, 25 June 1999, para.49.
[173] ibid.

The ICTY has drawn from a range of international instruments including UNCAT and the ECHR. For example, the Trial Chamber in *Furundžija* held that 'broad convergence of the aforementioned international instruments and international jurisprudence' demonstrates that there is now general acceptance of the main elements contained in the definition set out in Article 1 of' UNCAT.[174] However, in addition to reliance on UNCAT the ICTY has made significant contributions to the development of the definitions of torture and 'cruel treatment' within the IHL regime.

In *Aleksovski*[175] the Trial Chamber engaged in a reading of Common Article 3 to the Geneva Conventions. It was held that it 'prescribes humane treatment without distinction' as its purpose is 'to uphold and protect the inherent human dignity of the individual.'[176] Rather than define humane treatment, States Parties prohibited 'particularly odious forms of mistreatment that are without question incompatible with humane treatment.'[177] Examples of such mistreatment can be found throughout the jurisprudence of the ICTY[178] and in state practice.[179] The Trial Chamber held 'The general proscription in Common Article 3 is against inhuman treatment'.[180] The jurisprudence of the ECHR was examined drawing from the case of *Ireland v. UK*. It noted that the ECtHR was the only human rights body to date to define 'ill-treatment' as being 'the level of suffering endured by the victim.'[181]

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[174] *Furundžija* (n 34) para.161.
[175] *Aleksovski* (n 172) para.49.
[176] The Trial Chamber in *Furundžija* held that common Article 3 did include the criminalisation of torture, Furundzija (n 34) para.158.
[177] *Aleksovski* (n 172) para.49.
[178] *Prosecutor v. Babić* (IT-03-72-S) TC, Sentencing Judgment, 29 June 2004, para.26 where mistreatment is dealt with in general terms; see also *Prosecutor v. Kunarac et al* (IT-96-23 & 23/1) TC, Judgment, 22 February 2001, para.505.
[179] Australia's Military Manual cited in Henckaerts (n 115) 2151; France's LOAC Manual cited ibid 2152; US Instructor's Guide cited ibid 2152.
[180] *Aleksovski* (n 1722) para.51; Kelly Askin, 'Judgments Rendered in 1999 by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda: Tadic (App. Ch.); Aleksovski (ICTY); Jelisic (ICTY); Ruzindana & (and) Kayishema (ICTR); Serushago (ICTR); Rutaganda (ICTR)' (1999) 6 *ILSA Journal of International and Comparative Law* 485, 495.
[181] *Aleksovski* (n 172) para.53.

Continuing its analysis, the Trial Chamber engaged in a discussion as to the value of the preservation of human dignity noting that it 'is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value.'[182] This was tied to the 'respect for the human personality' and noted that 'the entire edifice of international human rights law, and of the evolution of international humanitarian law, rests on this founding principle.'[183] The Court reinforced its point thus:

> An outrage upon personal dignity is an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule.[184]

From the above passage it can be seen the Court had in mind the principle that human dignity, even in times of armed conflict, is inviolable and any acts causing 'real and lasting suffering' arising from humiliation or ridicule constitute a violation of dignity.[185] The Court supported its position by reference to IHRL. In addition to UNCAT the Court noted that the freedom from inhuman treatment is a basic principle of the UDHR and several other international human rights instruments including UNCAT.[186] Furthermore, reference was made to the test as to whether a particular course of conduct constituted cruel treatment established by the ECtHR in *Selmouni*.[187] In essence the test is subjective and relative to the impact the treatment has upon the victim.[188] For instance, there is difference between a healthy 24 year old

[182] ibid para.54.
[183] ibid.
[184] ibid.
[185] ibid.
[186] ibid.
[187] *Selmouni* (n 65) para.103.
[188] *Aleksovski* (n 172) para.56.

military pilot and a 70 year old 'grandmother with diabetes, asthma, and a heart condition'.[189]

In *Furundžija* the ICTY examined the definition of torture by reference to UNCAT, and noted IHL had no established definition of torture.[190] It defended its stance by stating that the ICTR in *Akayesu* had followed a similar line of reasoning.[191] A caveat was added when the Court highlighted that in order to be considered a 'war crime', or part of the IHL element of ICL, a nexus was required between the act of torture and the existence of an armed conflict, international *or* non-international.[192] In this fashion the definition of torture under the IHL regime differs from the definition provided by the IHRL regime which obviously requires no such connection to an armed conflict.[193] However, there is no suggestion made by the Trial Chamber that the substantive definition differs otherwise between the IHRL and IHL regimes, a point that is underscored where it explained that 'the primary purpose of this body of law is to safeguard human dignity.'[194] Again, the link to human dignity is apparent in the courts' jurisprudence.

Further divergence from the IHRL definition can be found in *Kunarac*. The Trial Chamber concluded that 'the definition of torture under [IHL] does not comprise the same elements as the definition of torture generally applied under human rights law.'[195] In particular the requirement of the involvement of a State agent was dropped,[196] representing a significant shift away from the IHRL definition of

[189] Gary Solis, *The Law of Armed Conflict* (CUP 2010) 441.
[190] *Furundžija* (n 34) para.159.
[191] ibid para.160.
[192] ibid para.162.
[193] ibid.
[194] ibid.
[195] *Kunarac* (n 178) para.496.
[196] ibid.

torture.[197] However, despite this definitional change the Court concluded that the infliction of 'severe pain or suffering, whether physical or mental' is essential to defining torture.[198] The removal of the requirement of the presence or instigation of a state official is a largely pragmatic response given that often those who commit war crimes could be classed as non-state actors or paramilitaries who are not affiliated with a state power.[199]

The ICTY has also been called upon to offer definition and clarity to the law surrounding 'cruel treatment'. *Blaškic* held that such treatment could include an order compelling protected persons, such as civilians, to prepare military fortifications or installations for use against their own forces.[200] The Appeals Chamber found this to be a serious attack on *human dignity* causing serious mental and potentially physical suffering.[201] Forcing protected persons to act contrary to their feelings or consciences would thus amount to cruel treatment. One explanation is that it reinforces their sense of helplessness in the face of their captor's power.[202]

Perhaps the simplest definition of 'cruel treatment' is to be found in *Mrskic et al* where the Trial Chamber defined such treatment as 'an intentional act or omission causing serious mental or physical suffering or injury to, or constituting a serious attack on human dignity upon, a person taking no active part in the hostilities.'[203] Consequently, failure to provide adequate medical treatment could amount to 'cruel treatment' providing that it caused 'serious mental or physical suffering' and was linked to an armed conflict.[204] As with other examples of inhuman or cruel treatment,

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[197] Jill Marshall, 'Torture Committed by Non-State Actors: The Developing Jurisprudence from the Ad Hoc Tribunals' (2005) 5 *Non-State Actors and International Law* 171, 177.
[198] *Kunarac* (n 178) para.496.
[199] Paolo Gaeta, 'State Officials a Requirement for the Crime of Torture?' (2008) 6 *JICJ* 183, 186.
[200] *Prosecutor v. Blaskić* (IT-95-14) AC, Judgment, 29 July 2004, para.597.
[201] ibid.
[202] Sussman (n 5) 227.
[203] *Prosecutor v. Mrkšić et al.* (IT-95-13/1) TC, Judgment, 27 September 2007, para.516.
[204] ibid para.517.

the criminalisation of such behaviour further highlights concern with the protection of human dignity. A further distinction between torture and inhuman and degrading treatment is suggested by Lord Hope who notes that the distinction between torture and inhuman or degrading treatment could be one of severity, or the purpose for which torture is used. The latter, purposive, account would render as torture any inhuman and degrading treatment administered for the purposes of extracting information or a confession from an individual.[205]

2.2.3 - Conclusions on torture within the IHL regime

The complete prohibition of torture, and other cruel treatment, is apparent from the above survey. Of particular note is the fact that there are no circumstances under which torture is actually to be either permitted or condoned. This was summed up by the ICTY in *Furundžija*:

> The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.[206]

The Court also noted 'torture in time of armed conflict is prohibited by a general rule of international law.'[207] Thus, in times of armed conflict, the rule against torture can be applied as part as both customary law and treaty law, 'the content of the prohibition being the same.' [208] According to the ICTY the custom and treaty law have merged, meaning torture is absolutely prohibited in all situations.

Despite such a widespread prohibition of torture it is important to highlight the requirement that acts of torture must be committed within the context of an armed conflict (international or non-international) for such acts to be considered a violation

[205] David Hope, 'Torture' (2004) 53 *ICLQ* 807, 826.
[206] *Furundzija* (n 34) para.146.
[207] ibid para.139.
[208] ibid.

of IHL. In this respect, it is a *sine qua non* of the requirement – much akin to the requirement under IHRL that the State be involved (directly or indirectly) in the physical act of torture.[209] As with IHRL, the inclusion of such a contextual element is a vital component of the definition. Despite the differing definitions of torture, it is suggested that there is nothing that would prevent their application in practice.[210]

The definition of treatment amounting to torture is similar, if not identical, to that which is found in IHRL and ICL. In part this is because the Courts considering torture as a violation of IHL have drawn from UNCAT and the jurisprudence of the ECtHR. [211] This also applies in instances of inhuman treatment where the ICTY considered the definition given in *Ireland v. United Kingdom* before the ECtHR.[212] There are therefore many shared similarities between the regimes as to the treatment that must be inflicted for a particular act to be considered torture, inhuman or degrading treatment. Differences emerge however when the perpetrators of torture are considered. Under IHRL only State officials, or those acting with their support or acquiescence, can commit acts of torture. In *Kunarac* the ICTY held that this was not a requirement for defining torture under IHL. [213] This can be largely attributed to the idea that IHL is recognised as binding State and non-State actors alike.[214] The removal of this requirement is significant departure from the IHRL definition, widening the applicable scope of torture to rebel groups as well as States.

As with the IHRL approach to torture, it is possible to discern a distinct approach to torture under the IHL regime. Despite this distinction there are similarities between the IHL, IHRL and ICL regimes. This is particularly so when

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[209] See above, 101.
[210] Cordula Droege, '"In Truth the Leitmotiv": The Prohibition of Torture and other Forms of Ill-treatment in International Humanitarian Law' (2007) 89 *ICRC* 515, 519.
[211] *Furundžija* (n 344) para.161.
[212] *Aleksovski* (n 1722) para.53.
[213] *Kunarac* (n 178) para.496.
[214] Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *ICLQ* 369, 394.

examining the physical elements of torture, and less so when considering the contextual elements such as the requirement that the acts be committed during times of armed conflict. Perhaps due to history, the IHL regime shares many similarities with the ICL regime in regard to torture. However, it remains that there are a number of differences between the three regimes, differences which can be viewed in the wider context and trend towards greater fragmentation of international law. These differences do not, it appears, substantially affect the operation of the various regimes studied. This could suggest that fragmentation is not necessarily a wholly negative phenomenon.

2.3 - Torture and the ICL regime

Acts of torture are prohibited under international criminal law, as they are in under IHRL and IHL. However, as was seen with the distinction between IHRL and IHL, the definition of the violation differs. The prime distinction in the case of ICL comes when considering torture as either an act of genocide or a crime against humanity. Although war crimes are prosecuted before international criminal tribunals and courts, the legal basis for such prosecutions lies firmly in the field of IHL.[215] Consequently, for an act of torture to be considered torture under the ICL it must conform to the basic requirements of the offences that compromise the regime. For instance, for torture to be considered a crime against humanity under the ICC and ICTR it must take place in the context of a 'widespread or systematic' attack against a civilian population.[216]

It is worth highlighting here the different approach of the ICTY Statute which stipulates that a crime against humanity must be committed in the context of an armed

[215] For example, the offences are listed as 'war crimes' or 'Grave Breaches of the Geneva Conventions' both of which are terms used in IHL.
[216] ICC Statute, art 7(1); ICTR Statute, art 3(1).

conflict.[217] However, the ICTY Appeals Chamber has itself cast doubt on this requirement in a statement in *Tadić*,[218] with such an approach reflecting what was perceived at the time to be the correct legal approach.[219] For an act of torture to amount to an act of genocide it must be aimed at destroying in whole or in part a national, ethnical, racial or religious group.[220]

As in the IHL regime, the 'contextual' elements of the offences of crimes against humanity and genocide, i.e. the requirement that the acts occur in a widespread or systematic fashion, or conform to the elements of genocide, are as important as the definition as the physical acts of torture. Such a recognition grounds the definitions in a formally understood notion of the ICL regime, thereby contributing to the arguments advanced in Chapter One that the three regimes are indeed separate from one another in both substantive and formal terms. The structure of the following section is structured so as to draw attention to these differences thereby contributing to the overall purpose of the thesis.

2.3.1 - Treaty Law and ICL

Treaties provide much of the framework for modern ICL. This section begins by examining the provisions of the IMT Statute, followed by the ICTY/R and ICC Statutes. Article 6(c) of the IMT Statute specified that individuals could be prosecuted for 'crimes against humanity' these included acts such as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population'. The inclusion of 'other inhumane acts' copies the wording of Article 6(b) of the Statute in the context of war crimes. As with other treaties and international

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[217] ICTY Statute, art 5(1).
[218] *Prosecutor v. Tadić* (IT-94-1-A) AC, Judgment, 15 July 1999, para.251.
[219] Christopher Greenwood, 'International Humanitarian Law and the Tadic Case' (1996) 7 *EJIL* 265, 269.
[220] Convention on the Prevention and Prohibition of Genocide, 9 December 1948, A/RES/260 ('the Genocide Convention') art 1; ICC Statute, art 6; ICTY Statute, art 4(2); ICTR Statute, art 2(2).

instruments, Article 6(b) did not offer a specific definition but rather enabled the IMT to prosecute individuals for 'inhumane acts' which, as again was the case with war crimes, cannot be said to exclude acts of torture which are by their very definition inhumane.

The Genocide Convention came into being after the Second World War. It criminalises acts committed with the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[221] In addition to genocidal killing the Convention also prohibits acts causing 'serious bodily or mental harm to members of the group'.[222] In contrast to war crimes, and the Nuremberg definition of crimes against humanity,[223] acts of genocide could be committed in peacetime. As there is no requirement of a connection to an armed conflict the Convention has been described by Schabas as 'the quintessential human rights treaty.'[224] Despite this, it has been included here as a violation of ICL because it has been principally interpreted not by human rights courts but by international criminal tribunals.[225]

Article 4 of the ICTY Statute established the Tribunal's jurisdiction over acts of genocide including 'causing serious bodily or mental harm to members of [a protected] group'. Article 2 of the ICTR Statute contains a similar provision. Crimes against humanity also featured as indictable offences at the ICTY/R. The Statutes explicitly prohibit torture[226] and 'other inhumane acts'.[227] The ICC Statute largely

[221] Genocide Convention, art 2.
[222] Genocide Convention, art 2(b).
[223] This required the presence of an armed conflict and was included in the ICTY Statute (art 5) but not the ICTR Statute (art 3).
[224] William Schabas, *The International Criminal Court* (CUP 2011) 100; see also *Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1) TC, Judgment, 21 May 1999, para.88.
[225] Thomas Margueritte, 'International Criminal Law and Human Rights' *in* William Schabas and Nadia Bernaz (eds) *Routledge Handbook of International Criminal Law* (Routledge 2011) 436.
[226] ICTY Statute, art 5(f); ICTR Statute, art 3(f).
[227] ICTY Statute, art 5(i); ICTR Statute, art 3(i).

echoes the Statutes of the ICTY and ICTR.[228] Genocide can be committed by causing 'serious bodily or mental harm to members of the [protected] group',[229] while torture remains a crime against humanity.[230] The 'other inhumane acts' enumerated in the ICTY and ICTR Statutes are replaced with a broader framed criminal act, namely 'Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'[231]

Developments of the definition of torture under the ICC Statute include the definitions provided by both Article 7(2) and in the Elements of Crimes. Article 7(2) appends a definition of torture plainly derived from UNCAT:[232] torture 'means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused'. The Elements further emphasise the point that torture is the infliction of 'severe physical or mental pain or suffering upon one or more persons.'[233] In relation to the 'other inhumane acts' the Elements clarify that such acts can occur when the 'perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.' The Elements also consider the commission of genocide by causing 'serious bodily or mental harm'.[234]

In order for an individual to be convicted for crimes against humanity under the ICC Statute it is necessary to prove the acts took place within the context of 'a widespread or systematic attack directed against any civilian population' and that an

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[228] However, William Schabas notes art 7 codifies the evolution of crimes against humanity before the ICTY/R; Schabas (n 224) 109.
[229] ICC Statute, art 6(b); see also Antonio Cassese, 'Genocide' *in* Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (vol 1 OUP 2002) – Cassese notes that the ICC Elements of Crimes regarding genocide are 'somewhat innovative' and urges caution as to how one views them as reflecting customary international law, 348-350.
[230] ICC Statute, art 7(1)(f).
[231] ICC Statute, art 7(1)(k).
[232] For a discussion see Cassese (n 229).
[233] ICC Elements of Crimes, art 7(1)(f).
[234] ICC Elements of Crimes, art 6(b).

accused individual had knowledge that it was an attack as such.[235] This is a vital constituent to be considered when defining any crime against humanity because without the 'widespread or systematic' element it cannot be held, if one is to be faithful to the principle of *lex lata*, a crime against humanity has occurred.

2.3.2 - ICL case law

There exists an ever-increasing corpus of case law emanating from the international criminal tribunals. Each of these has made a contribution towards the definition of torture. As with previous sections its primary focus is on the similarities between the ICL, IHRL and IHL regimes. Much of our modern understanding and appreciation of the law relating to the ICL regime has been developed by the ICTY and ICTR but Nuremberg was the impetus for much of contemporary ICL.

2.3.2(a) - Torture at Nuremberg and Tokyo

Given the scale of the atrocities committed by the accused at Nuremberg and the subsequent tribunals, it is little surprise that torture was included as a crime. Amongst those prosecuted was Ernst Kaltenbrunner, the former chief of the RSHA (*Reichssicherheitshauptamt* – Reich Security Main Office).[236] As head, Kaltenbrunner was also responsible for overseeing the SS *Einsatzgruppen* paramilitary death squads following regular German forces as they advanced across Eastern Europe. The Tribunal found that the SS, Gestapo and other elements under his command used 'methods which included the torture and confinement in concentration camps'[237] of

[235] ICC Statute, art 1.
[236] This was the SS organisation responsible for the internal and external security of the Third Reich which included the Gestapo and SD which acted as the Nazi Party's internal security force, IMT Judgment, 41 *AJIL* (147) 172, 258.
[237] ibid 285.

people and was personally ordered by Kaltenbrunner.[238] The judgment also examines the torture of PoWs and establishes they were ill-treated and tortured contrary to international law and 'in complete disregard of the elementary dictates of humanity'.[239] Torture was also used as an instrument with which to persecute the Jews under Kaltenbrunner's direction.[240]

Similar prosecutions followed in the subsequent trials of 'lesser' war criminals. These expanded the definition of 'crimes against humanity', explicitly referencing acts of torture as crimes against humanity.[241] In *Pohl*,[242] torture featured prominently in the indictments for war crimes[243] and crimes against humanity.[244] The judgment refers to, *inter alia*, the use of concentration camp detainees in 'scientific' experiments.[245] The judgment outlines specific examples of torture used by the SS, for example where an 'inmate could be fed salt herring without water until he went crazy, or...hanged head down.'[246] The remainder of the judgment is littered with references to acts of torture committed by the *Einsatzgruppen* both in the course of 'military' operations[247] and in concentration camps.[248]

The Tokyo Tribunal also saw prosecutions for acts of torture. The Indictment read that the 'Laws and Customs of War are established partly by the practice of civilised nations and partly by Conventions and assurances which are either directly binding upon the parties thereto, or evidence of the established and recognised

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[238] ibid.
[239] ibid 225.
[240] ibid 247.
[241] Law No 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Allied Control Council for Germany, (1946) No 3 Official Gazette 50, 20 December 1945.
[242] The Pohl Case, formally known as US v. Pohl and Others, *Judgment in Trials of War Criminals before the Nuernberg Military Tribunals*: Vol. V (1949).
[243] ibid 204-207.
[244] bid 207.
[245] ibid 971.
[246] ibid 1096.
[247] ibid e.g. 1139 and 1160.
[248] ibid e.g. 1226.

rules.'[249] The specific elements of the Indictment made reference to acts of torture and 'cruel treatment' committed against both PoWs and civilian internees.[250] In its Judgment the Tribunal described several acts which it considered to be torture including 'water treatment, burning, electric shocks, the knee spread, suspension, kneeling on sharp instruments and flogging.'[251] It noted that the '[m]ethods of torture were employed in all areas uniformly as to indicate policy in both training and execution.' Indeed, the Tribunal found that it was 'a reasonable inference that the conduct of the *Kempeitai* [the Japanese military police] and camp guards reflected the policy of the War Ministry.'[252] The Judgment then proceeds to outline and define several acts of torture mentioned above in addition to the use of mock executions[253] and the vivisection of live PoWs.[254]

In their analysis of the post-Second World War IMTs, Boister and Cryer explain that the 'Nuremberg IMT...moved towards the view that the 1929 [Geneva] Conventions [were] customary.'[255] They also make reference to the idea that the violations at Tokyo were seen by the Tribunal as violating basic rights.[256] Such a finding demonstrates an understanding on the part of the Tribunal that the protection of 'basic rights' was fundamental to its purpose and the prosecution of individuals for such acts was not only in the interests of the victims but also of the international community. This was an awareness shared by the tribunals created nearly 50 years later.

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[249] Nicholas Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (OUP 2008) 56.
[250] ibid 59.
[251] ibid 557.
[252] ibid.
[253] ibid 559.
[254] ibid 560.
[255] Nicholas Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 187.
[256] ibid.

The ICTY and ICTR have both considered the definition of torture as a crime against humanity. In *Perisic* the Trial Chamber held that '"Other inhumane acts" is a category of crimes against humanity recognised as forming part of customary international law. It functions as a residual category for serious crimes that are not otherwise enumerated in Article 5 of the Statute'.[257] The Tribunal noted that the category of other inhumane acts has been included in the statutes of the IMT and Tokyo Tribunal.[258] It further cited the *Stakic* Appeal Chamber judgment as referring to the ECHR and ICCPR as prohibiting certain forms of conduct.[259] The Trial Chamber's judgment in *Perisic* is supported by Mettraux who has written that 'with a few noticeable exceptions, most of the law that was set out at Nuremberg is accepted as forming part of customary international criminal law.' He continues by noting much 'of that body of rules and principles may in turn be found in the statutes of modern-day international criminal tribunals and all through their jurisprudence.'[260]

2.3.2(b) - Torture at the ICTY and ICTR

One of the first judgments of the ICTY pertaining to inhuman treatment determined that crimes against humanity 'are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity.'[261] The emphasis on human dignity is reminiscent of the provisions of IHL treaties, in particular the absolute minimum standards established by common Article 3 of the Geneva Conventions. Similar parallels are reflecting in the standards of the IHRL regime. This suggests that the protection of individual integrity is an

[257] *Prosecutor v. Perisić* (IT-04-81) TC, Judgment, 6 September 2011, para.110.
[258] ibid fn.220.
[259] ibid fn.649; see also *Prosecutor v. Kordić & Čerkez* (IT-95-14/2) AC, Judgment, 17 December 2004, para.117.
[260] Guénaël Mettraux, 'Judicial Inheritance: The Value and Significance of the Nuremberg Trial to Contemporary War Crimes Tribunals' *in* Guénaël Mettraux (ed), *Perspectives on the Nuremberg* Trial (OUP 2008) 600.
[261] *Prosecutor v. Erdemović* (IT-96-22) TC, Sentencing Judgment, 29 November 1996, para.28.

overarching concern of all three legal regimes. The decision by the ICTY in *Erdemovic* frames and demarcates the whole field of crimes against humanity, and ultimately places at its core the protection of the individual.

In *Kunarac*, torture was said to be an act or an omission causing 'severe pain or suffering, whether physical or mental' but with no specific and exhaustive elements of which acts constitute torture.[262] Existing case law, both from the ICTY and from other international courts including those from the IHRL regime, had 'not determined the absolute degree of pain required for an act to amount to torture.'[263] Torture has been said to be 'one of the most serious attacks upon a person's mental or physical integrity' with the 'purpose and the seriousness of the attack upon the victim' setting it apart from other mistreatment.[264] This is reminiscent of the definition provided by international human rights law, especially the threshold established in *Ireland v. UK*. The Tribunal noted that 'severe pain or suffering' rules out acts which are not of sufficient gravity such as interrogations and 'minor contempt for the physical integrity of the victim'.[265] Lastly, in similar fashion to the dissent of Judge Fitzmaurice in *Ireland*, the Trial Chamber noted 'Care must be taken to ensure that this specificity is not lost by broadening each of the crimes over which the Tribunal has jurisdiction to the extent that the same facts come to constitute all or most of those crimes.'[266] This marks a distinction between the IHRL and ICL regimes. This could be because, as de Frouville has noted, IHRL is not precise enough to serve as a foundation for a criminal offence owing to the principle of *nullum crimen sine lege*.[267]

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[262] *Kunarac* (n 178) para.149.
[263] ibid.
[264] *Prosecutor v. Krnojelac* (IT-97-25) TC, Judgment, 15 March 2000, para.180.
[265] ibid para.181.
[266] ibid.
[267] Olivier de Frouville, 'The Influence of the European Court of Human Rights' Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment' (2011) 9 *JICJ* 633, 642.

The 'severe pain and suffering' requirement of torture as a crime against humanity has been found in several other cases before the ICTY and the ICTR. In *Kvocka* it was held torture 'has been defined by the Tribunal jurisprudence as severe mental or physical suffering deliberately inflicted upon a person for a prohibited purpose'.[268] In *Akayesu* torture was interpreted in accordance with that which is given in UNCAT.[269] This is illustrative of the way in which the international criminal tribunals have drawn from IHRL for guidance, and while they are structurally different, remain connected to one another.[270]

The *Kvocka* Trial Chamber judgment is particularly useful because it noted that the interpretation of torture relating to the 'severity of pain or suffering' was held to be consistent with IHRL jurisprudence.[271] The Tribunal went on to list some inhumane acts found by the UNHRC[272] to constitute torture. These included the administration of electric shocks, mock executions, food and water deprivation and beatings.[273] In *Mucic* the ICTY relied heavily on the jurisprudence of the ECtHR,[274] in particular the cases of *Aksoy*[275] and *Aydin*.[276] It also referenced *Ireland* noting 'ill-treatment' lacked a precise definition. However, it concluded that 'there were several examples of such treatment constituting torture, examples which were derived from

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[268] *Prosecutor v. Kvočka et al* (IT-98-30/1) TC, Judgment, 2 November 2001, para.137.
[269] *Prosecutor v. Akayesu* (ICTR-96-4) TC, Judgment, 2 September 1998, para.681; Almost the exact same wording was used by the ICTR in Musema where torture was held to be '[i]ntentionally inflicting severe pain or suffering, whether physical or mental, on a person for such purposes as obtaining from him or a third person information or a confession, or punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.' para.285.
[270] de Frouville (n 267) 649.
[271] *Kvočka* (n 268) para.142.
[272] Here the Tribunal relied upon several proceedings before the UNHRC including *Muteba v. Zaire* (124/82) 25 March 1982, UN Doc A/39/40 and *Grille Motta v. Uruguay* (11/77) 25 April 1977, UN Doc A/35/40; see *Kvočka* ibid fn.306 and fn.307.
[273] *Kvočka* ibid para.146.
[274] *Mucić* (n 4) paras.465 and 466 respectively.
[275] *Aksoy v. Turkey* (Application no. 21987/93) Judgment, 18 December 1996.
[276] *Aydin* (n 766).

the jurisprudence of human rights bodies and courts.'[277] Indeed, in several cases the jurisprudence of the ECtHR has been cited by the ICTY, a point de Frouville highlights as exemplifying the 'common principle of respect for human dignity' linking the IHRL, IHL and ICL regimes.[278] However, such a point does not alter the fact that the three regimes remain distinct, explaining why definitions of the IHRL regime are not automatically transposed into ICL or IHL.[279]

The so-called 'purposive element', by which is meant the purposes for which acts of torture are committed e.g. obtaining information from an individual, has been adapted by both the ICTY and the ICTR. In early cases the definition to which both tribunals adhered was the definition given in UNCAT. For example, in *Musema* the ICTR noted that torture could be committed only for certain purposes, the wording of which reflected the wording of UNCAT. It will be recalled that under UNCAT particular acts only constitute torture:

> for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.[280]

However, it was suggested in *Kvočka* the purposes set down in UNCAT 'do not constitute an exhaustive list, and should be regarded as merely representative' of the purposes for which torture can be committed in the context of ICL.[281] Such a viewpoint highlights the structural differences between the IHRL and ICL regimes, illustrating the need for both regimes because neither on its own would be sufficient to cover all instances of torture or ill-treatment.

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[277] *Mucić* (n 4) para.461.
[278] de Frouville (n 2677) 648.
[279] ibid.
[280] UNCAT, art 1(1).
[281] *Kvočka* (n 2688) para.140.

The ICTY has added further elements to the purposive requirement. Notably in *Furundžija*, the Trial Chamber concluded that humiliating the victim or a third person constitutes a prohibited purpose for torture under IHL. The Trial Chamber held: 'among the possible purposes of torture one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law.' Furthermore, 'the primary purpose of this body of law is to safeguard human dignity.'[282] This was affirmed by the Trial Chamber in *Kvočka* where it was held the 'intent to humiliate' an individual could also constitute a motivation for torturing that individual.[283]

Alongside the 'purposive' element is the *Krnojelac* judgment where the Trial Chamber held that torture 'as a criminal offence is not a gratuitous act of violence'.[284] This is because 'it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose.' [285] Even the infliction of very severe pain would not amount to torture as a war crime or crime against humanity.[286] Schabas has developed this further by noting that torture 'for purely private purposes...would fall outside the scope of the definition [of torture as a crime against humanity].'[287]

The final difference between the ICL and IHL on the one hand and IHRL on the other is the involvement of State officials. In early cases, as with the purposive element, the ICTY and ICTR followed the requirement set forth by UNCAT that a state official was necessary for particular acts to be considered 'torture'. For example in *Akayesu* the ICTR held that torture was committed only when 'pain or suffering is

[282] *Furundžija* (n 344) para.161.
[283] *Kvočka* (n 268) para.153.
[284] *Krnojelac* (n 2644) para.180.
[285] ibid.
[286] ibid.
[287] William Schabas, *The UN International Criminal Tribunals* (CUP 2006) 207; see also Schabas (n 224) 114: in order for a crime against humanity to be committed the perpetrator must know that the act is part of a 'widespread or systematic' attack.

inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'[288] At the ICTY this viewpoint was similarly expressed in *Furundžija* by the Appeals Chamber.[289] It should be noted that both Akayesu and Furundzija can be classified as 'state officials'. At the material times of their offences Akayesu was a mayor,[290] and Furundzija a commander of a special military unit.[291]

This requirement has since been dropped from the definition of torture in both IHL and ICL.[292] In *Krnojelac* the ICTY Trial Chamber held that 'when relying upon human rights law relating to torture, the Trial Chamber must take into account the structural differences which exist between that body of law and international humanitarian law, in particular the distinct role and function attributed to states and individuals in each regime.'[293] In *Kvočka* the Court noted that '[d]iffering views have been expressed in the jurisprudence of the Tribunal as to whether the suffering must be inflicted by a public agent or the representative of a public authority in order to meet the definition of torture.'[294] This was examined further by the Appeals Chamber, which concluded that in light of the *Furundžija* and *Kunarac* judgments, such a requirement was 'not a requirement under customary international law in relation to the criminal responsibility of an individual outside the framework of the Torture Convention.'[295]

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[288] *Akayesu* (n 269) para.681.
[289] *Prosecutor v. Furundžija* (IT-95-17/1) AC, Judgment, 21 July 2000, para.111.
[290] *Akayesu* (n 26969) para.1.
[291] *Furundžija* (n 344) para.40.
[292] At the preparatory conference for the ICC the majority of delegations took the view that the requirement of the involvement of persons acting in an official capacity 'would create the unintended impression that non-state actors are not covered' meaning that the war crime of torture could only be committed by state forces and exclude rebels, terrorists and other non-state actors. See Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (CUP 2002) 46.
[293] *Krnojelac* (n 26464) para.181.
[294] *Kvočka* (n 2688) para.137.
[295] *Prosecutor v. Kvočka et al* (IT-98-30/1) AC, Judgment, 28 February 2005, para.281.

The issue was explored in depth in *Kunarac*. The Appeals Chamber explored the difference between the responsibility of States and individual criminal responsibility for torture. It concluded there is a split between the customary international law of torture as it relates to the former and the meaning of torture under international law in general terms.[296] It concluded that that the Trial Chamber had been correct to remove the requirement that, for the purposes of international criminal law, acts of torture could only be committed by, or under the direction of, a public official.[297] Lastly, the ICTY in *Mrskić* held that 'it is now settled in the jurisprudence of the Tribunal that the perpetrator need not have acted in an official capacity.'[298] Here, there is evidence to suggest the ICL and IHL are different from IHRL as to how they approach the definition of torture a result of structural differences between the regimes.[299]

The reason for the divergence from the IHRL definition was one of jurisdiction. Had the tribunals continued with the definition given by IHRL, and in particular UNCAT, certain individuals would have escaped justice on the grounds that they were non-state actors. This appears to be a sensible modification of the law relating to torture under both the ICL and IHL regimes. Such a distinction between IHRL, and IHL/ICL was held not to 'preclude recourse to human rights law in respect of those aspects which are common to both regimes.'[300] Such common elements would constitute the majority of what could be termed the *actus reus* of torture i.e. the physical acts associated with such inhumane treatment. The Trial Chamber acknowledged the ECtHR's reasoning and criteria when assessing the gravity of

[296] *Prosecutor v. Kunarac et al* (IT-96-23 & 23/1) AC, Judgment, 12 June 2002, para.147.
[297] ibid para.148.
[298] *Prosecutor v. Mrkšić et al* (IT-95-13/1) TC, Judgment, 27 September 2007, para.514.
[299] de Frouville (n 2677) 642.
[300] *Krnojelac* (n 264) para.181.

torturous acts.[301] It concluded that, despite the differences between the IHRL, IHL and ICL regimes, the 'prohibition against torture applies at all times.'[302]

2.3.3(c) - Torture as genocide at the ICTY and ICTR

The final part of this section turns to the inclusion of acts of torture as genocide. The first case to consider the causing of serious bodily or mental harm was *Akayesu*. Here the Tribunal took 'serious bodily or mental harm...to mean acts of torture, be they bodily or mental, inhumane or degrading treatment'.[303] The Court cited the *Eichmann case* in which the District Court of Jerusalem held that such acts were designed to 'cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture.'[304] Causing serious bodily or mental harm does not have to result in 'permanent and irremediable' harm.[305] This reasoning follows the criterion set down in both IHRL and IHL wherein the 'permanence' of serious bodily or mental harm is not required.

Serious mental or physical harm has been held to entail 'more than minor impairment on mental or physical faculties.[306] This means harm beyond 'temporary unhappiness, embarrassment, or humiliation.'[307] Furthermore, it 'must be harm that results in a grave and long-term disadvantage to a person's ability to led [*sic*] a normal and constructive life.'[308] It must, in other words, have more than a short-term or temporary effect on the victim.[309] Evidence of suffering neednot be visible after the commission of the act.[310]

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[301] ibid.
[302] ibid para.182.
[303] *Akayesu* (n 26969) para.504.
[304] ibid para.503.
[305] ibid para.502.
[306] *Prosecutor v. Bagilishema* (ICTR-95-1A) TC, Judgment, 7 June 2000, para.59.
[307] *Prosecutor v. Krstić* (IT-98-33) TC, Judgment, 2 August 2001, para.342.
[308] ibid.
[309] *Blagojević* (n 1344) para.586.
[310] *Prosecutor v. Brđanin* (IT-99-36) TC, Judgment, 1 September 2004, para.484.

After *Akayesu* both Tribunals undertook more detailed and thorough examinations of the necessary elements of this particular act of genocide. In *Kayishema and Ruzindana* it was held that the 'phrase serious bodily harm should be determined on a case-by-case basis, using a common sense approach.'[311] The Trial Chamber continued: 'causing serious bodily harm' is self-explanatory. It could be construed as meaning any harm that causes serious injury to health, disfigurement or serious injury to organs or senses.[312] The definition of bodily or mental harm should be assessed on a case-by-case basis.[313]

The exact threshold at which particular acts cause 'serious bodily or mental harm' has not been specifically referenced by either the ICTY or ICTR. In *Brđanin* the Trial Chamber noted that it was 'understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial or religious group.'[314] In the *Seromba* appeal it was determined that it did not 'squarely [address] the definition of such harm. The quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.'[315] In analysing these judgments it is particularly worthwhile to note that in order to constitute an act of genocide such 'serious bodily or mental harm' must 'be of such a serious nature as to threaten [a group's] destruction in whole or in part.'[316]

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[311] *Kayishema* (n 224) para.108.
[312] ibid para.109.
[313] *Prosecutor v. Kajelijeli* (ICTR-98-44) TC, Judgment, 1 December 2003, para.815; the 'case-by-case' approach was also seen in Krstić (n 307) para.510.
[314] *Brđanin* (n 310) para.690.
[315] *Prosecutor v. Seromba* (ICTR-2001-66) AC, Judgment, 12 March 2008, para.46.
[316] ibid.

'Serious harm' was further considered in *Popović*. The detention of victims, Bosnian men, before the Srebrenica massacre, including the removal the victims' identity papers caused 'uncertainty as to their ultimate fate' and eventually this turned to 'fear and terror'.[317] They were 'detained in intolerable conditions of overcrowded facilities with no food, little if any water and abhorrent sanitary conditions' and in 'many instances they were subjected to taunting and physical abuse.'[318] Indeed, in *Semanza* the ICTR concluded that whilst the 'term "serious bodily harm" is not defined in the Statute' it 'seeks to punish serious acts of physical violence, including sexual violence, falling short of killing.'[319] As with other elements of torture and inhumane treatment under the ICL regime, this again highlights the concern the regime shares with IHRL and IHL for the preservation and protection of human dignity.

The ICTY described in *Popović* the circumstances and acts which were said to have been committed by the accused. It found 'that serious bodily and mental harm was caused to those who survived the killing operation. Those few who lived were often physically injured and all endured the extreme anguish and terror of a close encounter with violent death. Several were forced by circumstance to pretend to be dead and to hide under the cover of and surrounded by the bodies of those killed around them.'[320] The Court continued that the survivors 'then endured harrowing circumstances in order to escape' and concluded that it had 'no doubt as to the intense physical suffering and mental anguish endured by these survivors as a direct result of the implementation of the plan to murder.'[321] The ICTR Appeals Chamber in *Seromba* held that 'serious mental harm includes "more than minor or temporary

[317] *Prosecutor v. Popović* (IT-05-88) TC, Judgment, 10 June 2010, para.844.
[318] ibid.
[319] *Prosecutor v. Semanza* (ICTR-97-20) TC, Judgment, 15 May 2003, para.320.
[320] *Popović* (n 317) para.845.
[321] ibid.

impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat".'[322] Consequently, the definition of torture for the purposes of ICL could be that there has to be more than momentary panic or terror, suggesting a restrictive approach to how psychological torture can be inflicted, again perhaps because the ICL regime requires certainty and precision in order to conform to the principles of a fair trial for all parties.

2.3.3 - Conclusions on torture within the ICL regime

International criminal law has contributed greatly to the definition of torture with respect to war crimes, crimes against humanity and genocide. As has been argued above, each specific physical act of torture has to be linked to either a widespread and systematic attack on a civilian population or to occur with the intent to destroy in whole or in part a national, ethnical, racial or religious group. Without such a connection the physical act will not constitute a crime against humanity or genocide and thus not amount to a violation of international criminal law. Therefore, it appears any definition of torture for the purposes of international criminal law should also include a reference to the wider contextual acts of crimes against humanity or genocide. As with the IHRL and IHL regimes, the definition of torture includes more than the physical acts of torture. The emergence of a definition of torture under ICL consisting of more than the physical act of torture differentiates the ICL from the IHRL and IHL regimes. It serves to illustrate the functional differences existing between the regimes. In part this is due to the purpose of ICL in bringing perpetrators of international crimes to justice thereby curbing impunity.

The conduct constituting torture under the ICL remains largely identical to that which is found under the IHRL and IHL regimes. The threshold remains 'severe

[322] *Seromba* (n 315) para.46.

pain or suffering' whether physical or mental.[323] Like IHL, ICL has relied upon *Ireland v. United Kingdom* when defining this threshold.[324] Unlike IHRL, particularly UNCAT, torture can be inflicted through an omission.[325] This marks a departure from the definition of torture given under IHRL. Similarly, it now appears to be a settled aspect of ICL that torture need not be committed by State officials: non-State actors are equally culpable.[326] The IHRL regime also has a relatively narrow conception of torture in the sense that there must be a purpose to its infliction on the victim, for example the obtaining of information or a confession.[327] ICL has abandoned this requirement, allowing acts committed out of sadistic pleasure to amount to torture. [328] The final, and perhaps principal, distinction between torture under ICL and torture under IHRL and IHL is that the acts must take place either in the context of a 'widespread or systematic attack against a civilian population' or 'with the intent to destroy in whole or in part a national, ethnical, racial or religious group, as such'. Thus torture under ICL is restricted to the occurrence in either the context of a crime against humanity or genocide. However, despite these differences they do not preclude reference to the jurisprudence of the IHL and IHRL regime as and when necessary.[329]

Conclusion to Chapter Two

The purpose of this chapter has been to examine the multiple definitions of torture arising from the IHRL, IHL and ICL regimes. As has been noted above, the definition of the physical acts of torture is identical across the three regimes, but this means that

[323] *Krnojelac* (n 264) para.180.
[324] *Kvočka* (n 268) para.142.
[325] *Kunarac* (n 178) para.149; UNCAT requires an 'act by which severe pain or suffering' is inflicted. This seemingly rules out the infliction of such pain or suffering by omission.
[326] *Mrskić* (n 298) para.514.
[327] UNCAT, art 1(1)
[328] *Mucić* (n 4) para.1268.
[329] *Krnojelac* (n 266) para.181.

there are three identical definitions of the physical act of torture rather than one common definition shared between the three. Differences in the definition arise when considering the contextual elements of the definitions, as in IHRL where the involvement of a State official is required for an act to be considered torture. Such elements contextualise the violations with respect to a given regime. Without such a contextual element being present it makes no legal sense to then claim that a violation has occurred.

The approach taken also raises questions as to what the definition of torture under regimes other than IHRL, IHL and ICL would be. The prohibition of torture is widely regarded as one of the few *ius cogens* norms of public international law,[330] but defining torture is not necessarily as easy. For instance, the three regimes undoubtedly share a common element when considering which acts constitute torture, with the IHL and ICL regimes drawing heavily from the definitions and jurisprudence of the IHRL regime.[331] Differences emerge, as has been seen, when the other elements of the regimes' definitions are considered. The IHRL regime requires the involvement, in some form, of state officials, while the IHL and ICL regimes have done away with this requirement permitting non-State actors to be prosecuted for acts of torture.[332] The ICL regime has also found that torture can be committed for purposes other than those permitted under IHRL, including acts of sadistic violence.[333] This widens the definitional scope of torture compared to IHRL.

From the above chapter it can be argued that three different definitions of torture have emerged, each of which could be applicable to the same situation. This would appear to confirm the fears of those who have argued fragmentation can lead to

[330] de Wet (n 1); Bassiouni (n 1).
[331] This can be seen in *Furundžija* (n 34) fn.179 where the ICTY cited the definition given in Ireland v. United Kingdom (n 55).
[332] This can be seen in *Kunarac* (n 278) para.496.
[333] For example as in *Mucić* (n 4) para.1268

a loss of certainty and clarity of the law. The evidence cited above suggests the three regimes remain able to function without one another. This is despite the frequent citing of IHRL in IHL and ICL cases that the courts have used as a means of formulating regime specific definitions. Despite this, the growing autonomy of the ICL and IHL regimes from IHRL has been noted particularly post-2000 where the ICTY no longer makes clear and explicit references to ECtHR jurisprudence.[334]

The fragmentation of international law is a very real phenomenon. The approaches of the three regimes to torture are markedly different suggesting international law is indeed fragmenting. Each of the three regimes considered in this chapter suggests this is true. Fragmentation is frequently seen as posing a considerable challenge to the operation of international law.[335] However, despite the often negative representation of fragmentation there is little evidence from practice that the phenomenon is negatively impacting on international law. A divergence of law does not necessarily and automatically mean that there is a conflict.[336] Indeed, such divergence could be seen as evidence for Koskenniemi's view that different institutional projects are being carved out of international law.[337]

Similarly, there is little evidence of deference of one regime's courts or tribunals to those of another, a factor reminiscent of the ICTY's refusal in *Tadić* to follow the definition of control established by the ICJ in *Nicaragua*. Crucially, the regimes appear able to function independently of one another. This is despite a shared use of the physical definition of torture. Such usage does not necessarily imply a close link between the three regimes. It could, for instance, be evidence that the various judicial organs saw no need to replicate definitions that had been developed

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[334] de Frouville (n 267) 644-646.
[335] As seen in Chapter One , 31-34.
[336] Wilfred Jenks, 'The Conflict of Law Making Treaties' (1953) 30 *BYIL* 425, 425.
[337] Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *EJIL* 7, 9.

elsewhere. This would not necessarily imply that the courts of each regime would have been unable to develop their own definition of the physical act of torture had this been required.

The way in which tribunals such as the ICTY have been willing to dispense with the strict IHRL definition, particularly with regard to the requirement that a State official be involved in the torture, can be seen as demonstrating the independence of the tribunals from the IHRL regime. This position also serves as a foundation to the approach taken in subsequent chapters where there is a shared sense of condemnation of particular acts, but how the acts are construed as amounting to violations of a regime's law differs depending on the purpose of the regime. The following chapter on enforced disappearances of individuals is linked to torture, inhuman and degrading treatment discussed in the present chapter. It will help to develop ideas discussed in this chapter and demonstrate the position advanced in the thesis.

Chapter Three – Enforced Disappearances

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Introduction

The enforced disappearance of individuals can amount to a violation of the IHRL, IHL and ICL regimes. However, despite the common prohibition of such acts there are several crucial differences as to how enforced disappearances are defined within each regime. Such differences could stem from the composite nature of the violation and the functional differences between the regimes, in addition to a lack of clear definitions of the act within each regime. The International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED)[1] established a comprehensive definition of enforced disappearances under IHRL. However, differences continue to exist between the ECHR and Inter-American system with the latter placing greater emphasis, for example, on the impact an individual's disappearance has on 'family dynamics'.[2] This division between sub-regimes within the IHRL serves as one example as to how the regimes continue to evolve and can be differentiated from one another.

The IHL regime continues to lack a singular definition, instead relying upon an assortment of violations which taken together recognise that enforced disappearances committed in the context of an armed conflict (international or non-international) are to be prohibited. In recent history, the enforced disappearance of individuals has generally occurred on a widespread or systematic scale even when committed in the context of an armed conflict. This was the case in the Russian

[1] International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, UN Doc.A/61/488 (ICCPED).
[2] *Goiburú et al. v. Paraguay* (Merits, Reparations and Costs) Judgment of September 22 2006, para.103.

Republic of Chechnya,[3] in contemporary Syria[4] and the quasi-armed conflict taking place in parts of Mexico.[5] It is therefore more probable that future prosecutions of those responsible for enforced disappearances against civilians will be based in the law relating to a crime against humanity (that can occur whether or not an armed conflict exists).[6] However, the wording of the ICC Statute makes it clear that a crime against humanity is defined as being an attack against a *civilian* population. This raises questions as to the level of protection from enforced disappearance combatants will receive from the protection of ICL.[7]

As will be seen in this chapter, defining enforced disappearances is not an easy task. Difficulties arise from the composite nature of the act. For instance, the act of causing an individual to disappear could amount to the criminal offence of kidnap and murder; or the human rights violation of torture, the denial of the right to a fair trial, incommunicado detention, and ultimately violation of the right to life. Violations can also occur in respect of the victims' relatives. Thus each act of enforced disappearance comprises a number of subsidiary acts to the overarching act of enforced disappearance, each of which is capable of being considered a violation in its own right. At a fundamental level, such acts diminish an individual's autonomy to an absolute minimum.[8] Concomitant with this is the absence of any oversight of the

[3] There are several Human Rights Watch reports on disappearances in Chechnya. E.g. 'Who Will Tell Me What Happened to My Son?' (September 2009) http://www.hrw.org/reports/2009/09/28/who-will-tell-me-what-happened-my-son-0; 'Worse Than a War' (March 2005) http://www.hrw.org/reports/2005/03/21/worse-war; 'Last Seen...' (April 2002) http://www.hrw.org/reports/2002/04/15/last-seen-0; 'Swept Under' (February 2002) http://www.hrw.org/reports/2002/02/02/swept-under-0 (all last accessed 23 March 2013).

[4] See Human Rights Watch Report 'Torture Archipelago' (July 2012) http://www.hrw.org/reports/2012/07/03/torture-archipelago-0 (last accessed 23 March 2013).

[5] See Human Rights Watch Report 'Mexico's Disappeared' (February 2013) http://www.hrw.org/reports/2013/02/20/mexicos-disappeared (last accessed 23 March 2013).

[6] ICC Statute, Article 7(1)(i).

[7] William J. Fenrick, 'Should Crimes Against Humanity Replace War Crimes?' (1999) 37 *Columbia Journal of Transnational Law* 767.

[8] This is similar to the use of torture to diminish an individual's autonomy – as discussed in Chapter Two.

detaining authority's powers increasing the risk to the individual of torture and extrajudicial execution.[9]

Despite such clear prohibitions, the definition of enforced disappearance necessarily differs between the regimes studied in the chapter below. For example, a vital element for enforced disappearance under the IHRL regime is that the acts be perpetrated by agents of the State or with the State's acquiescence. Without such an element present an act cannot be defined as a violation of the IHRL prohibition of enforced disappearance. In the IHL sphere there must be a link between the disappearance and the existence of an armed conflict. For the disappearance to amount to a crime against humanity the act must be located in a widespread or systematic attack against a civilian population.[10]

The following chapter is structured so as to first provide an analysis of the definition of enforced disappearance under the IHRL regime, namely under the UN system, the Inter-American system and the ECHR. Following the IHRL section is a discussion of the IHL and ICL provisions relating to enforced disappearance. These latter sections will draw from the jurisprudence of the Nuremberg Tribunals, the ICTY and the Bosnian War Crimes Chamber. In doing this, the chapter seeks to emphasise the functional differences between the three regimes.

3.1 - Enforced disappearance and IHRL

The issue of enforced disappearances in IHRL has become an increasingly prominent topic in the international courts and in the international community as a whole. Much of the development in this area has been driven by the Inter-American Court and the

[9] Marthe Lot Vermeulen, '"Living Beyond Death": Torture or Other Ill-Treatment Claims in Enforced Disappearances Cases' (2008) 1 *Inter-American and European Human Rights Journal* 159, 164; see also Matthew Lippman, 'Disappearances: Towards a Declaration on the Prevention and Punishment of the Crime of Enforced or Involuntary Disappearances' (1988) 4 *Connecticut Journal of International Law* 121, 122.

[10] ICC Statute, art 7(1).

ECtHR. The Inter-American Court has been instrumental in developing this area of law. In part this is due to the widespread and systematic human rights abuses that occurred in Latin America in the 1960s and 1970s. The practice of enforced disappearance in these countries has been described as 'a deliberate policy on the part of governments or their supporters.'[11] What is apparent is that neither the ECHR nor IACHR has a specific violation relating to enforced disappearances. Instead, the courts have resorted to pre-existing rights, for example the right to life or liberty. This section begins by considering the law developed explicitly under the guidance of the UN.

3.1.1 - The UN human rights system and enforced disappearances

The UN position relating to enforced disappearances and the IHRL regime can be drawn from numerous sources including UNGA resolutions or reports by constituent bodies of the UN. Enforced disappearances have been considered a human rights violation by the UN since Resolution 33/173 (1978).[12] This resolution noted the composite nature of enforced disappearances, stressing such acts had the potential to violate, *inter alia*, the right to life, the right to liberty, freedom from torture and the right to a fair and public trial. It called upon governments to 'devote appropriate resources to searching for [disappeared] persons and to undertake speedy and impartial investigations'.[13] Article 1(b) called for law enforcement and security services to be fully accountable 'especially in law' for their actions, and Article 1(c) obliged members to ensure that the human rights of detained individuals were fully

[11] J. Daniel Livermore and B.G. Ramcharan, '"Enforced or Involuntary Disappearances": An Evaluation of a Decade of United Nations Action' (1990) 6 *Canadian Human Rights Year Book* 217, 218.
[12] UNGA Res 173 (XXXIII) (20 Dec 1978) UN Doc A/RES/33/173.
[13] ibid art 1(a).

respected. As with other resolutions of the UNGA, Resolution 33/173 is non-binding and indicative more of the political will to achieve an objective.

In 1992 resolution 47/133 was passed by the UNGA.[14] Article 1 states 'Any act of enforced disappearance is an offence to human dignity'[15] because it removes that person outside the protection of the law 'and inflicts severe suffering on them and their families.'[16] Although non-binding, Article 4(1) of the resolution requires each State to criminalise acts of enforced disappearance. Acts of enforced disappearance are never justifiable under any circumstances, including times of war and public emergencies.[17] This resolution formed the foundations for the International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED), first signed in December 2006 and entered into force in December 2010.[18]

The preamble of ICCPED recalls the provisions of several international human rights treaties including the International Covenant on Economic Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and 'the other relevant international instruments in the fields of human rights, humanitarian law and international criminal law'. The purpose of the treaty is to prevent enforced disappearances and combat impunity.[19] The preamble also considers it the 'right of any person not to be subjected to enforced disappearance, the right of victims to justice and to reparation' and affirms 'the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the

[14] UNGA Res 133 (XLVII) (18 Dec 1992) UN Doc A/RES/47/133.
[15] ibid art 1(1).
[16] ibid art 1(2).
[17] ibid art 7.
[18] International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, UN Doc.A/61/488 (ICCPED); for a commentary on the Convention see Susan McCrory, 'The International Convention for the Protection of all Persons from Enforced Disappearance' (2007) 7 *Human Rights Law Review* 545.
[19] ICCPED, preamble.

disappeared person, and the right to freedom to seek, receive and impart information to this end'.

The substantive articles of the treaty follow a pattern similar to that of UNCAT. Article 1(1) states plainly 'No one shall be subjected to enforced disappearance.' This prohibition is not subject to any derogation even in 'exceptional circumstances.'[20] Article 2 of ICCPED defines 'enforced disappearance' and it is structured along similar lines to the definition of torture in UNCAT. The first of the elements is the physical act, namely the 'arrest, detention, abduction or any other form of deprivation of liberty'. This is followed by the perpetrator requirement, necessitating the act be committed by 'agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State'. This is followed by the purposive element which places 'such a person outside the protection of the law' by refusing 'to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person.'

The Convention readily seeks to provide a working definition of enforced disappearance for the purposes of human rights protection and for criminal sanction against those who commit such acts. With regard to the latter it must be remembered that for the crime to be committed it is necessary to prove each individual element of the offence against an accused. As with CAT, the ICCPED obliges States Parties to investigate acts of disappearances[21] and to ensure that enforced disappearance amounts to a criminal offence under domestic law.[22] It also provides that the 'widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the

[20] ICCPED, art 1(2).
[21] ICCPED, art 3.
[22] ICCPED, art 4.

consequences provided for under such applicable international law.'[23] Like CAT it also restricts liability for acts of enforced disappearance to individuals operating as state agents or under what can be loosely termed the 'control' of the state.[24]

3.1.2 - The Inter-American system and enforced disappearance

South and Central America have a history of enforced disappearances and the punishment of those who perpetrated such acts. This led to the adoption in 1994, and entry into force in 1996, of the Inter-American Convention on Forced Disappearances of Persons (IACFDP).[25] It is aimed at preventing and punishing those guilty of enforced disappearance. The preamble highlights the grave effect enforced disappearance has on the dignity of the human being. It reaffirms the idea that enforced disappearances can amount to a crime against humanity.

The main body of the treaty contains several articles which aim to prevent, protect and punish. The first article categorically prohibits enforced disappearances at all times even in a state of emergency. Punishment of offenders is covered in Article 1 and Article 1(d) compels states to take legislative, administrative and judicial action to comply with the commitments undertaken in the Convention. As such Article 1, taken as a whole, establishes the framework of the Convention. The remainder of the treaty provides for the criminalisation of enforced disappearance;[26] the extradition of those suspected of committing such offences;[27] and the prohibition of enforced

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[23] ICCPED, art 5.

[24] It is not suggested that the word 'control' reflects the definition given in either the *Tadić interlocutory appeal on jurisdiction judgment* or the ICJ *Nicaragua* judgment, although interpreting the definition of 'authorization, support or acquiescence' might require an analysis of the two cases; *Prosecutor v. Tadić* (IT-94-1) AC, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986..

[25] Inter-American Convention on Forced Disappearance of Persons, 9 June 1994 (IACFDP).

[26] ibid art 4.

[27] ibid art 5.

disappearance in situations of emergency or war.[28] It is consequently a non-derogable obligation.

Article 2 of the IACFDP contains the definition of enforced disappearance:

> For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

As with other human rights treaties, it limits the liability of individuals acting as agents of the state (e.g. police officers) and 'persons acting with the authorization, support, or acquiescence of the state' (e.g. paramilitary forces). Enforced disappearance can be termed a 'State crime' that cannot be committed by non-State actors (unless acting with 'the authorization, support, or acquiescence of the state'). While this reflects the enormous power that the State has over the individual, it fails to recognise that often guerrilla groups or other non-state actors (e.g. drug cartels) control territory in much the same fashion as the state does. However, the liability of non-state actors would be covered by the law of kidnap or false imprisonment under a State's domestic criminal law. The Convention reinforces the notion that only States can violate human rights law. It has been noted by Vermeulen that for much of its first 50 years of life the ECtHR has been concerned on the whole with 'minor' violations of domestic human rights law rather than gross, widespread and systematic violations which has been the staple of the Inter-American Court.[29] Huneeus has echoed this in the context of remedies noting that unlike the ECtHR, 'the Inter-American Court, which came of age in a region of dictatorships, prefers to be less deferential.'[30]

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[28] ibid art 10.
[29] Vermeulen (n 9) 196.
[30] Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493, 496.

The IACHR has also seen several cases brought by victims' families in instances of enforced disappearance. This is despite the IACHR lacking a specific right relating to enforced disappearance. Instead the Inter-American Court has relied upon existing provisions. These include the violation of the right to life under Article 4, violation of the right to humane treatment under Article 5, the right to personal liberty under Article 7, and Article 25 concerning the right to judicial protection.

The Inter-American Court was one of the first international human rights courts to consider instances of disappearance in the 1989 case *Velasquez Rodriguez.*[31] This concerned the disappearance of Manfredo Velasquez in Honduras in 1981. He was illegally detained by members of the Honduran security forces.[32] Soon after his detention he disappeared.[33] The Court noted how during the period of 1981 and 1984 between 100 and 150 people were subjected to enforced disappearances.[34] Furthermore, the disappearances all followed a similar pattern. The acts would be perpetrated by armed men who would kidnap the victim in broad daylight with apparent impunity.[35] It was public knowledge the perpetrators worked for the Honduran police or military.[36] The nature of the acts and the way in which they were perpetrated was described as 'systematic',[37] committed in a methodical fashion.

The Court set down the context of disappearance as a human rights violation. Disappearances were not new in the history of human rights violations but, the court noted, the way in which they had come to be used to terrorise the population at large by spreading 'anguish, insecurity and fear' was a recent innovation. This had become

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[31] *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988).
[32] ibid para.3.
[33] ibid.
[34] ibid para.147(a).
[35] ibid para.147(b).
[36] ibid para.147(c).
[37] ibid para.147(d).

exceptionally intense in Latin America.[38] It concluded disappearances represented a 'complex human rights violation' which must be confronted and understood in an 'integral fashion'.[39] The term 'integral fashion' reflects the composite nature of enforced disappearances as they are comprised of a number of individual violations.

The *Velasquez Rodriguez* judgment is indicative of a cautious and conservative approach to a novel human rights violation. Its approach to acts of disappearance is similarly novel, placing the violation under three main headings: a violation of the right to life (Article 4), the right to humane treatment (Article 5), and the right to personal liberty (Article 7). With regard to Article 4 the Court held disappearances often involve the secret extra-judicial execution of the individual followed by the concealment of the body so as to destroy evidence and ensure the perpetrators are not caught.[40] Evidence also showed the disappeared were frequently subjected to torture, inhuman or degrading treatment, prohibited under Article 5.[41] Finally, on the matter of a violation of Article 7, the Court held that the 'kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty'.[42] By examining the main elements of disappearance set down in *Velasquez Rodriguez* it is possible to conclude that at least three fundamental human rights are violated by such an act, namely the right to life, the right humane treatment and the right to liberty. The content of these violations has been further defined and developed by subsequent case law of the Inter-American Court.

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[38] ibid para.149.
[39] ibid para.150.
[40] ibid para.157.
[41] ibid para.156.
[42] ibid para.155.

Article 4 in relation to disappearances has not been developed much further in the jurisprudence of the Inter-American Court since *Velasquez Rodriguez*. In *Godinez Cruz* the Court used the relevant paragraphs verbatim from *Velasquez Rodriguez*.[43] In *Blake* the death of the victim was held to be the date formally recognised by the Guatemalan state on the victim's death certificate.[44] The case of *Neira Alegria et al* arises under slightly different circumstances to most disappearance cases in that it relates to the quelling of a prison riot where, the Court held, there was a disproportionate amount of force used by the authorities despite the lack of identifiable remains of the three individuals who effectively disappeared.[45] This reflects a trend across the three regimes towards recognising that it is possible to for an enforced disappearance to have occurred even if it cannot be proven that the victim has died.

In *Tiu Tojin* the Court was asked to adjudicate upon the apparent enforced disappearance of a child and her mother. These acts, the Court concluded, occurred as 'part of a pattern of massive and systematic violations to human rights' which occurred during the internal armed conflict in Guatemala.[46] It further held that the whereabouts of the child was unknown and it was possible that she had either been killed or handed over to a third party.[47] Lastly, in *Gomez-Palomino* the Court heard evidence that on

> many occasions, the decision to eliminate the victim and to conceal of the victim's remains ensued. In order to destroy the evidence of such acts, the bodies of the

[43] *Godínez Cruz Case*, Judgment of January 20 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989) para.165.
[44] *Blake v. Guatemala*, Judgment of January 24 1998, Inter-Am. Ct. H.R. (Ser. C) No. 36 (1998) para.83.
[45] *Neira Alegria et al v. Peru*, Judgment of January 19 1995, Inter-Am. Ct. H.R. (Ser. C) No. 20, para.76; an almost identical ruling was handed down in the case of *Durand y Ugarte v. Peru*, Judgment of 16 August 2000 (Ser. C) No. 68 (2000), para.79.
[46] *Tiu Tojin v. Guatemala*, Judgment of November 26, 2008, Inter-Am. Ct. H. R. (Ser. C) No. 190 (2008) para.52.
[47] ibid para.41.

> victims were incinerated, mutilated, abandoned in inaccessible or isolated areas, were buried or parts of their remains were scattered in different places.[48]

Those detained by the security services entered into well-established clandestine detention network, with the majority of those entering being killed.[49] This emphasises the totality of control exercised by state security forces over the disappeared and serves to illustrate the extent to which disappearances can be classed a gross violation of human rights and human dignity.

The Inter-American Court has been much more willing than the ECtHR to classify acts of enforced disappearance as a violation of the right to humane treatment. This highlights the differences that exist between the two regional systems. It can therefore be viewed as an aspect of fragmentation in action, serving to underscore the dangers of advocating a single, universalised definition of human rights law.

In *Godinez and Cruz* the Court found that the circumstances of disappearances, often including extended periods of solitary confinement, can constitute 'cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being.'[50] Such a principle is at the heart of several rulings for example in the *Street Children Case*, though not concerned with disappearances, the Court held that it was reasonable to infer that whilst isolated in detention the victims 'experienced extreme psychological and moral suffering during those hours.'[51] This can be used to illustrate the Inter-American Court's concern about the

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[48] *Gomez-Palomino Case v. Peru*, Judgment of November 22 2005, Inter-Am. Ct. H.R. (Ser. C) No. 136 (2005) para.54.2.
[49] ibid para.54.3.
[50] ibid para.164.
[51] *Villagrán Morales et al. Case* (the "Street Children" Case), Judgment of November 19 1999, Inter-Am. Ct. H.R. (Ser. C) No. 63 (1999) para.163; for the principle applied in the context of disappearance see *Suarez Rosero v. Ecuador*, Judgment of 12 November 1997, Inter-Am. Ct. H.R. (Ser. C) No. 35 (1997) para.90.

psychological suffering experienced by those detained at the hands of security services. In *La Cantuta* the Court ruled that 'in light of the circumstances in which they were detained and taken to an indefinite place before being executed or vanished, the alleged victims were placed in a situation of vulnerability and lack of protection which affected their physical, mental and moral integrity.'[52] Furthermore, the context and *modus operandi* of the security forces permitted the inference that the victims would have had 'deep feelings of fear, anxiety and defenselessness.' At the very least victims would watch others being tortured and executed, increasing a sense of fear.[53] Consequently, the Court felt confident enough to describe the acts as violations of Article 5 of the IACHR.

The Inter-American Court has also considered the treatment of the relatives of victims and determined in several cases that such treatment constitutes a violation of a relative's right to humane treatment. For example, in *Goiburu*[54] it was held that the facts allowed the Court to conclude that there was a violation of the relatives' rights owing to the disappearance of the victim. It further noted that this had had a negative impact upon the relatives' social relations and employment in addition to altering the 'family dynamics'.[55] In *La Cantuta* the Court placed emphasis on the treatment of the victims' families noting that the violation of a relative's right to mental and moral integrity is often violated in cases of disappearance. Furthermore, such a violation is exacerbated by the 'continued refusal of state authorities to supply information on the victim's whereabouts or to conduct an effective investigation to elucidate the facts'.[56] The Court also highlighted several instances where the state violated these rights

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[52] *La Cantuta Case v. Peru*, Judgment of November 29 2006, Inter-Am. Ct. H.R. (Ser. C) No. 162 (2006) para.113.
[53] ibid.
[54] *Goiburú et al. v. Paraguay*, Judgment of September 22 2006, Inter-Am. Ct. H.R. (Ser. C) No. 153 (2006).
[55] ibid para.103.
[56] *La Cantuta* (n 52), para.123.

including an instance where, after the discovery of a number of secret graves, the remains of some of the victims were returned to their families 'in milk cartons'[57] and cases where the families were threatened and branded as terrorists.[58]

The final substantive area to be examined is that of violations of Article 7 which includes *inter alia* the right to liberty. In *Ticona Estrada* the Court found that the illegal detention of the victim by state agents violated Article 7, and because the victim subsequently disappeared it 'constitutes an ongoing violation with legal consequences that extend until the present date.'[59] This was similar to the ruling in *Portugal* where the violation of Article 7 existed from the date the victim was reported missing in 1990[60] to the date his remains were found in 2000. This is an important ruling because at the time of the victim's disappearance the Court lacked competence to rule on his death or alleged torture. However, because 'Article 7 of the Convention...was violated continuously until that date...owing to his forced disappearance' it was still able to adjudicate on the matter and hold the Panamanian government to account for his disappearance.[61]

The fundamental nature of Article 7 was highlighted in *Bamaca-Velasquez*.[62] The Court noted that any individual deprived extra-judicially of his or her freedom should be freed or brought before a judge. This was vital in protecting the liberty of

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[57] ibid para.125(a).
[58] ibid para.125(c) & (d).
[59] *Ticona Estrada v. Bolivia*, Judgment of November 27 2008, Inter-Am. Ct. H.R. (Ser. C) No. 191 (2008) para.61.
[60] Though disappeared in 1970, he was only reported missing to the authorities because under the military dictatorship which existed until 1990 it was impossible to seek remedies for such acts committed by the State, see *Heliodoro Portugal v. Panama*, Judgment of August 12 2008, Inter-Am. Ct. H.R. (Ser. C) No. 186 (2008) para.4.
[61] *Portugal*, ibid para.113; this is similar to the idea of 'continuous kidnap' developed by Chilean Courts and cited in the case of *Almonacid-Arellano* to circumvent amnesty laws. *Almonacid-Arellano v. Chile*, Judgment of September 26 2006, Inter-Am. Ct. H.R. (Ser. C) No. 154 (2006) para.72(c).
[62] *Bamaca-Velasquez v. Guatemala*, Judgment of November 25 2000, Inter-Am. Ct. H.R. (Ser. C) No. 70 (2000).

the individual against interference by the State.[63] In the absence of such a right the potential for further and graver human rights abuses becomes more probable.[64] Furthermore, it was emphasized in this case that, though the victim was a guerilla engaged in an internal armed conflict, 'the detainee should have been ensured the guarantees that exist under the rule of law, and been submitted to a legal proceeding' and that while the state does indeed have an obligation to guarantee its security it must perform its actions subject to limitations and according to legal procedures that balance 'public safety and the fundamental rights of the human person.'[65] However, it is worth highlighting that despite the Court's approach to the fundamental nature of Article 7, it is not a non-derogable right under the IACHR,[66] which challenges the Court's assertions in the above case.

The Inter-American Court has played an important role in the development of the international jurisprudence relating to enforced disappearances. As the IACHR does not explicitly afford individuals a right not to be subjected to enforced disappearances, the Court has had to develop the law under a number of pre-existing rights such as torture and the right to life. In doing this, the Court ensured that enforced disappearance victims receive justice while at the same time developing the law within established boundaries rather than creating new causes of action. It has placed emphasis on the inherent dignity of both the victim and their relatives. This was achieved by recognising the violation of a victim's rights can also cause suffering to relatives, giving rise to a violation of the latter's human rights.

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[63] ibid para.140.
[64] ibid para.150.
[65] ibid para.143.
[66] IACHR, Article 27 (2) provides a list of non-derogable rights.

3.1.3 - Enforced disappearances and the ECHR

The ECHR, like the IACHR, contains no outright provisions relating to the enforced disappearance of individuals. This has not prevented the ECtHR from determining that the enforced disappearance of individuals constitutes a violation of the ECHR. The Court has relied upon Articles 2 (the right to life),[67] 3 (prohibition of torture, inhuman and degrading treatment),[68] 5 (the right to liberty),[69] 6 (the right to a fair trial)[70] and 13 (the right to an effective remedy).[71] The condemnation of acts of enforced disappearance by the ECtHR underlines the serious nature of the acts and both the revulsion to such acts within the Council of Europe and generally in the international community.

The ECtHR has concerned itself with a whole range of human rights violations committed by member states from issues of privacy[72] to the use of force by security or military forces.[73] However, it was not until the 1998 *Kurt* judgment that the Court first considered the issue of enforced disappearance.[74] The ECtHR turned to the matter of gross violations of human rights in the wake of Turkish security service activity against those suspected of being affiliated with Kurdish separatists. In addition to the seemingly widespread use of torture against such individuals as discussed in Chapter Two, Turkish security forces also engaged in acts of enforced disappearance.

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[67] *Kurt v. Turkey* (Application no. 24276/94) Judgment, 22 January 1998.
[68] *Luluyev and others v. Russia* (Application no. 69480/01) Judgment, 9 November 2006.
[69] ibid.
[70] *Umarov v. Russia* (Application no. 12712/02) Judgment, 3 July 2008.
[71] *Orhan v. Turkey* (Application no. 25656/94) Judgment, 18 June 2002.
[72] *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493.
[73] *Nachova v. Bulgaria*; McCann v. UK; Peter Cumper, When the State Kills (1995) 4 *Nottingham Law Journal* 207; Stephen Skinner, 'The Right to Life, Democracy and State Responsibility in "Urban Guerilla" Conflict: The European Court of Human Rights Grand Chamber Judgment in Giuliani and Gaggio v. Italy.' (2011) 11 *Human Rights Law Review* 567.
[74] *Kurt* (n 67).

As *Kurt* was the first case before the ECtHR to consider an enforced disappearance, it provides a framework for the analysis of future cases. The Court was asked to consider the disappearance of the applicant's son, allegedly performed by Turkish security forces. She relied upon, *inter alia*, Articles 2, 3, 5 of the Convention. The Court relied heavily upon the violation of Article 5, noting that in relation to Article 2 the case was based 'entirely on presumptions' made from the detention of the applicant's son in conjunction with analyses of allegedly tolerated practices including disappearance.[75] As such, the evidence did not substantiate her claim and there was no violation of Article 2. The Court held likewise in its adjudication of the alleged violation of Article 3 towards the victim, noting the applicant failed to adduce sufficient evidence to support her claim.[76] Furthermore, her claim that the disappearance of her son 'in a context devoid of the most basic judicial safeguards must have exposed him to acute psychological torture'[77] was likewise dismissed by the Court.

The Court's primary findings of a violation of the ECHR rested therefore on Article 5 which guarantees an individual's right to liberty and freedom from arbitrary detention. The Court treated disappearance in *Kurt* as an aggravated violation of Article 5 noting that '[p]rompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention'.[78] At stake was the protection of the liberty and personal security of individuals which could ultimately subvert the rule of law and, of importance for the individuals concerned,

[75] ibid para.108.
[76] ibid para.116.
[77] ibid para.111.
[78] ibid para.123.

place them beyond the reach of legal protection.[79] The Court termed this 'unacknowledged detention' amounting to a negation and grave violation of Article 5 guarantees.[80]

The circumstances surrounding the enforced disappearance of an individual are frequently heinous and often result in the death of the individual detained by the state though in several cases no body has ever been recovered.[81] In *Bazorkina*,[82] the first of the cases concerning disappearances in Chechnya, the Court ruled that even without the body of the applicant's son, Yandiyev, could be presumed dead given the length of time for which he had been missing. This was taken in conjunction with the order given by a Russian officer that Yandiyev be executed.[83] However, the lack of a body, while evidence enough for the death of the applicant's son, made it impossible for the Court to determine whether he had been subjected to torture, inhuman or degrading treatment.[84]

Proving that an individual has been abducted by agents of the State is fundamental to establishing a substantive breach of Article 2. In many of the Russian cases, victims are seen being bundled into vehicles as in *Luluyev*,[85] captured on video surrounded by 'hostile servicemen',[86] or by 'federal officers'.[87] Other cases simply state that the victim was abducted by 'State servicemen' and not seen since.[88] In *Khashiyev*, the Court has held that the standard of proof required to prove an

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[79] ibid para.123.
[80] ibid.
[81] e.g. *Akhiyadova v. Russia* (Application no. 32059/02) Judgment, 3 July 2008.
[82] *Bazorkina v. Russia* (Application no. 69481/01) Judgment, 27 July 2006.
[83] ibid paras.110-111.
[84] ibid para.133.
[85] *Luluyev* (n 68), para.80.
[86] *Baysayeva v. Russia* (Application no.74237/01) Judgment, 5 April 2007, para.141.
[87] *Musayeva and others v. Russia* (Application no 74239/01) Judgment, 26 July 2007, para.75.
[88] e.g. *Alikhadzhiyeva v. Russia* (Application no. 37193/07) Judgment, 24 May 2011, para.128; *Ibragimov v. Russia* (Application no. 34561/03) Judgment, 29 May 2008, para.93; *Betayev and Betayeva v. Russia* (Application no. 37315/03) Judgment, 29 May 2008, para.81.

individual's disappearance is that of 'beyond all reasonable doubt'.[89] Such a standard, used in criminal prosecutions, could be seen as out of place in a human rights court outside the criminal justice system. It places an onerous burden upon the applicants, one which in principle is hard for them to discharge especially in relation to disappearances.

The Court has taken steps to mitigate the harshness of this noting that such 'proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.'[90] Despite this, such an approach seems to be at variance with the overarching concern and purposes of the ECHR namely to protect human rights. It seems that, even with the safeguard developed in *Khashiyev*, the operation of the law in this regard remains unnecessarily harsh particularly in cases of disappearance.[91] Further difficulties in proving enforced disappearance arise from States' refusal to cooperate with the Court thus compounding the difficulties faced by the Court.[92] Ultimately, this impacts upon the victims' families who are left with a substantially high threshold to cross before the Court will entertain a violation of the ECHR. It is questionable as to whether this is in the best interests of justice and the protection of human rights.

With regard to disappearances in Turkey the Court's approach has been marked by a degree of reluctance to attribute disappearances to State agents. In *Osmanoglu* the Court observed the manner of the victim's abduction shared many similarities with the disappearances of other individuals in Turkey.[93] However, there

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[89] *Khashiyev and Akayeva v. Russia* (Application no. 57945/00) Judgment, 24 February 2005, para.134.
[90] ibid para.134.
[91] This is an interesting point and merits further discussion but it is outside the scope of this thesis.
[92] Joseph Barrett, 'Chechnya's Last Hope? Enforced Disappearances and the European Court of Human Rights' (2009) 22 *Harvard Human Rights Journal* 133, 138.
[93] *Osmanoglu v. Turkey* (Application no. 48804/99) Judgment, 24 January 2008, para.58.

was insufficient evidence to establish who was behind the victim's disappearance.[94] Consequently, there was no violation of Article 2.[95] Similarly, in the cases of *Koku*[96] and in *Seker*[97] the Court has refused to recognise a violation of Article 2. In *Seker* the Court gave its reasons for refusing such a violation, noting that the circumstances of the victim's disappearance was a matter of speculation and supposition due to the lack of sufficient evidence on which to determine that he had been abducted and killed by State agents.[98] Unlike the ICTY and Inter-American Court, the ECtHR appears reluctant to take into account circumstantial evidence which would support an applicant's claim if the standard of proof required was on the balance of probabilities. However, as previously mentioned, the ECtHR has adopted a beyond reasonable doubt approach that could be said to favour defendant States rather than the applicants.

In *Ipek* the applicant watched as his sons were taken away by Turkish soldiers before their disappearance.[99] Coupled with the fact that the victims had been missing for nine years at the date of the ruling and because the state failed to provide any explanation for their detention the Court concluded that Turkey had violated Article 2. In the case of *Tas* the Court held that the applicant's son must be 'be presumed dead following his detention by the security forces.'[100] This finding took place in the context of the situation in south-east Turkey in 1993 where unacknowledged detention of an individual would be life-threatening.[101] Several other cases have attributed the disappearance of individuals to military or law enforcement agencies of

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[94] ibid para.63.
[95] ibid para.64.
[96] *Koku v. Turkey* (Application no. 27305/95) Judgment, 31 May 2005, para.112.
[97] *Seker v. Turkey* (Application no. 52390/99) Judgment, 21 February 2006.
[98] ibid para.65.
[99] *Ipek v. Turkey* (Application no. 25760/94) Judgment, 17 February 2004, para.182.
[100] *Tas v. Turkey* (Application no. 24396/94) Judgment, 14 November 2000, para.67.
[101] ibid para.66.

the Turkish State.[102] As with other human rights violations, in order to establish that a victim's substantive right to life (as opposed to the procedural duty to investigate a death) must occur at the hands, or with the acquiescence, of State agents rather than non-State actors. This serves to restrict the application of Article 2 to cases in which the State is liable.

Article 2, the Court has ruled, is also capable of being breached by the state where it fails to investigate the disappearance and presumed death of a victim.[103] This procedural violation of Article 2 has allowed the Court to find a violation even where it is unclear that the victim suffered at hands of agents of the state as happened in *Osmanoglu* and *Koku*. In *Osmanoglu* the Court held it could not be certain as to the identity of the perpetrators, but no investigation was launched into the disappearance of the victim.[104] Furthermore, the State failed to take immediate measures which undermined the effectiveness of the protection afforded to the victim.[105] The failure to take such 'reasonable measures' to 'prevent a real and immediate risk to the life of Atilla Osmanoglu from materialising' violated his right to life under Article 2.[106] Similar reasoning was used in *Koku* where it was held the defects in the criminal investigation system that removed the victim's legal protection[107] meant Turkey was in breach of Article 2.[108] Similarly, most disappearance cases concerning Russia have found procedural violations of Article 2.[109]

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[102] See also *Orhan* (n71), para.359; and *Akdeniz v. Turkey* (Application no. 25165/94) Judgment, 31 May 2005, para.101.
[103] This matter is only discussed in brief as it does not squarely fit with the current discussion as to how substantive, as opposed to procedural, breaches occur and are defined; See *R (on the application of Ali Zaki Mousa and others) v. Secretary of State for Defence* [2013] EWHC 1412 (Admin).
[104] *Osmanoglu* (n 93) para.78.
[105] ibid para.83.
[106] ibid.
[107] *Koku* (n 96), para.145.
[108] ibid para.146.
[109] e.g. *Imakayeva v. Russia* (Application no. 7615/02) Judgment, 9 November 2006, para.177.

The ECtHR has also made substantial use of Article 3. In *Akdeniz* Article 3 rights of the victim had been violated based on the evidence of several eyewitnesses detained alongside him.[110] Further evidence was drawn to corroborate this from a report written by soldiers who were responsible for their detention. The report noted that the detained men had various injuries on their bodies caused during their attempts at escape and also as a result of the use of force.[111] This report and the eyewitness statements were sufficient in the eyes of the Court to find that 'the applicant's son was subjected to ill-treatment, which, at the least, reaches the threshold of inhuman and degrading treatment and discloses in that respect a violation of Article 3 of the Convention'.[112]

However, the Court has faced difficulties in determining that an individual had been tortured or subjected to inhuman or degrading treatment before his or her disappearance, a point similar to the evidential issues relating to Article 2 discussed above. In *Lyanova* it was impossible to determine both how the victims died and whether they were subjected to ill-treatment due to the fact that their remains had never been found.[113] This was due to the 'beyond all reasonable doubt' standard of proof used by the Court in its determinations.[114] Similar rulings have been handed down by the Court in *Tas*, where the Court did not consider it appropriate to make any findings under Article 3 concerning the effect which the incommunicado detention might have had on the victim.[115] The Court's reticence in finding violations of Article 3 in relation to the victims is seemingly due to the very high-level of proof ('beyond all reasonable doubt') apparently required in order to establish a violation of a

[110] *Akdeniz v. Turkey* (Application no. 25165/94) Judgment, 31 May 2005, para.118.
[111] ibid.
[112] ibid para.119.
[113] *Lyanova and Aliyeva v. Russia* (Application nos. 12713/02 & 28440/03) Judgment, 2 October 2008, para.114.
[114] ibid para.115.
[115] *Tas* (n 100) para.76.

Convention right. In cases involving the enforced disappearance of an individual it is questionable whether such a standard of proof is required given the nature of the proceedings (civil as opposed to criminal) and the ends sought i.e. the protection of human rights.

The Court has, however, been more receptive to holding that relatives' Article 3 rights have been violated from the outset.[116] This has subsequently been applied in several cases.[117] The requirements necessary for such a finding depend on several factors which distinguish such ill-treatment from 'emotional distress'.[118] These include the nature of the relationship, whether the family member witnessed the abduction, the family member's attempt to discover information about the victim and, importantly, the way in which the authorities dealt with such inquiries.[119] Often in such cases the applicants are close relations of the victim.[120] Witnessing the abduction is a ground for holding a violation of Article 3,[121] but such a requirement is not totally necessary as the Court found in *Baysayeva* where the applicant saw a video of the abduction[122] and in *Alikhadzhiyeva* where the applicant had not witnessed the event live or by video.[123]

The actions of the applicant after the victim's disappearance has been held as crucial to establishing whether the applicant has suffered a violation of his or her rights. There are several cases in which the applicants have done everything in their

[116] *Kurt* (n 67) para.134; For a comparison of the approaches of the ECtHR and Inter-American Court see Alexander Murray, 'Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts' (2013) 2 *International Human Rights Law Review* 57.
[117] e.g. *Bazorkina* (n 82) para.141; *Ibragimov* (n 88), para.107; *Elmurzayev v. Russia* (Application no. 3019/04) Judgment, 12 June 2008, para.120; *Tas* (n 100), para.80; *Orhan* (n71), para.360.
[118] *Bazorkina* (n 82), para.111.
[119] ibid.
[120] *Osmanoglu* (n 93) para.97.
[121] *Umarov* (n 70) para.126.
[122] Baysayeva (n 86) para.141.
[123] *Alikhadzhiyeva* (n 88) para.121.

power to establish what happened to their loved ones. In *Sangariyeva*[124] the Court heard how the Applicants had written to, and visited, various official bodies and despite their efforts had never 'received any plausible explanation or information as to what became of their relative following his abduction.'[125] The Court concluded that the 'manner in which their complaints have been dealt with by the authorities must be considered inhuman treatment'.[126] Thus it is a requirement that the State act in a manner that amounts to inhuman or degrading treatment *vis-à-vis* the relative.

However, there are cases in which the ECtHR has refused to acknowledge that an applicant's Article 3 rights have been violated. For example in *Togcu*[127] the Court held that while the investigation into the applicant's son 'may have caused the applicant feelings of anguish and mental suffering' it was unable to establish that a violation of Article 3.[128] The Court seemingly applied a remoteness test in the case of *Koku*[129] noting that while the applicant was the brother of the victim, he was not present at the time of the disappearance as he was living in the United Kingdom. While he did report his brother's disappearance to international organisations he did not 'bear the brunt' of making inquiries in Turkey.[130] In the absence of aggravating features there had been no violation of Article 3.[131] Lastly, although investigation of the victim's death might have been inadequate to the point where it violated the procedural element of Article 2, the failings were not sufficiently serious to constitute

[124] *Sangariyeva and others v. Russia* (Application no. 1839/04) Judgment, 29 May 2008.
[125] ibid para.91; see also Ipek (n 99) paras.182-183.
[126] ibid para.92.
[127] *Togcu v. Turkey* (Application no. 27601/95) Judgment, 31 May 2005.
[128] ibid para.128.
[129] *Koku* (n 96).
[130] ibid para.171.
[131] ibid para.172; a similar line of reasoning was used by the Court in *Cakici* to rebut the claims made by the applicant. *Cakici v. Turkey* (Application no. 23697/94) Judgment, 8 July 1999, para.99; see also I where the Court held that there was insufficient suffering on the part of the Applicant to constitute a violation of article 3, *Celikbilek v. Turkey* (Application no. 27693/95) para.98.

a violation of the Article 3 rights of the applicant.[132] This represents a conservative approach to the matter at hand, with the Court only recognising a violation of Article 3 in the most egregious of circumstances and then only in respect of close family members.

Violation of the Article 5 right to liberty is the final breach of the ECHR to be considered. The basis for such claims is relatively straightforward with many of the Applicants arguing that their relatives were subjected to 'unacknowledged detention' and that this violated the rights guaranteed by Article 5. In *Akhmadova* the Court reiterated its finding that 'unacknowledged detention is a complete negation of [such] guarantees and discloses a very grave violation of Article 5'.[133] In *Timurtas* the safeguards guaranteed by Article 5 were deemed to have been totally negated by the victim's unacknowledged detention.[134] The Court has also shown itself to be willing to find that serious violations of Article 5 can be considered in lieu of a violation of Article 3 (in the absence of a body). For example, in *Orhan* the Court noted the 'acute anxiety' that individuals held incommunicado must experience is an aggravated aspect of a violation of Article 5 rather than a violation of Article 3.

Article 5 also imposes on States Parties certain duties. For example in *Bazorkina* the Court held that it was the responsibility of the state 'to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since'.[135] The judgment in *Alikhadzhiyeva* notes that while the victim was abducted by state servicemen, his detention was not logged in

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[132] *Tahsin Acar v. Turkey* (Application no. 26307/95) Judgment, 8 April 2004, para.229.
[133] *Akhmadova and Akhmadov v. Russia* (Application no. 20755/04) Judgment, 25 September 2008, para.95; *Ipek* (n 99) para.191.
[134] *Timurtas v. Turkey* (Application no. 23531/94) Judgment, 13 June 2000, para.106.
[135] *Bazorkina* (n 82), para.146.

any custody records and there existed no official trace of him.[136] It concluded that 'the absence of detention records, noting such matters as the date, time and location of detention and the name of the detainee, as well as the reasons for the detention and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention'.[137] Lastly, the Court has also held that the difference between an Article 2 violation and an Article 5 violation is one of degree in that the longer an unacknowledged detention continues the more weight can be attached to this to determine that the victim is dead.[138]

Compared with the Inter-American Court, the ECtHR has adopted a fundamentally conservative approach to enforced disappearances. This can be seen in its requirement that violations be proven by the applicants to a beyond reasonable doubt standard of proof rather than on a balance of probabilities. This seems unduly harsh particularly in respect to serious violations of human rights such as enforced disappearances when, due to the very nature of the act, it is almost impossible to establish categorically that the victim was subjected to an enforced disappearance by State agents. This can be coupled with the more restrictive approach to the rights of relatives when compared with the Inter-American Court. It will be recalled that the latter considered impact of the disappearance on the 'dynamics' of the victims' families, a methodology not adopted by the ECtHR. Despite these criticisms, the ECtHR has made a significant contribution to the law relating to enforced disappearances, particularly in respect of the procedural aspect of the right to life and the rights of victims' relatives.

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[136] *Alikhadzhiyeva* (n 88) para.128.
[137] ibid.
[138] *Tanis and others v. Turkey* (Application no. 65899/01) Judgment, 2 August 2005, para.201.

3.1.4 - Conclusion on enforced disappearance within the IHRL regime

Taken together the systems examined above offer a substantial contribution to the prohibition of enforced disappearance in the international legal system. Common to each sub-regime is the requirement that State agents be involved in acts of enforced disappearances. This condition highlights the State-centric nature of IHRL that effectively excludes acts of enforced disappearance perpetrated by non-State actors from consideration as a violation of IHRL. Despite this, it remains possible for the State to be held liable for enforced disappearances performed by non-State actors in a limited range of circumstances. First, it would be possible for a non-State actor to disappear an individual and the State refuse to investigate the circumstances of the disappearance. Under the ECHR this could amount to a violation of the procedural element of Article 2. Linked to this, the State could respond to a relative's concerns about the victim in cruel or callous fashion, potentially giving rise to a violation of Article 3 in respect of the relative but not the victim. In this scenario, there might be no violation of the ECHR in respect of a victim but there could be a violation in respect of a victim's relatives.

Other factors arise from the lack of a specific provision classifying enforced disappearance as a violation of human rights. Instead, the Inter-American Court and ECtHR have approached the matter cautiously by utilizing pre-existing provisions of their respective conventions. Both Courts have used rights that protect the right to life, the right to be free from torture, inhuman or degrading treatment and the right to liberty and security. By developing the law in this fashion, the Courts have ensured that new causes of action have not been created. In other ways the ECtHR in particular has demonstrated a marked reluctance to adopt a more flexible approach to the inclusion of circumstantial evidence in addition to failing to adopt a balance of

probabilities stand of proof. In doing this, the ECtHR potentially excludes many legitimate claims brought by the relatives of the disappeared, ultimately to the detriment of greater human rights protection.

What is interesting about the IHRL approach to enforced disappearance is the emergence of a well-defined and developed human rights violation, albeit one that is derived from, and seemingly dependent on, other human rights. As with other areas examined in this thesis it is possible to identify the response of the IHRL regime as separate from those found in the IHL and ICL regimes. In respect of enforced disappearances, the IHRL regime has led the international response to prohibiting the acts, particularly through regional human rights courts. What the above section helps to establish in relation to the overall theme of this thesis is that the IHRL regime is not dependant upon the IHL and ICL regimes. In turn, this raises questions as to whether the concerns of those who see fragmentation as a danger to the operation and effectiveness of international law are perhaps misplaced. The fragmentation of international law has resulted in human rights protection that recognizes the anguish faced by the disappeared and their relatives, a protection that is not as strong under IHL and ICL.

3.2 - Enforced disappearance and IHL

The IHL regime, as with the IHRL regime, lacks specific provisions prohibiting instances of enforced disappearances. It is also possible to use existing rules to ensure that protection is afforded to victims of enforced disappearances in times of armed conflict. The IHRL regime specifically requires acts be committed by State agents (or with their involvement), in contrast the IHL regime is not as State-centric. However, it does have its own conditions on use, most notably the requirement that acts of enforced disappearance occur in the context of an international or non-international

armed conflict. In this context, this requirement largely serves to distinguish violations of IHL from violations of IHRL. This chapter begins by examining the customary status of enforced disappearances under IHL, followed by an overview and analysis of the treaty provisions that could potentially allow for the creation of a composite prohibition of enforced disappearance. Lastly, the section concludes by considering some case law principally that which arose from the Nuremberg Trials deliberations over the *Nacht und Nebel* (night and fog) decree which saw thousands of enemies of the State disappearing without trace.

3.2.1 - Customary IHL and enforced disappearance

Unlike other areas of IHL, the customary element of IHL is considerably weaker. Some support for the idea that enforced disappearance is a violation of the customs of war is found in the *Justice Case*, a subsequent trial to the Nuremberg IMT.[139] In this case the Tribunal held that the *Nacht und Nebel* decree under which thousands of people were subjected to acts of enforced disappeared led to violations of customary international law and therefore provided a customary basis for the offence for which the individuals in this case were prosecuted.[140] However, despite this reference the customary international law relating to enforced disappearances is limited with preference being given to treaty law in the form of the Geneva Conventions and their Additional Protocols.

3.2.2 - IHL treaty law and enforced disappearance

The IHL regime lacks a codified definition of disappearances, in much the same way as the ECHR and IACHR lack explicit provisions. Despite this, it is possible to

[139] *US v. Altstoetter et al. 'The Justice Case'*, Judgment of 3-4 December 1947, Trials of War Criminals before the Nuernberg Military Tribunals, vol. III, (United States Government Printing Office: Washington) .
[140] ibid p.1032.

identify treaty provisions that could be said to prohibit enforced disappearances. This section sketches out the provisions contained within these instruments before moving on to consider the jurisprudence of international courts and tribunals.

The starting point for any discussion of the IHL provisions of the Geneva Conventions is Common Article 3, establishing an absolute minimum standard of protection applicable across the IHL regime. Particularly relevant to the construction of a definition of enforced disappearance are the prohibitions of murder, cruel treatment and torture; the commission of outrages against personal dignity including humiliating and degrading treatment; and the imposition of sentences and executions without judgment by a 'regularly constituted court' that affords judicial guarantees 'recognized as indispensable by civilized peoples.' While these prohibitions do not explicitly mention enforced disappearance, it is apparent that many instances of enforced disappearance encountered in the IHRL section concerned murder, torture and extra-judicial killing, all of which can be evidenced in the provisions of Common Article 3.

Other Articles in the Geneva Conventions also suggest that enforced disappearances are prohibited. For example, the First Geneva Convention requires belligerents to register PoWs 'falling into their hands'.[141] It is also a requirement to provide burials or cremation of the dead to determine the cause of death, establish the identity and facilitate the identification of the remains at a later date.[142] Similar provisions are found in the Second,[143] Third[144] and Fourth[145] Geneva Conventions. Although these provisions do not directly relate to enforced disappearances, they do address many of the concerns encountered under the IHRL regime. For example,

[141] GC I, Article 16.
[142] GC I, Article 17.
[143] GC II, Articles 19-20.
[144] GC III, Articles 120-122.
[145] GC IV, Articles 136-139.

denying knowledge of the detained individual as occurred in *Kurt*, or burying the victims in unmarked and concealed graves as in *Bazorkina*.[146] The purpose of highlighting these provisions is to underscore the importance that IHL attaches to the proper treatment of the remains of the deceased, a factor often missing in instances of enforced disappearances.

The Additional Protocols to the Geneva Conventions also contribute to a definition of enforced disappearances under the IHL regime. Additional Protocol I, applying in instances of international armed conflict, contains fundamental guarantees prohibiting 'violence to life, health, or physical or mental well-being of persons' including murder and torture,[147] and 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault'.[148] Article 75(3) requires that people arrested during an armed conflict should be informed of the reasons for their detention.[149] Taken together these provisions add further strength to both defining and prohibiting enforced disappearances in times of international armed conflicts.

Additional Protocol II, although considered weaker in its protection because it applies to non-international armed conflicts, does offer a similar degree of protection to enforced disappearances even though such protection is not explicit. For example, Article 4 contains fundamental guarantees which prohibit 'violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture',[150] and 'outrages upon personal dignity, in particular

[146] *Bazorkina* (n 82) para.110 – in this case the victim's body was never recovered, permitting the inference his grave was concealed.
[147] AP I, Article 75(2)(a).
[148] AP I, Article 75(2)(b).
[149] AP I, Article 75(3).
[150] AP II, Article 2(a).

humiliating and degrading treatment'.[151] An obligation is also imposed on the parties to a conflict to search for 'persons who have been reported missing by an adverse party.'[152] The provisions of both Additional Protocol I and Additional Protocol II underscore the importance of humane treatment of individuals, the prohibition of extra-judicial killing and the importance of ensuring that detainees and the missing are accounted for by the belligerents. These prohibitions could help to shape how the violation of IHL of enforced disappearances is defined.

3.2.3 - IHL case law of enforced disappearance

Much of the IHL jurisprudence can be examined through the lens of the ICL regime. However, as was the approach with torture in Chapter Two; this section concerns itself as far as is practicable with instances of enforced disappearance properly considered to be war crimes. Here, war crimes mean either the violation of the Geneva Conventions or the relevant war crimes provisions of the international criminal tribunals. This section begins by considering the prosecution of individuals at Nuremberg for the enforced disappearance of individuals. In approaching the matter in such a fashion, it is intended to demonstrate the historical background to the prohibition of enforced disappearances found in the IHRL, IHL and ICL regimes.

At Nuremberg prosecutors asked the Tribunal to consider instances of enforced disappearance relating in particular to the Night and Fog Directive ('*Nacht und Nebel Erlass*') signed by Hitler in December 1941.[153] At the heart of the directive was the idea that an individual was to be disappeared without a trace and no information would be given by authorities to the relatives.[154] As such, Finucane has

[151] AP II, Article 4(2)(e).
[152] AP II, Article 33.
[153] Brian Finucane, 'Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War' (2010) 35 *Yale Journal of International Law* 171.
[154] *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 *AJIL* 172, 229.

termed the Directive an attack on 'familial integrity',[155] used to intimidate (and therefore pacify) the civilian populations of occupied territories.[156] The 'fundamental innovation' of *Nacht and Nebel* was not the attack upon the victim but rather the harm it was intended to cause to their families.[157] As such, it can be considered more egregious because it victimises the individual in addition to using the victim as method of intimidating the wider populace.

It was held *Nacht und Nebel* amounted to a violation of the laws and customs of war. The Judgment continued noting that under Article 46 of the Hague Convention,[158] 'Family honour and rights, the lives of persons and private property...must be respected.' For the IMT, therefore, the disappearance of individuals violated Article 46 and thus constituted a violation of the laws or customs of war. The prohibition of enforced disappearances, as Finucane cogently argues, appears to have its origins in the laws of war.[159] For Finucane, this is a condemnation by the IMT of *Nacht und Nebel* 'as a form of mistreatment inflicted upon the missing persons and their families' rather than murder or deportation.[160] The implementation of *Nacht und Nebel* was regretted by one of the defendants, Keitel, who realised, perhaps too late, that the removal of individuals from the protection of the law and the use of the decree as a substitute for the death penalty was contrary to acceptable standards of behaviour expected of military officers.[161]

Subsequent trials at Nuremberg also considered the disappearance of individuals. In the *Justice Case* the Tribunal considered *Nacht und Nebel* in detail,

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[155] Finucane (n 153) 173.
[156] ibid 176.
[157] ibid 178.
[158] Hague Convention (IV) Respecting the Laws and Customs of War on Land, UKTS 9 (1910) 59 (Eng. Fr.).
[159] Finucane (n 153) 195.
[160] ibid 178.
[161] Eugene Davidson, *The Trial of the Germans* (University of Missouri Press 1997) 338.

identifying two elements relevant to the disappearance of individuals. These were that the victims were 'spirited away for secret trial by special courts' and that the victims' whereabouts were to be kept completely secret.[162] Such treatment either led to the immediate execution of the individual or to their being placed in 'protective custody', left to the mercy of the Gestapo.[163] The Tribunal described *Nacht und Nebel* as an 'illegal, cruel, and inhumane plan or scheme'[164] and that those planning and implementing it 'knew that its enforcement violated international law of war' as well as knowing that it was 'intended to serve as a terroristic measure in aid of the military operations and the waging of war by the Nazi regime.'[165] This formulation has been used approximately as a basis for future decisions on enforced disappearances in the IHL and IHRL regimes.

Further evidence to this end is cited by the Tribunal from the testimony of Lieutenant General Rudolf Lehmann, head of the legal division of the *OKW* (*Oberkommando der Wehrmacht* - the Supreme Command of the Armed Forces).[166] In this he stated that he argued that *Nacht und Nebel* be rejected 'for manifold reasons' including 'for reasons of international law, for reasons of justice, and policy of justice, and primarily, because [he] said the administration of justice should never do anything secretly.' This opinion was shared by 'the leading jurists of the armed forces.'[167] Such a statement by a leading lawyer in the OKW provides evidence to suggest that those planning and implementing *Nacht und Nebel* knew of the illegality of their measures. The Tribunal commented on the legality of the decree later in the

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[162] *Altstoetter et al* (n139) 1031.
[163] ibid 1031-1032.
[164] ibid 1034.
[165] ibid 1038.
[166] Lehmann was prosecuted in the *High Command Trial* see: *US v. Leeb et al* 'The High *Command Case*', Judgment of 27-28 October 1948, vols. X and XI, (United States Government Printing Office: Washington). He was sentenced to seven years for his involvement in the commission of war crimes and crimes against humanity committed against enemy belligerents, prisoners of war and crimes against civilians. See ibid vol. XI, 690-695.
[167] ibid 1040.

judgment where it was noted that it constituted a violation of 'the international law of war and international common law relating to recognized human rights.'[168] This latter comment is interesting because it highlights the acceptance by the Tribunal that individuals could be held responsible not only for the violation of the laws of war but also for the violation of human rights.

The *Justice Case* considered the conditions and treatment of those detained under *Nacht und Nebel.* In addition to being kept incommunicado, they were subjected to overcrowded prison conditions, ravaged by disease because of the poor provision of medical treatment and poorly fed.[169] Detainees were to be treated with special precaution, not allowed any correspondence, 'locked up hermitically from the outer world, and that care should be taken that their real names remain unknown to the lower prison personnel.'[170] This serves to underscore the brutality with which the detainees were treated as well as the complete level of isolation to which they were subjected, factors common to contemporary instances of enforced disappearance.

Nacht und Nebel detainees at their trials were 'occasionally denied the aid of any counsel'.[171] Even if the detainee was afforded legal counsel, they were often represented by 'those who were recognized as unconditionally reliable, pro-State and judicially efficient lawyers.'[172] The sentences imposed ranged from death to internment in concentration camps. As part of the *Nacht und Nebe*l programme revolved around secrecy, no criminal records were kept.[173] If a detainee died, death certificates were issued but were only available to inspection with the consent of the

[168] ibid 1057.
[169] ibid 1044.
[170] ibid 1045.
[171] ibid 1046.
[172] ibid 1047.
[173] ibid 1049.

Reich Minister of Justice.[174] The bodies of those executed or who died during their detention were placed in unmarked graves. Their bodies to be used for teaching or research purposes, although this latter requirement was later relaxed and bodies turned over to institutes 'for experimental purposes.'[175] Just as the individuals detained were denied contact with the outside world so too were their bodies after death, their existence being removed from the face of the Earth. This is a common trait of modern enforced disappearances cases before the Inter-American Court and ECtHR.

Lastly, the Tribunal turned to examining the purpose of *Nacht und Nebel* noting the fundamental purpose of the decree would serve as a deterrent to the remainder of the population in the occupied territories.[176] The policy became a means of instrumentality to control and coerce those in the occupied territories. It created an atmosphere of fear amongst the friends and relatives, leading to the meting out of inhumane treatment to the prisoners and their friends and relatives. Such distress was the direct purpose of *Nacht und Nebel* and consequently 'cruel punishment was meted out to the families and friends without any charge or claim that they actually did anything in violation of any occupation rule of the army or any crime against the Reich.'[177] The Tribunal here established that 'mental cruelty may be inflicted as well as physical cruelty.'[178] In this sense, the basis of the Inter-American and ECtHR rulings are discernable in the Nuremberg judgments.

In the *RuSHA Case*[179] the Tribunal referred to a 'special category of prisoners' who were 'persons alleged to have committed offenses against the Reich or the

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[174] ibid.
[175] ibid 1050.
[176] ibid 1056.
[177] ibid 1057.
[178] ibid 1058.
[179] *US v. Greifelt et al*, '*The RuSHA Case*', Judgment of 10 March 1948, Trials of War Criminals before the Nuernberg Military Tribunals, vol. V (United States Government Printing Office).

German forces in the occupied countries.'[180] These were the *Nacht und Nebel* inmates who were bound for execution without delay or, if this was not possible (the reasons for this are not clear in the judgment), were to be taken to Germany and handed over to the security services. The judgment concludes that 'No word of the prisoners was permitted to reach their relatives or the country from which they came'. They therefore disappeared without a trace, used as instruments to cow the populations of the occupied territories. The Indictment in the *Ministries Case* refers to the purpose of *Nacht und Nebel* as the creation of a 'judicial reign of terror in the occupied territories',[181] while in its judgment the Tribunal held that keeping those detained under perpetual sentence of death 'is a trait typical of the sadism of the Nazi regime, and if anything could be considered a crime against humanity, such a practice is.'[182] The prosecution of individuals for acts of enforced disappearance under *Nacht und Nebel* represents an important development for the international legal system. It recognised that the detention of individuals and then acting as if they did not exist could be prosecuted as a crime under IHL.[183]

3.2.4 - Conclusion on IHL and enforced disappearance

The IHL regime now contains some of the weakest protection relevant to enforced disappearances. This stands in contrast to the fact that the IHL regime via the Nuremberg Tribunals conducted some of the first prosecutions relating to enforced disappearances that occurred under the *Nacht und Nebel* decree. As a result of this weakness, one possible method of addressing enforced disappearances that occur during armed conflict would be to treat instances of enforced disappearance as murder

[180] ibid 221.
[181] *US v. Weizsaecker et al*, '*The Ministries Case*', Judgment of 14 April 1949, Trials of War Criminals before the Nuernberg Military Tribunals, vol. XII (United States Government Printing Office) 46.
[182] ibid 608.
[183] Davidson (n 161) 338.

contrary to established prohibitions of illegal killing during armed conflict. This would be permissible even if the victim's body was never recovered. This could serve as evidence to suggest that despite the fragmentation demonstrated between the three regimes, the IHL regime will continue to function in respect of enforced disappearances.

Enforced disappearance in the IHL regime is primarily based on the existence of an armed conflict. This could be international or non-international but must, in any event, meet the minimum standard set out in Common Article 3 of the Geneva Conventions. If this is not met then IHL is not activated. Going beyond this criterion, it would appear that the physical act of subjecting an individual to enforced disappearance is broadly similar to that which is found in the IHRL regime. As with torture, the largest difference between IHL and IHRL, beyond the armed conflict criterion, is that IHL can be applied to non-State actors as well as State officials or its armed forces. This potentially widens the scope of protection to be afforded to individuals in times of armed conflict. Fragmentation of the international legal system can be seen as cause for the divergence between IHRL, IHL and ICL. However, each of the regimes remains able and committed to preventing acts of enforced disappearance albeit in differing fashions.

3.3 - Enforced disappearance and ICL

The prohibition of enforced disappearance under ICL has a chequered history. For example, the disappearance of individuals into Nazi concentration camps under the *Nacht und Nebel* decree was explicitly referred to at Nuremberg, albeit in the context of IHL. However, it then fell from the consciousness of ICL and was not included as a discrete offence in the ICTY, ICTR or SCSL Statutes. Despite this, the ICTY has

given some limited consideration to the matter,[184] subsequently developed by the Bosnian War Crimes Court.[185] Enforced disappearance is now regarded as a crime against humanity under the ICC Statute.[186] However, the requirements contained both in the Statute and the Elements of Crimes are particularly onerous and it remains to be seen whether this offence will be much used by the Prosecutor. For an instance of disappearance to constitute a crime against humanity it is necessary to demonstrate that the incident occurred within the context of a widespread or systematic attack against a civilian population, and that the perpetrator had knowledge of the attack.[187] This section does not consider the customary law of ICL because of the highly codified nature of the regime, it instead begins with the treaty provisions followed by an analysis of the relevant case law.

3.3.1 - ICL treaty law and enforced disappearance

The revulsion to the practice of enforced disappearance has led to the prosecution of several individuals for the act before the ICTY. The ICTY, lacking a specific offence of enforced disappearance in its statute had to rely upon Article 5(i) which prohibited 'other inhumane acts'. This is a broad category of offence and has elsewhere been held to include persecutory acts, the forcible transfer of person and enforced prostitution.[188] The broad scope of Article 5(i) does however present problems especially concerning whether it violates the fair trial principles of *nulla poena sine*

[184] *Prosecutor v. Kupreskić* (IT-95-16-T) TC, Judgment, 14 January 2000, para.563.
[185] *Prosecutor v. Damjanovic* (No.X-KR-05/51) Trial Judgment of the Court of Bosnia and Herzegovina, 15 December 2006
[186] ICC Statute, Article 7(1)(i).
[187] ICC Statute, Article 7(1).
[188] *Kupreskic* (n 184) para.566.

lege and *lex stricta* where criminal offences have to be strictly defined and not advanced by analogy.[189]

The evolution of enforced disappearance as a violation of international criminal law came in the drafting process of the ICC Statute which now classifies enforced disappearance as a crime against humanity.[190] It is defined as the 'arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization'.[191] This conforms in broad terms with how the violation under IHRL has been defined both in the ICCPED and in the jurisprudence of the ECtHR and Inter-American Court. Indeed Schabas has noted that the content of crimes against humanity found in the ICC Statute has been 'enriched principally by developments in international human rights law.'[192] The only element different here is the addition that the crime can be committed by a 'political organisation' in addition to being a crime committed only by a state. This conforms with the idea of broadening international criminal justice so as to include non-state actors many of which, be they armed groups or rebel governments, could not be defined *per se* as being a state.

Article 7(2)(i) continues that such acts of enforced disappearance are followed by 'a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.' This is reminiscent of the *Nacht und Nebel* order given by the Nazis, and also of practices held to amount to enforced

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[189] See Dana for a discussion of this in relation to modern international criminal law: Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory of the Principle of Legality in International Criminal Law Sentencing' (2009) 99 The Journal of Criminal Law and Criminology 857, 864; See also Hiromi Sato, 'Modes of International Criminal Justice and General Principles of Criminal Responsibility' 4 Gottingen Journal of International Law 765, 801.
[190] ICC Statute, Article 7(1)(i).
[191] ICC Statute, Article 7(2)(i).
[192] William Schabas, *The International Criminal Court* (CUP 2011) 115.

disappearance by the ECtHR and Inter-American Court. The last element, that of intentionally removing the individual from the protection of the law 'for a prolonged time' protects the individual and recognises that often when a person is thus deprived of their freedom the potential for further violation of other rights, and the commission of other criminal offences by the perpetrators, is increased.

The ICC Elements of Crimes offers additional illumination on the definition of enforced disappearance. The Elements are not legally binding on the ICC but rather they serve as a tool for the interpretation of the crimes defined in the ICC Statute. The first element to be proven is that the perpetrator either 'arrested, detained or abducted one or more persons' or that he refused 'to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.' This conforms to the crime as it is defined in its base definition in Article 7(2)(i). There appears to be a two-stage test for each of the offences specified in the first two elements.

The first offence is either that the perpetrator detained a person (Elements 1(a)) and then proceeded to refuse to acknowledge that person's detention (Elements 1(b)); *or* that the perpetrator refused to acknowledge a person's detention which was preceded by or accompanied with the detention of the individual. The inclusion of these two types of enforced disappearance broadens the scope of the law relating to enforced disappearances. The first instance, detaining and then refusing to acknowledge the detention of the individual, is widely found in the IHRL jurisprudence. It could be termed as a 'classical' enforced disappearance where the person performing the detention subsequently proceeds to deny knowledge of the individual. The second type of enforced disappearance listed in the Elements permits the prosecution of an individual who refuses to acknowledge an individual's detention

regardless of how that individual came to be in their custody. By constructing the definition of enforced disappearance in this manner, the Elements grant a much wider category of offence that can be used to hold a greater pool of individuals to account.

The third element specifies that the perpetrator was aware that the detention would be followed by the refusal to acknowledge the deprivation of freedom or that such refusal was preceded by a deprivation of freedom. Fourth, is the requirement that the detention was carried out with the 'authorization, support or acquiescence of, a State or a political organization.' No guidance is given as to how a State, or political organisation, is to be defined. The former can be defined by recourse to other areas of international law,[193] while the latter might raise questions as to exactly what is meant by a 'political organisation'.

Next is the temporal element requiring that the detained individual be removed from the protection of the law for a 'prolonged period of time'. There is no definition provided as to what would constitute a 'prolonged period of time' which could cause difficulties where an individual is detained for anything up to several days which might not be considered 'prolonged'. It is submitted here that the death of an individual even if they were only detained for a few hours, as in many of the Chechen cases, before being summarily executed could constitute a prolonged period of time on the basis that the individual's final hours were spent in unacknowledged and enforced detention.

The final two elements relate to the requirement common to all crimes against humanity, namely that the conduct 'was committed as part of a widespread or systematic attack directed against a civilian population'; and that the perpetrator knew that the enforced disappearance (or refusal to acknowledge detention) was part of a

[193] James Crawford, *The Creation of States in International Law* (2nd edition, OUP 2006).

widespread or systematic attack directed against a civilian population. These two elements impose on the prosecutor the additional *actus reus* and *mens rea* requirement that there is firstly a widespread or systematic attack (the *actus reus*) and that the perpetrator knew that it was part of a widespread or systematic attack (the *mens rea*). The additional requirement that these elements be proved does lead to a narrowing of the definition of enforced disappearance in that it would presumably exclude sporadic instances of disappearances.

In conclusion, the Elements create a lengthy definition of the crime against humanity of enforced disappearances. Some aspects of the Elements, such as the intention to remove the victim from the protection of the law 'for a prolonged period of time' could be difficult to prove especially in the context of wider civil unrest. The Elements also require that the detention be conducted with the authorization, support or acquiescence of, a State or a political organization.' Interestingly, this makes the crime of enforced disappearance the only crime against humanity that requires the involvement of a State or political official. Although the term 'political organization' could include non-State actors it should be recognised that not all non-State actors could be said to be a 'political organization'. This would mean either a liberal interpretation on the part of the Court in defining 'political organization' in order to convict some perpetrators or the possibility that enforced disappearances committed by non-State actors would not be classified as a crime against humanity. Such a state of affairs could compromise the desire of the ICC to provide justice both for the accused and for the victims.

3.3.2 - ICL case law and enforced disappearance

The driving force behind the development of the crime of enforced disappearance has been the ICTY that utilised the wide-ranging term 'other inhumane acts' of Article

5(i) to criminalise such acts in *Kupreškic*. This section therefore begins by examining the definition of this category of crimes against humanity so as to provide a solid basis for the analysis of enforced disappearances in ICL. While the ICC Elements appear to offer a concise definition as to what constitutes an enforced disappearance there are instances in which the ICTY's jurisprudence will be useful to clarify certain aspects of the offence, leaving such analysis far from redundant. This will be most noticeable when it comes to choosing between prosecuting an accused for enforced disappearance or simply for murder. The latter choice might prove to be a simpler method of ensuring that justice is administered rather than attempting to satisfy each criterion required to prove an enforced disappearance.

3.3.2(a) - Enforced disappearance at the ICTY

The ICTY in *Kupreškic* set about establishing the boundaries of enforced disappearance. The Trial Chamber noted that there was concern as to how the term was to be defined because of its lack of specificity.[194] This was seen as contrary to the operation of criminal law which demands that criminal offences be strictly construed in order for an accused to know the exact charges made against him. The Court held that the term was included as a 'residual category' in much the same fashion as 'humane treatment' contained in common Article 3 of the Geneva Conventions was to be construed.[195] In analysing the existing corpus of international law pertaining to this matter, the Trial Chamber made reference to Article 7(k) of the ICC Statute which states that it includes 'causing great suffering, or serious injury to the body or to mental or physical health.'

[194] *Kupreskić* (n 184) para.563.
[195] ibid.

Recourse was made to several international human rights treaties and having analysed a number of provisions of these treaties the Court concluded that 'other inhumane acts' must 'be as serious as the other classes of crimes provided for in the other provisions of Article 5.'[196] The Court also referred to definitions of 'inhumane treatment' decided under Article 2 (b) of the ICTY Statute, noting that in *Delalic* the Trial Chamber had ruled that such treatment was an intentional act or omission 'which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.'[197] Having reviewed the law, *Kupreškic* held that 'the expression at issue undoubtedly embraces...the enforced disappearance of persons.'[198] The *Kupreškic* judgment did not however go on to establish how the enforced disappearance of persons was to be defined, merely that it constituted a crime against humanity under the ICTY Statute.

Further development came in the cases of *Lukic*, *Krnojelac* and *Limaj* although the crime was developed by reference to the crime of murder rather than explicitly to the crime of the enforced disappearance of individuals. However, there are several overlaps with this approach and the approach taken by the IHRL regime. Furthermore, the Court has made reference in several cases to the disappearance of individuals, including widespread and systematic instances of the practice but has failed to translate this into an indictable offence. For example, in *Vasiljevic* reference was made to instances concerning arbitrary killings and disappearance of civilians from the municipality of Visegrad. It was noted that the number of disappearances peaked in June and July 1992 and the Court referred to a pattern and intensity when describing the disappearances.[199]

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[196] ibid para.566.
[197] *Prosecutor v. Delalić* (IT-96-21-T) TC, Judgment, 16 November 1998, para.543.
[198] *Kupreskić* (n 184) para.566.
[199] *Prosecutor v. Vasiljević* (IT-98-32-T) TC, Judgment, 29 November 2002, para.53.

Lukić referred to several instances of enforced disappearances including events at the Uzmanica concentration camp. However, these acts did not appear on the indictment, but were instead used by the Court to contextualise the indicted offences. Several instances of disappearances were cited, including the disappearance of 20 young detainees in July 1992, none of whom have been seen since.[200] Similar instances were reported to have occurred in November 1992.[201] Further in the judgment it is noted, in the context of a murder charge, there is no need to produce the deceased's body in order to support a murder conviction. Death may be established by circumstantial evidence, 'providing that the only reasonable inference available from the evidence presented to the Trial Chamber is that' the victim is dead 'as a result of acts or omissions of the accused'.[202] The relevant factors to be taken into account with regard to circumstantial evidence includes proof of the mistreatment of the victim, 'patterns of mistreatment and disappearances of other victims...and lack of contact by the victim with others whom the victim would have been expected to contact, such as his or her family.'[203] The requirement of having to produce a body to prove death had been discounted as early as the *Tadić* judgment with the Court highlighting the practical difficulties connected with having to produce a body to prove that an individual has died during conflicts. It did however note that 'there must be evidence to link injuries received to a resulting death.'[204] This position can be contrasted with that adopted by the ECtHR which, it will be recalled, has been reluctant in many cases to establish the death of an individual without evidence that

[200] *Prosecutor v. Lukić* (IT-98-32/1-T) TC, Judgment, 20 July 2009, para.797.
[201] ibid para.798.
[202] ibid para.904.
[203] ibid para.904; this had previously been confirmed in *Martić*(IT-95-11-T) TC Judgment, 12 June 2007, para.59; and *Prosecutor v. Halilović* (IT-01-48-T), TC, Judgment, 16 November 2005, para.37.
[204] Prosecutor v. *Tadić* (IT-94-1-T) TC, Judgment, 7 May 1997, para.240.

the individual has died. Furthermore, the ECtHR has been markedly more reluctant to take into account evidence of a circumstantial character.

In *Limaj* the Trial Chamber acquitted the defendants on the charge of murder because there was no evidence linking the defendants to the disappearance of the victims. [205] This was despite the victims' disappearance and evidence suggesting disappearances had been conducted at the concentration camp.[206] The Chamber concluded that '[having] regard to all the relevant circumstances the Chamber cannot be satisfied that the Prosecution has established that Milovan Krstic and Miodrag Krstic are in fact dead.'[207] This is an evidential aspect of the offence because the Prosecution is required to establish beyond reasonable doubt that the defendants caused the death of the victims, rather than relying on a balance of probabilities test. This was confirmed in *Krnojelac* where the Tribunal held that that proving that a person had been murdered beyond a reasonable doubt did not require proof that the victim's body had been recovered,[208] a point subsequently confirmed by the Appeals Chamber in *Kvocka*.[209] Again, this is suggestive of a greater acceptance of the value of circumstantial evidence when compared with the ECtHR. One possible reason for this difference is that the ICTY was dealing with cases that took place in a widely recognised armed conflict whereas the ECtHR has not. However, the disparity between the approach taken by the ICTY and by the ECtHR again serves as evidence to suggest that the two regimes are more separate and independent than might be first thought.

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[205] Prosecutor v. *Limaj* (IT-03-66-T) TC, Judgment, 30 November 2005, para.342.
[206] ibid.
[207] ibid para.343.
[208] *Prosecutor v. Krnojelac* (IT-97-25) TC, Judgment, 15 March 2002, para.326.
[209] *Prosecutor v. Kvočka* (IT-98-30/1-A) AC, Judgment, 28 February 2005, para.260.

3.3.2(b) Enforced disappearance at the Bosnian War Crimes Chamber

The Bosnian War Crimes Chamber (BWCC) was created to absorb some of the ICTY's workload and to strengthen the justice system in Bosnia and Herzegovina.[210] It serves as a forum for the domestic prosecution of those accused of committing genocide, crimes against humanity and war crimes. The BWCC began its life as a hybrid court with international judges and domestic judges sitting alongside each other.[211] Overtime, the balance has shifted towards having more domestic judges and now only six international judges sit in the Court, a number likely to decrease further in years to come. While its jurisdiction is provided for under domestic law by means of the Bosnian and Herzegovina Criminal Code ('the Bosnian Criminal Code'),[212] many of the provisions which grant the Court jurisdiction over international crimes are directly inspired by international criminal law and the jurisprudence of the ICTY, in addition to international human rights law.

Chapter XVII of the Criminal Code creates the criminal offences of, *inter alia*, genocide,[213] crimes against humanity[214] and war crimes.[215] Of particular relevance to this chapter is the inclusion in Article 172(1)(i) of enforced disappearance as a crime against humanity. This replicates the provisions of the ICC Statute and copies verbatim the definition of enforced disappearance found in Article 7(2)(i) of the ICC Statute.[216] Article 172(1)(i) and (2)(i) in addition to providing domestic criminal sanction for the enforced disappearance of individuals also fulfils the role of incorporating the ICC Statute into Bosnian law.

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[210] Janine Clark, 'The State Court of Bosnia and Herzegovina: a path to reconciliation?' (2010) 13 *Contemporary Justice Review* 371, 373.
[211] ibid.
[212] Criminal Code of Bosnia and Herzegovina ('Bosnian Criminal Code'), 24 January 2003, available at http://www.sudbih.gov.ba/files/docs/zakoni/en/krivicni_zakon_3_03_-_eng.pdf (accessed 26 March 2012).
[213] Bosnian Criminal Code, Article 171.
[214] ibid Article 172.
[215] ibid Articles 173-75, Articles 177-179.
[216] ibid Article 172(2)(i).

The Court has considered instances of enforced disappearance as a crime against humanity in several cases. In *Damjanović*[217] the BWCC considered the individual elements which the prosecutor would require to prove beyond a reasonable doubt. These were the existence of the abduction or arrest of persons with the acquiescence and/or the support of a State or political organisation. The perpetrator must also refuse to give information on the fate or whereabouts of the persons taken away with the intent to remove that person or persons from the protection of the law for a prolonged period of time. This follows closely the wording of the Bosnian Criminal Code and ICC Statute but is worth repeating here because it demonstrates the use of the law by the Court. In addition to fulfilling the individual elements of the specific offence of enforced disappearance is the requirement that the umbrella elements of crimes against humanity be proven i.e. that the disappearance was part of a widespread or systematic attack against a civilian population and the perpetrator knew this was the case.[218]

In the case of *Damjanovic* the Court heard how the accused, a member of the Bosnian Serb army, would arrest individuals without grounds and without giving information[219] while dressed in the uniform 'recognisable as that of a soldier of the RS [Republika Srpska] Army'.[220] These victims were 'neither accounted for nor found.[221] Consequently, the Court was certain that the accused both carried out the physical act of disappearing people and that he did so with the support or acquiescence of the Republika Srpska. The Court also emphasised the notorious reputation of the accused for committing such acts and while such a reputation was

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[217] *Damjanovic* (n 185).
[218] See ICC Statute Article 7(1).
[219] *Prosecutor v. Damjanović* (No. X-KR-05/51) Trial Judgment of the Court of Bosnia and Herzegovina, 15 December 2006, 27.
[220] ibid 26.
[221] ibid.

not considered in itself to be directly probative 'it support[ed] the conclusion that the accused did not hesitate to commit such acts'.[222] With regard to the umbrella offence of the attacks being widespread or systematic, the Court noted that the accused's 'presence and...reputation contributed to the systematic attack on the civilian population.'[223] This latter statement is revealing because it shows understanding on the part of the Court that one individual with a reputation for committing crimes against humanity can be used by a State or political organisation in its attack on civilians. It further serves to recognise the fact that the individual was obviously acting with impunity and thus gives rise to individual criminal responsibility which is a basic tenet of modern international criminal law.[224]

Following the judgment in *Damjanovic* the Court has considered several other cases involving the disappearance of individuals. For example, in *Stevanović*[225] the court listed a case where hospital patients disappeared en route from a hospital to 'safe territory', a journey made at the behest of the accused.[226] While in *Perković*[227] the accused, a reserve military officer with the rank of major, was found to have both perpetrated in and knew of the occurrence of the enforced disappearance of individuals 'but neither prevented nor punished'[228] such acts. This gave rise to his responsibility as a commander, a further basic tenet of international criminal law. In *Bastah*[229] the Court identified objective and subjective elements of the crime noting that the fact that the accused were at the material time part of the armed forces of

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[222] ibid.
[223] ibid.
[224] This is now contained in Article 25, ICC Statute. See also Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *JICJ* 953.
[225] *Prosecutor v. Stevanović* (No. X-KR-05/24-2) Trial Judgment of the Court of Bosnia and Herzegovina, 29 July 2008.
[226] ibid 75.
[227] *Prosecutor v. Perković* (No. X-KR-09/662) Trial Judgment of the Court of Bosnia and Herzegovina, 24 December 2009.
[228] ibid 11.
[229] *Prosecutor v. Bastah* (No.X-KR-05/122) Trial Judgment of the Court of Bosnia and Herzegovina, 4 February 2010.

Republika Srpska and in that capacity apprehended persons who remain unaccounted for constitutes the objective element of the offence;[230] while the subjective element was established when the accused refused to provide information about the fate of the person detained.[231]

However, there have been instances where the accused has been acquitted. For example in *Savić*[232] the Court ruled that the elements of the offence were not proven even though the alleged victims were not seen again there was insufficient evidence to show that the accused knew what would happen to them once they were detained, nor was there evidence to suggest that he knew what the final outcome of their disappearance would be (the victims were allegedly executed).[233] This last point seems strange because knowledge of the victims' fate is not a required element of the offence. One possible reason for this is that it was made to underscore the accused's lack of knowledge of the umbrella elements required for a crime against humanity i.e. that it was part of a widespread or systematic attack. Another acquittal came in the case of *Mandić*,[234] a former Deputy Minister of the Interior of Republika Srpska. The prosecution alleged that his command responsibility for such acts was engaged however the Court held that there was no evidence, to overcome the burden of reasonable doubt, that the accused committed or ordered such acts.[235]

The Court has reviewed the relevant international law concerning enforced disappearances in *Bastah*.[236] In this case the Court noted that the 'current sources of international law define the notion of enforced disappearance as a crime against

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[230] ibid 60.
[231] ibid 61.
[232] *Prosecutor v. Savić* (No. X-KR-07/478) Trial Judgment of the Court of Bosnia and Herzegovina, 3 July 2009.
[233] ibid 103.
[234] *Prosecutor v. Mandić* (No. X-KRZ-05/58) Trial Judgment of the Court of Bosnia and Herzegovina, 1 September 2009.
[235] ibid.
[236] *Bastah* (n 229).

humanity'. It also referred to the UN General Assembly resolution on enforced disappearances[237] which the Court found had been adopted into national criminal legislation by Article 172(1)(i). However, it did not make reference to the ICC Statute, the international convention on enforced disappearances or to the jurisprudence of the ECtHR or Inter-American Court. Another issue in this regard which lacks clarity is why the Court felt it needed to refer to international law at all when enforced disappearance, though based on international law, has clearly been transformed into domestic law by virtue of the Bosnian Criminal Code. This recognition of international law appears to be an attempt by the Court to provide justification for its decision even though the relevant law is domestic. The jurisprudence of the BWCC with regard to enforced disappearance can help to identify future trends in the field and suggest how the ICC might approach instances of enforced disappearance in the future. It also serves to illustrate the methodology of domestic courts concerned with international criminal law, and how they too may consider the matter in the future.

3.3.3 - Conclusion on the ICL regime and enforced disappearance

The ICTY has adopted a largely cautious approach in instances of enforced disappearance. Instead of specifically stating that individuals have been forcibly disappeared the Court has relied upon the crime of murder with the requirement that a body need not be produced in order to prove the said murder. This is obviously similar in fact to instances of enforced disappearance adjudicated by the ECtHR and Inter-American Court. Such an approach is understandable if one considers the general reluctance on the part of the Tribunal to unnecessarily extend its jurisdiction over crimes which are not specifically enumerated in the ICTY Statute. The Court did

[237] ibid 59.

state that enforced disappearance, as a crime against humanity, could be classified under Article 5(i) which relates to 'other inhumane acts'.[238] However the Court has up until now not found an accused guilty of such an act, this could be for example due to the unwillingness of the ICTY Prosecutor to try to extend the boundaries of this law and given the late stage in the proceedings it is unlikely that individuals will now be found guilty of the offence at the ICTY. However, this does not mean that all is lost because as has been seen the Bosnian War Crimes Court has successfully prosecuted individuals for the offence and it is now also a well-defined, if cumbersome, crime against humanity under the ICC Statute.

The ICC Elements of Crimes offers a comprehensive definition of enforced disappearance as a crime against humanity. It is comprised of eight elements, two of which are the 'standard' elements required for an individual to held liable for a crime against humanity, namely that the enforced disappearance was committed as part of a widespread or systematic attack against a civilian population, and that the perpetrator knew the conduct was part of such an attack. The remaining six elements present a detailed description of enforced disappearance which, as discussed, could prove to be too complicated to be employed. Instead, prosecutors may very well prefer to prosecute an accused for murder.

Fragmentation therefore can be seen as offering not only solutions to complex problems but also additional complexity where it is not warranted. The Elements of Crimes at the ICC can be seen as helping to clarify the definition of the various criminal offences contained in the Statute. However, the definition of fragmentation contained therein can be seen as unnecessarily complicated. In one regard this reflects the complicated nature of the criminal offence of enforced disappearance. This can be

[238] *Kupreskić* (n 184) para.566.

compared with the comparatively simpler definition of enforced disappearance as a violation of IHRL. The difference could be because of the requirement that criminal offences be strictly construed under the Statute and thus a high-degree of legal certainty is required in order to hold an individual criminally liable for the crime against humanity of enforced disappearance.

Conclusion to Chapter Three

Throughout this chapter reference has been made to the fact that enforced disappearance is often treated as a composite violation of a regime's rules rather than as an independently recognised legal provision. This is the case in the IHRL and IHL regimes and until the advent of the ICC Statute a feature too of the ICL regime. The composite nature of enforced disappearance stems from the various acts associated with it. For instance, in the IHRL regime there is the detention of the individual followed by a deprivation of liberty. Subsequent to this is perhaps torture, inhuman or degrading treatment followed by an extrajudicial killing. Thus, in the context of the ECHR there is the potential for a violation of Articles 2, 3 and 5 in respect of the victim, plus the violation of relatives' rights under Article 3 and a procedural violation of Article 2 should the State fail to investigate the disappearance. In the context of ICL, there is the additional burden of proving that an accused had the requisite *mens rea* when performing the acts. There has however been marked interest in the outright prohibition of enforced disappearances in both the IHRL and ICL regimes. This can be evidenced by the creation of the International Convention for the Protection of All Persons from Enforced Disappearance in the IHRL regime, and the inclusion of Article 7(1)(i) in the ICC Statute that makes enforced disappearance a crime against humanity.

The approach to defining enforced disappearance as adopted by the three regimes differs, as it does with torture, in a number of fundamental ways. Firstly, the IHRL regime is primarily concerned with the regulation of State behaviour *vis-à-vis* individuals subject to its jurisdiction. As a result, the definition of enforced disappearance in the IHRL includes the requirement that such acts be performed by, or with the acquiescence or other knowledge of, State agents. Acts performed by non-State actors could not therefore be considered to be violations of human rights law. The IHL regime requires the existence of an international or non-international armed conflict. This means that acts performed by military, paramilitary or rebel groups in situations that do not amount to a recognisable armed conflict would not be considered a violation of IHL. Lastly, enforced disappearance under the ICC Statute requires that the acts be performed during a widespread or systematic attack by a State or political organisation. This would exclude two instances of enforced disappearance. The first being where enforced disappearances are sporadic and thus not categorised as 'widespread or systematic'. The second being where such acts are performed by actors other than those affiliated with a State or political organisation. Thus, even though the three regimes agree that instances of enforced disappearance amount to a violation of their rules, situations could arise in which victims could be without redress.

The different approaches of the three regimes can be seen as evidence to support the assertion that the three regimes, though they share identical ends by prohibiting enforced disappearance, are recognisably separate. This could be seen as evidence of the fragmentation of the international legal system. However, it can also be seen as evidence to support the position advanced by this thesis that this fragmentation does not greatly affect the operation of the three regimes if they are

viewed in isolation of one another. By viewing the regimes in this manner it is apparent that they are 'special' in the sense used by Ratner in that they each aim to regulate a certain type of conduct.[239]

For the purposes of prohibiting enforced disappearance the IHL regime is clearly the weakest of the three regimes, lacking a singular violation and potentially relying on several composite offences. However, this does not detract from the substantial improvements made in the IHRL and ICL regime. A similar difference between the regimes is discernible in the next chapter when the thesis considers sexual violence, although the difference in that case relates to the strong protection afforded by the IHL and ICL regimes and the comparatively weak protection found in the IHRL regime.

Fragmentation has resulted in different definitions of enforced disappearance depending on the regime in question. However, these should not be seen as necessarily conflicting with one another, but rather as existing separately from one another. Despite such differences there is evidence to suggest that the regimes can afford victims and their families with the necessary forms of redress or to punish those who commit acts of enforced disappearance. Fragmentation therefore does not necessarily affect the operation of the law within the legal regimes concerned or cause them to stop functioning in an efficient and effective manner.

[239] Steven R. Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 *AJIL* 475, 485.

Chapter Four – Sexual Violence

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Introduction

The issue of sexual violence has received increased attention over the past two decades, particularly with the advent of the international criminal tribunals for the former-Yugoslavia and Rwanda. Until this time women's rights were barely considered by IHRL, IHL and ICL.[1] One possible reason for the lack of international concern over sexual violence, a term including rape, sexual assault and forced prostitution,[2] is the idea that such acts were traditionally seen as 'private' acts outside of public regulation.[3] Accordingly, it is seen as 'devoid' of political context and thus not a matter for human rights.[4] Even international conventions such as the Convention for the Elimination of Discrimination against Women (CEDAW) have been dismissed as 'window dressing',[5] failing to usher in promised 'revolutionary changes'.[6] The relative lack of concern demonstrated by the international legal community towards violence against women has led to some feminist writers to call for greater politicisation of the issue.[7] Such a perspective has implications for the appeal to a more formal approach to international law advocated throughout this thesis.

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[1] Rhonda Copelon, 'International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking' (2002) 11 *American University Journal of Gender, Social Policy and Law* 865, 866.
[2] Inger Skjelsbæk, 'Sexual Violence and War: Mapping Out a Complex Relationship' (2001) 7 *European Journal of International Relations* 211, 212-213.
[3] Pamela Goldberg and Nancy Kelly, 'International Human Rights and Violence against Women' (1993) 6 *Harvard Human Rights Journal* 195.
[4] ibid 196.
[5] Copelon (n 1) 866.
[6] Julie Minor, 'An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination against Women' (1994) 24 *Georgia Journal of International and Comparative Law* 137, 143; see also Rebecca Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1990) 30 *Virginia Journal of International Law* 643.
[7] Gillian Youngs, 'Private Pain/Public Peace: Women's Rights as Human Rights and Amnesty International's Report on Violence against Women' (2003) 28 *Signs* 1209, 1209.

Apparent in the literature regarding sexual violence is the lack of certainty as to what conduct constitutes sexual violence, and how the international legal system should respond to such conduct. Even such egregious acts as rape have competing definitions, a point explored in more detail in this chapter. Nor is it clear whether sexual violence is sex with violence or violence with a sexual manifestation.[8] While none of this seeks to undermine the suffering experienced by the victims it can cause problems when attempting to establish an accused's liability for his acts.[9] Such uncertainty again leaves the path clear for a less formalistic, more policy-orientated and instrumentalist approach to sexual violence which can in itself be seen as a symptom of the increased fragmentation of international law. Countering the policy-orientated approach whilst remaining sympathetic to victims by not descending into 'misogynistic formalism'[10] is potentially a rather difficult task given the weight of feminist legal thought on the issue.

This chapter outlines the different approaches taken by each of the three legal regimes studied in defining rape and other forms of sexual violence against women. In contrast to other violations considered in this thesis, there is a relatively small amount of case law on this subject matter, a point which can be attributed to several factors. Some writers would argue that this reflects the way in which international law represents the interests of men or the way in which women's rights are treated within the international legal system.[11] Others signpost the creation of the UN international criminal tribunals, in particular the ICTR, and how this has led to a marked concern

[8] Skjelsbæk (n 2) 212.
[9] In cases of sexual violence studied here the perpetrator is usually male.
[10] Adrienne Kalosieh, 'Consent to Genocide?: The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca' (2003) 24 *Women's Rights Law Reporter* 121, 134.
[11] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613.

with prosecuting individuals for sanctionable conduct against women.[12] Further reasons can be seen from the differences between the three regimes. While IHL and ICL expressly prohibit acts such as rape, the IHRL regime lacks such clarity. It relies upon classifying rape and similar acts as torture, inhuman or degrading treatment. Another pertinent factor is the State-centric nature of the IHRL regime which primarily imposes obligations on States rather than individuals.[13] One final point to highlight here is that while this chapter focuses on sexual violence committed against women, the international tribunals have held that acts of sexual violence can also be committed against men[14] therefore much of the study below can be equally applied to men and women.[15]

This chapter serves to illustrate the way in which a formalised understanding of international law can address the needs of victims while providing a robust framework for a fair trial for an accused and for the creation of a more rigorous conception of international law. It begins by considering the response of the IHRL regime in particular the protection afforded under the UN, ECHR and Inter-American regimes. Unlike the law relating to torture and enforced disappearance, human rights law does not offer a great amount of protection to victims of sexual violence. The second substantive section examines the response of the IHL regime to sexual

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[12] Alex Obote-Odora, 'Rape and Sexual Violence in International Law: ICTR Contribution' (2005) 12 *New England Journal of International and Comparative Law* 135; Kelly Askin, 'Gender Crimes Jurisprudence in the ICTR' (2005) 3 *JICJ* 4.

[13] For a discussion of horizontality and human rights see Gavin Phillipson and Alexander Williams 'Horizontal Effect and the Constitutional Constraint' (2011) 74 *MLR* 878.

[14] e.g. *Prosecutor v. Češić* (IT-95-10/1) 11 March 2004, para.13; see Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' (2007) 18 *EJIL* 253; R. Charli Carpenter, 'Recognizing Gender-Based Violence against Civilian Men and Boys in Conflict Situations' (2006) 37 *Security Dialogue* 83; Hilmi Zawati, 'Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity' (2007) 17 *Torture* 27; Nor is rape of men by men to be seen necessarily as evidence of homosexuality but instead an expression of power, control and the feminisation of the victim: Skjelsbæk (n 2) 224; sexual minorities can also be subjected to such acts: James Wilets, 'Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: an International and Comparative Law Perspective' 60 *Albany Law Review* 989.

[15] The obvious exception being forced pregnancy; Milan Markovic, 'Vessels of Reproduction: Forced Pregnancy and the ICC' (2007) 16 *Michigan State Journal of International Law* 439.

violence committed during armed conflict, an issue that has historically been neglected by the regime.[16] Lastly, the response of the ICL regime to sexual violence is analysed because this regime has been responsible for increased awareness of the issues addressed.

4.1 - Sexual violence and IHRL

Acts including rape and sexual violence would appear to be *prima facie* violations of human rights. Yet despite such an initial perspective, the reality is not necessarily as clear. One of the most obvious barriers when linking sexual violence to human rights violations is the fact that many human rights instruments, including the three major systems studied in the present chapter, do not explicitly specify a right not to be raped or subjected to sexual violence. Instead, there is an assumption that such acts would amount to a violation of the right to be free from torture, inhuman and degrading treatment. A further problem occurs because most acts of violence committed against women take place in the private sphere, committed by their families or communities.[17] This has led some commentators, for example Youngs, to regard all violent acts against women as torture, regardless of the context, i.e. whether it occurs in public or in private. By addressing the matter in this fashion they seek to 'add force' to arguments that are, on their own admission, 'political'.[18]

The public-private dichotomy raises difficulties because traditionally the IHRL regime is concerned with the limitation of State power *vis-à-vis* the individual rather than between private citizens.[19] Indeed, one commentator has highlighted that

[16] For a history of sexual violence see Myriam Denov, 'Wartime Sexual Violence: Assessing a Human Security Response to War-Affected Girls in Sierra Leone' (2006) 37 *Security Dialogue* 319, 320.
[17] Christine Chinkin, 'Violence against Women: the International Legal Response' (1995) 3 *Gender and Development* 23, 24.
[18] Youngs (n 7) 1209.
[19] Catherine Moore, 'Women and Domestic Violence: the Public/Private Dichotomy in International Law' (2003) 7 *International Journal of Human Rights* 93.

so-called 'intimate violence', (for instance between husband and wife) can occur because of the restriction of State power: the 'protection of the private sphere from the intrusion of public (state) interference has historically worked against women exposed to the excesses of unfettered male dominance and violence.'[20] According to this critique the State has to balance the limitation of its own power with the protection of women from violence, a problem reflected in the State's position as both being 'representative of institutionalized inequalities between men and women and a powerful site of actual or potential change'.[21] The locus of the problem is therefore the distinction between the public and private spheres. On the one hand, if a State adequately protects women from domestic violence through the criminal law, recourse to human rights law might be lessened while providing arguably greater protection to women.

Due to the State-centric nature of human rights law and the fact that it is recognised that the majority of acts of violence against women are committed in the 'private' sphere, a limit is placed on the effectiveness of the IHRL regime. The following section examines the limited protection afforded under this regime beginning with some UN instruments before moving on to consider the ECHR and Inter-American systems. The position advocated in this section is that the traditional conception of IHRL should remain, with only acts committed by State officials constituting human rights violations. In part this is due to a concern over the blurring of the traditional formal distinctions between legal regimes. More importantly from a practical perspective, often criminal law is better positioned to provide protection to women not only from domestic violence but from acts of serious violence. Despite

[20] Youngs (n 7) 1210.
[21] ibid 1212.

these concerns, IHRL remains an important tool for guiding domestic authorities towards outlawing acts of violence against women.[22]

4.1.1 - Sexual violence and the UN system

The UDHR offers some initial guidance and framing of the issues when it states that 'All human beings are born free and equal in dignity and rights'.[23] Article 2 continues stating everyone 'is entitled to the rights and freedoms set forth in [the UDHR], without distinction of any kind' including sex. It is apparent from this that the international community was minded to eliminate sex-specific rights violations. However, as shall be seen, this intention fell considerably short when it came to the practical implementation of these rights and the protection of women.

In 1993 the UN General Assembly passed Resolution 48/104 which is comprised of several articles condemning 'gender-based' violence. Article 1 states that such violence is 'likely to result in...physical, sexual or psychological harm or suffering to women' which can include 'threats of such acts, coercion or arbitrary deprivation of liberty.' Other articles provide a definition of such conduct which includes, *inter alia*, 'battering...marital rape [and] female genital mutilation'[24] in addition to other 'traditional practices harmful to women'[25] which takes place in all walks of life including the workplace and in education.[26] Such behaviour is not permissible when perpetrated or condoned by the State.[27] Article 3 offers a restatement of the principle that women are entitled to equal enjoyment of human rights including the right to life and the right not to be subjected to acts of torture.

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[22] Bonita Meyersfeld, 'Reconceptualizing Domestic Violence in International Law' (2003) 67 *Albany Law Review* 371.
[23] UDHR, art 1.
[24] UNGA Res 48/104 (20 Dec 1993) UN Doc A/Res48/104, art 2.
[25] ibid art 2(a).
[26] ibid art 2(b).
[27] ibid art 2(c).

In the UN System, the principal treaty is the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which aims to eliminate discrimination against women. Given the importance of CEDAW to IHRL relating to women's rights,[28] it is important to mention it here even though it does not explicitly deal with the issue of sexual violence. Article 1 defines discrimination against women widely and can be stated as being the inability to participate in society on an equal basis to, and receive the same rights as, men. Article 2 lists several measures that States Parties must take to conform to CEDAW including 'the legal protection of the rights of women'.[29] One important component of ensuring equality and eliminating discrimination of women must be the recognition that sexual violence against women is a serious violation of the non-discrimination principle enshrined in CEDAW.

The anti-discrimination element of CEDAW is an important aspect of preventing acts of sexual violence being committed against women. Despite this political ambition, CEDAW has been criticised because it permits reservations. In particular, reservations are permitted even if they 'appear to conflict with the object and purpose of the treaty. The purpose of the Convention is the elimination of discrimination, and all of these reservations clearly hinder that objective. In essence, they permit discrimination.'[30] According to this, the condemnation of discrimination against women is severely undermined because the permissible reservations work to nullify the intended effects of the treaty. However, as Meron notes the reservations

[28] See Sally Merry, 'Gender Justice and CEDAW: The Convention on the Elimination of All Forms of Discrimination Against Women' (2011) 9 *Hawa* 49; Lisa Baldez, 'The UN Convention to Eliminate All Forms of Discrimination Against Women (CEDAW): A New Way to Measure Women's Interests' (2011) 7 *Politics and Gender* 419.
[29] Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'), 18 December 1979, 1249 UNTS 13, art 2(c).
[30] Minor (n 6).

prevent the treaty from becoming too broad,[31] thereby ensuring as wide a body of States Parties as possible. Balancing between effective protection and having sufficiently large number of States Parties for the treaty to have legitimacy thus becomes an important aspect of treaty politics.

4.1.2 - Sexual violence in the ECHR

A new treaty aimed at the prevention of violence against women has been drafted within the Council of Europe.[32] Article 1 specifies that the Convention is to 'protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence'[33] as well as contributing 'to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women'.[34] Interestingly, in a move away from the *lex specialis* nature of IHL, the Convention specifies categorically that the Convention 'shall apply in times of peace and in situations of armed conflict.'[35] This is important as it extends the protection of a human rights convention to situations of armed conflict indicating a shift back towards universal application of human rights, albeit in the narrow field of women's rights. The Convention defines 'violence against women' as being a violation of:

> human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[36]

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[31] Theodor Meron, *Human Rights Law-Making in the United Nations* (OUP 1986) 60.
[32] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 11 May 2011, CETS No.210; This is a new treaty and as such the literature on it is patchy but see Ronagh J.A. McQuigg, 'What Potential Does the Council of Europe Convention on Violence against Women Hold as Regards Domestic Violence?' (2012) 16 *International Journal of Human Rights* 947.
[33] (n32) art 1(1)(a).
[34] ibid art 1(1)(b).
[35] ibid art 2(3).
[36] ibid art 3(a).

The treaty also obliges States Parties to enact legislation to ensure women live free from violence,[37] as well as prohibiting State agents from engaging in violence against women.[38] As with the Belem do Para Convention,[39] the Council of Europe's Convention, when it enters into force, will represent a trend in international law towards the creation of formal rules through which the human rights of women can be protected.

One of the most notable cases before the ECtHR concerning sexual violence was that of *Aydin v Turkey*.[40] In this case the applicant alleged that she had been raped while detained by members of the Turkish security services. The Court heard how she had been 'subjected to a series of particularly terrifying and humiliating experiences while in custody'. [41] Such treatment had to be placed in the context of her sex and age 'and the circumstances under which she was held'.[42] She was detained for three days, much of which time was spent blindfolded and paraded naked, adding 'to her overall sense of vulnerability.'[43] In terms of the acts of rape, the Court noted that she suffered 'the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.'[44] Furthermore, rape causes deep psychological scars 'which do not respond to the passage of time as quickly as other forms of physical and mental violence.'[45] The Court held that the rape 'of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can

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[37] ibid art 4(1).
[38] ibid art 5(1).
[39] A similar convention in the Inter-American System: Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belem do Para'), 9 June 1994, entered into force 5 March 1995, ILM 33 (1994).
[40] *Aydin v. Turkey* (Application no. 23178/94) Judgment, 25 September 1997.
[41] ibid para.84.
[42] ibid para.84.
[43] ibid para.84.
[44] ibid para.83.
[45] ibid para.83.

exploit the vulnerability and weakened resistance of his victim.'[46] Lastly, the Court turned to the cumulative nature of the ill-treatment, noting that both the physical and mental violence *and* the rape of the applicant would each have been capable of amounting to torture contrary to Article 3 even if the other act had not occurred.[47]

The principle in *Aydin* was confirmed in *Maslova*, a case in which one of the applicants was raped repeatedly by state officials.[48] In another case the Court heard how both applicants had been subjected to 'virginity tests' when they were detained, even though there was no medical or legal necessity to justify such intrusive examination.[49] In addition to such treatment, both applicants alleged they were raped and were suffering from post-traumatic stress disorder and depression.[50] The Court found that there had been a substantive violation of Article 3, even though it was 'unable to establish the complete picture of the severity of the applicants' ill-treatment due to the failure of the national authorities to ensure the effectiveness and reliability of the applicants' earlier medical examinations.'[51] This ruling underscores the psychological effects that torture can have on an individual, and the duty of the State to conduct an effective investigation in instances where allegations are made by the applicant of sexual violence. The Court has also held that not only do actual incidents of rape by state officials amount to torture but also that threats of rape and of sexual assault might also constitute a violation of Article 3.[52]

The ECtHR has also moved against gaps in the criminal law which prevent victims from obtaining redress for sexual violence. This engages a State's

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[46] ibid para.83.
[47] For further discussion of *Aydin* see Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58 *ICLQ* 565, 567-569.
[48] *Maslova & Nalbandov v. Russia* (Application no. 839/02) Judgment, para.108.
[49] *Salmanoglu & Polattas v. Turkey* (Application no.15828/03) Judgment, para.88.
[50] ibid para.96.
[51] ibid para.97.
[52] *Bati and Others v. Turkey* (Application nos. 33097/96; 57834/00) Judgment, paras.110-124.

responsibility to protect the rights of individuals from violation by others, not just agents of the State. This gives rise to the concept of horizontal human rights and raises questions as to whether private citizens can violate the human rights of others.[53] However, the idea of horizontal human rights still engages a state's responsibility for its failure to act and does not, in itself, lend itself to the creation of a human rights violation by a private actor. This can be illustrated through the case of *X and Y*.[54] The applicants sought to challenge the lack of criminal sanction for those who committed sexual offences against the mentally handicapped, with the law only providing a remedy at civil law. The Court held that this was a case where 'fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.'[55] In this case it can be seen that the human rights violation was committed by the State in the form of a lack of effective criminal sanction while the original perpetrator committed a criminal offence.

Other cases before the ECtHR have focused on the issue of domestic violence. In *Bevacqua* the Court held that states had a duty to protect individuals and that it was not acceptable to class domestic violence as a trivial incident as it involved only 'light bodily injury'.[56] Likewise in *Opuz*, after analysing several elements of international law, the Court held that a 'State's failure to protect women against domestic violence breaches their right to equal protection of the law and this failure does not need to be intentional.'[57] This led the Court to conclude that 'the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form

[53] See Phillipson (n 13).
[54] *X & Y v. Netherlands* (Application no. 8978/80) Judgment, 26 March 1985.
[55] ibid para.27.
[56] *Bevacqua & S v. Bulgaria* (Application no. 71127/01) Judgment, 12 June 2008, para.63.
[57] *Opuz v. Turkey* (Application no. 33401/02) Judgment, 9 June 2009, para.191.

of discrimination against women.'[58] Furthermore, the passivity of the State and 'impunity enjoyed by the aggressors...indicated that there was insufficient commitment to take appropriate action to address domestic violence.'[59]

4.1.3 - Sexual violence in the Inter-American system

In the Inter-American system, the 1994 Convention on the Prevention, Punishment and Eradication of Violence against Women, also known as the Convention of Belem do Para, is aimed at the 'prevention, punishment and eradication of violence against women'.[60] This treaty defines violence against women as being 'any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.'[61] These acts can include domestic violence including spousal rape and sexual assault,[62] community-based violence which also includes rape and sexual abuse in addition to trafficking, forced prostitution and sexual harassment in the workplace.[63] Lastly, it includes conduct 'perpetrated or condoned by the state or its agents regardless of where it occurs.'[64]

Article 3 states that basic human rights of women are to be respected, including the right to life,[65] the right not to be subjected to torture[66] and the 'right to equal protection before the law and of the law'.[67] As well as these definitions the Convention also imposes on States Parties certain duties including to enact domestic

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[58] ibid para.200.
[59] ibid para.200.
[60] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; see Berta Esperanza Hernandez-Truyol, 'Law, Culture and Equality – Human Rights' Influence on Domestic Norms: The Case of Women in the Americas' (2000) 13 *Florida Journal of International Law* 33.
[61] CEDAW (n29) art 1.
[62] ibid art 2(a).
[63] ibid art 2(b).
[64] ibid art 2(c).
[65] ibid art 3(a).
[66] ibid art 3(d).
[67] ibid art 3(f).

legislation to 'prevent, punish and eradicate violence against women',[68] and to 'establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures'.[69] The content of the Convention is largely reflective of UN General Assembly Resolution 48/100 and as such can be seen as part of the increased trend towards the establishment of formal rules in the form of a treaty instead of an over-reliance on deformalised rules of international law.

The Inter-American Court has also considered sexual violence to be a human rights violation.[70] This is despite recognition by the Court in the *Cotton Field* case that 'it is evident that a State cannot be held responsible for every human rights violation committed between private individuals within its jurisdiction'.[71] Despite this, it does not mean that the State is not under an obligation to adopt reasonable measures to find the victims alive after the victims had been kidnapped and subjected to sexual violence by private individuals.[72] Furthermore, the Court stressed that it was the:

> duty of the States to organize the entire government apparatus and, in general, all the structures through which public authority is exercised, so that they are able to ensure by law the free and full exercise of human rights.[73]

Evidently, the Court's holding on this aspect underscores the belief that human rights violations should be prohibited by the State as far as possible, reflecting the positive

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[68] ibid art 7(c).
[69] ibid art 7(f).
[70] Rosa Celorio, 'The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting' (2010) 65 *University of Miami Law Review* 819.
[71] *Case of Gonzalez et al ('Cotton Field') v. Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparation and Costs) Inter-American Court of Human Rights, para.280; See Katrin Tiroch, 'Violence against Women by Private Actors: The Inter-American Court's Judgment in the Case of Gonzalez et al. ("Cotton Field") v. Mexico (2010)' 14 *Max Planck Yearbook of United Nations Law* 371.
[72] ibid para.284.
[73] ibid para.236; see also *Kawas-Fernandez v. Honduras* (Merits, Reparations and Costs) Judgment of 3 April 2009, Inter-Am. Ct. H.R. (Ser. C) No. 196 (2009) para.137; *Anzualdo Castro v. Peru* (Preliminary Objections, Merits, Reparations and Costs) Judgment of 22 September 2009, Inter-Am. Ct. H.R. (Ser. C) No. 202 (2009) para.62.

duty to uphold human rights often imposed on States Parties.[74] In *Cotton Field* the Inter-American Court condemned the response of the authorities to the attempts made by the relatives of the victims to discover their whereabouts and what happened to them. In particular it noted that certain comments made by State officials in relation to one missing young woman that she was 'surely with her boyfriend, because girls were very flighty and threw themselves at men'[75] underscored a culture of impunity for such crimes, and sent 'the message that violence against women is tolerated'. This leads to further perpetration 'together with social acceptance of the phenomenon.'[76] The Court is therefore underscoring the idea that such acts, in addition to direct violence against women, is discriminatory.[77]

The Inter-American Court has made reference to the ECtHR case of *Aydin*[78] in *Miguel Castro Castro Prison* brought against the backdrop of a prison disturbance.[79] Amongst other serious human rights violations, for instance the use of live ammunition and white phosphorous grenades, were cases of sexual violence committed against female inmates by prison officers. This included subjecting six female inmates to forced nudity which not only violated their dignity, but made them the 'victims of sexual violence, since they were naked and covered only with a sheet, while armed men [members of the State police force] surrounded them.'[80] This behaviour was classified as sexual violence because the 'men constantly observed the

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[74] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004).
[75] *Cotton Field* (n 71) para.199.
[76] ibid para.400.
[77] ibid para.402; For further analysis of this case see Ruth Rubio-Marin and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment' (2011) 33 *HRQ* 1062.
[78] *Aydin* (n 40).
[79] *Case of the Miguel Castro Castro Prison v. Peru* (Merits, Reparations and Costs) Judgment of 25 November 2006, Inter-Am. Ct. H. R. (Ser. C) No. 160 (2006).
[80] ibid para.306.

women.'[81] The Court also examined the definition of rape after it emerged one inmate had been subjected to a forced vaginal search by a male officer (the Court in its judgment did not consider any other definition of this than 'rape' suggesting that the actions of the officer could not be justified).[82] It continued to define rape, noting that it 'must be...understood as act [*sic*] of vaginal or anal penetration without the victim's consent, through the use of other parts of the aggressor's body [the Court had earlier considered penile penetration] or objects, as well as oral penetration'.[83] The Court here made reference to the jurisprudence of the ICTR, in particular the *Akayesu* judgment, suggesting that it sought to confirm its position by reference to the practice of the international criminal tribunals.[84] To an extent, this demonstrates the way in which the various regimes of the international legal system inter-link and share common virtues and values.

4.1.4 - Conclusion on sexual violence in the IHRL system

Sexual violence is more often seen as a criminal offence as opposed to an act committed by a State as illustrated in *X & Y*.[85] Caution needs to be exercised against the expansion of human rights violations to incorporate acts of private citizens which are often best addressed either through the criminal or the civil law. However, where state agents commit acts of sexual violence this is sufficient to give rise to a violation of human rights for example under Article 3 of the ECHR, as was seen in *Aydin* where rape was said to amount to torture.[86] As will be seen in the remainder of this chapter, IHL and ICL provide greater clarity when it comes to defining sexual

[81] ibid.
[82] ibid.
[83] ibid para.310.
[84] ibid.
[85] See also Livio Zilli, 'The Crime of Rape in the Case Law of the Strasbourg Institutions' (2002) 13 *Criminal Law Forum* 245.
[86] *Aydin* (n 40).

violence against women, in large part because IHRL is concerned with the violation of individuals rights in the state-citizen context while IHL and ICL are focused on individual accountability for violations.

Inevitably, the deficiencies of the IHRL regime in addressing the inter-linked issues of sexual and domestic violence have drawn fire from scholars concerned about the commission of such acts against women. However, as has been noted, sexual 'violence is viewed as inherently discriminatory in that it both reflects inequality and perpetuates it.'[87] Such discrimination in itself could amount to a violation of human rights by the State. This position would, however, simply amount to another indirect method of ensuring the protection of women's rights by IHRL (the other being the use of torture, inhuman and degrading treatment provisions). Instead, the IHRL regime could be better used to encourage State protection of women's rights via domestic criminal and civil law. As some feminist scholars note, no law will fully prevent violence against women but they will raise awareness of the issue and ensure that victims have some measure of redress.[88]

Definitions of sexual violence in IHRL have largely drawn from the jurisprudence relating to torture, inhuman and degrading treatment. This can, at least in part, be ascribed to the fact that both the ECHR and IACHR lack specific provisions relating to sexual violence and discrimination against women.[89] Such a lack of provision has not prevented the Courts from adjudicating these matters. In *Aydin*, the ECtHR emphasised the physical and psychological aspects of rape as

[87] Copelon (n 1) 869.
[88] Nancy Farwell, 'War Rape: New Conceptualizations and Responses' (2004) 19 *Affilia* 389, 393; Barbara Bedont and Katherine Hall-Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) 6 *Brown Journal of World Affairs* 65, 80.
[89] Measures have been taken within both of these regimes to increase awareness of sexual violence through the creation of new treaties such as the Convention of Belem do Para.

amounting to torture for the purposes of Article 3.[90] Similarly, in *Miguel Castro Castro Prison* the Inter-American Court determined that forced vaginal searches of female prisoners by male guards amounted to rape. The Courts have also imposed positive obligations on States Parties to prevent acts of sexual violence, suggesting a State can be liable for private acts of sexual violence if the State in question fails to take adequate steps to protect women.[91]

4.2 - Sexual violence and IHL

The IHL regime has been criticised for being 'minimal and weak' and failing to protect women in times of armed conflict.[92] Even the 'traditional' view that regards rape as a natural consequence of war, and thus inevitable,[93] can lead to condoning it.[94] Rape has long been used as a weapon of war as a means of intimidating and subduing the local populace.[95] The use of such a weapon is an 'asymmetric strategy' of war, the aim of which 'to inflict trauma and thus to destroy family ties and group solidarity within the enemy camp.'[96] Often such rapes are performed to 'humiliate, or destroy, the identity of a victim.'[97]

Steps were taken in the 19th Century when rape was prohibited by the Lieber Code,[98] widely seen as one of the first codifications of IHL.[99] However, this did little

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[90] *Aydin* (n 40).
[91] As seen in the *Cotton Fields* Case before the Inter-American Court (n 71).
[92] Kelly Askin, 'International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288, 294.
[93] Bedont (n 88) 65.
[94] Farwell (n 88) 389.
[95] ibid 390.
[96] Bulent Diken and Carsten Bagge Laustsen, 'Becoming Abject: Rape as a Weapon of War' (2005) 11 *Body and Society* 111, 111.
[97] Karmen Erjavec and Zala Volcic, '"Target", "cancer" and "warrior": Exploring painful metaphors of self-presentation used by girls born of war rape' (2010) 21 *Discourse Society* 524, 525.
[98] Lieber Code 1863, art 44; Available at http://www.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/A25AA5871A04919BC12563CD002D65C5/FULLTEXT/IHL-L-Code-EN.pdf
art 47 provides that rape and other crimes shall be punishable by death or severe punishment.
[99] Lesley C. Green, *The Contemporary Law of Armed Conflict* (Manchester University Press 2008) 36-37.

to protect women from sexual violence in future conflicts. Since 1945 there has been greater awareness of the need to protect women in particular and also to punish perpetrators of crimes against women. Developments in the law of armed conflict have been advanced through customary international law, treaties and the jurisprudence of various international criminal tribunals. As in previous chapters, care has been taken to distinguish, as far as is possible, between IHL and ICL.

Despite the advances made in 'formal' law, it remains that rape and other acts of sexual violence continue to be committed in times of armed conflict. The reasons behind this are several but they can be broken down into three main groups as identified by Skjelsbæk. The first is the essentialist approach that sees women as victims 'in order to assert militaristic masculinity'; the second is a structuralist approach that holds women are targeted so as to attack the ethnic, religious or political group; the third is 'social constructionism', holding women are targeted to 'masculinize the identity of the perpetrator and feminize the identity of the victim'.[100] In the essentialist approach sexual violence is the manifestation of the perception that women are possessed by men in times of peace, with rape in wartime being seen as the taking of another man's property.[101] Indeed, it is often seen as a 'stamp of total conquest',[102] and consequently about 'power and control' derived from notions of 'masculine privilege'.[103] The links between the political (the 'power and control') and the demand that it be regulated could be said to lead to a policy-orientated approach to IHL overtaking the stricter and inherently more conservative formal notions of the law.

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[100] Skjelsbæk (2) 215.
[101] ibid 217.
[102] Diken (n 96) 118.
[103] Christine Chinkin, 'Rape and Sexual Abuse of Women in International Law' (1994) 5 *EJIL* 326, 328.

4.2.1 - Customary IHL and sexual violence

Customary law remains a valuable element of IHL. Rule 93 of the ICRC Study concerns rape and other sexual violence. It examines military manuals, domestic legislation and the practice of the UN Security Council. This does not offer much in the way of definitions but, as with torture and enforced disappearance, it does help to establish a framework within which more formal rules can be developed which provide a clearer definition of the relevant acts.

The military manuals of several States prohibit rape in times of armed conflict. For example the UK's Law of Armed Conflict Manual states that women are to be protected from rape, forced prostitution and indecent assault.[104] This applies equally in non-international armed conflicts as it does in international armed conflicts.[105] The military manuals of several States prohibit rape in international[106] and non-international armed conflicts,[107] with both provisions referring to 'outrages upon personal dignity'. The Israeli military manual goes further noting that 'Even if it appears that in war everything is permissible and there is no differentiating between a moral and an immoral act, even in the heat of battle there are actions that are considered unacceptable' including acts of rape.[108] From these three examples it is apparent that rape in times of armed conflict is prohibited by the military law of many, if not all, States.[109]

Other examples of customary IHL can be identified through State practice such as domestic legislation, court judgments and statements made by government

[104] UK Ministry of Defence, *Manual of the Law of Armed Conflict* (OUP 2004) 218.
[105] ibid 400.
[106] Jean-Marie Henckaerts & Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol 1 CUP 2005) 323-326.
[107] ibid.
[108] Available at http://www.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule93 (Accessed 17 March 2014).
[109] See Rule 93 in the ICRC Customary International Law Study for further examples of military manuals. Jean-Marie Henckaerts & Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol 2 CUP 2005) 2193-2197.

ministers. Legislation often provides detailed guidance as to the definition of offences such as rape. For example, the Australian Criminal Code Act 1995 defines a rape committed in the course of an international armed conflict as being when 'the perpetrator sexually penetrates another person without the consent of that person' with the knowledge of, or is reckless to, the lack of consent, and that the conduct is associated with and takes place in the context of an international armed conflict.[110] The term 'sexually penetrate' is defined as being the penetration of the genitalia or anus with a body part or 'by any object manipulated by [a] person'[111] or the penetration of the mouth with the penis.[112] This is largely reflective of Australian laws which define rape in the domestic context; a similar example to this can be seen also in England's Sexual Offences Act 2003.[113] Such legislation can be seen as illustrative of the prohibition of rape and other sexual offences in domestic criminal legislation.

The UN Security Council has been particularly active with regard to establishing that sexual violence is a violation of IHL. In addition to the Statutes of the ICTY/R (which were created by UN Security Council resolutions) it has also issued several resolutions condemning acts of rape and sexual violence. In Resolution 1743 concerning Haiti, the Security Council condemned 'the grave violations against children affected by armed violence, as well as the widespread rape and other sexual abuse of girls.'[114] Resolution 1034, concerning Bosnia, expressed the Council's concern over evidence which demonstrated 'a consistent pattern of rape'.[115] Similar condemnations can be found in Resolution 1493 which referred to 'acts of violence systematically perpetrated against civilians' in the Democratic Republic of Congo

[110] Australian Criminal Code Act 1995, Schedule 1, section 268.59.
[111] ibid schedule 1, section 268.59(4)(a).
[112] ibid schedule 1, section 268.59(4)(b).
[113] Sexual Offences Act 2003, c.42, s.1(1).
[114] UNSC Res 1743, 15 February 2007, UN Doc S/RES/1743, para.17.
[115] UNSC Res 1034, 21 December 1995, UN Doc S/RES/1034, para.2 of the preamble.

including 'sexual violence against women and girls';[116] and in Resolution 1539 on children and armed conflict the Council condemned 'sexual violence mostly committed against girls'.[117] While these do not define rape or other acts of sexual violence they do provide a framework within which definitions can be developed by other international actors.

4.2.2 - IHL Treaty law and sexual violence

There is no explicit reference to sexual crimes in the IMT Statute, leading to criticism that the Nuremberg trials did not adequately punish those who committed sexual crimes against women.[118] Though the wording of Article 6(b) states that the list of crimes is 'not be limited to' those enumerated there was no attempt to prosecute individuals for sexual crimes.[119] This is more surprising given that 'ill-treatment' is specified as being a war crime in Article 6(b)&(c) relating to crimes against humanity. These provide that 'other inhumane acts committed against any civilian population' were crimes capable of prosecution under the IMT Statute.

After Nuremberg there came the Geneva Conventions and their Additional Protocols prohibiting rape and other forms of sexual violence in the context of both international and non-international armed conflicts. The starting point is Common Article 3 to the Geneva Conventions offering a basic minimum standard of treatment in non-international armed conflicts. While there is no specific prohibition of rape or other acts of sexual violence, there are two provisions worth mentioning. Article 3(1)(a) prohibits 'violence to life and person, in particular murder of all kinds,

[116] UNSC Res 1493. 28 July 2003, UN Doc S/RES/1493.
[117] UNSC Res 1539. 22 April 2004, UN Doc S/RES/1539.
[118] Richard Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34 *Case Western Reserve Journal of International Law* 277, 279; Catherine Niarchos, 'Women, War and Rape: Challenges Facings the International Tribunal for the Former Yugoslavia' (1995) 17 *HRQ* 649, 651-652.
[119] Niamh Hayes, 'Creating a Definition of Rape in International Law: the Contribution of the International Criminal Tribunals' *in* Shane Darcy and Joseph Powderly (eds) *Judicial Creativity the International Criminal Tribunals* (OUP 2010) 129-130.

mutilation, cruel treatment and torture'; the second is Article 3(1)(c) prohibiting 'outrages upon personal dignity, in particular humiliating and degrading treatment'. Both of these provisions could be invoked to cover sexual crimes which would undoubtedly qualify as 'cruel treatment' and 'humiliating and degrading treatment'.

The Fourth Geneva Convention, regarding the protection of civilians, makes explicit reference to the protection of women: 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.[120] More widely, protected persons 'are entitled, in all circumstances, to respect for their persons [and] their honour',[121] a provision which again emphasises the need to protect women from sexual violence. Copelon notes that while rape is prohibited by the Geneva Conventions it is regarded as an attack against 'honour' and 'dignity', not as a separate offence like torture. This is problematic for her because it implies that raped women have been dishonoured, reinforcing the social view that the victims of rape are viewed in negative terms.[122]

The Additional Protocols to the Geneva Conventions make additional references to the protection of women in times of international armed conflict (AP I) and non-international armed conflict (AP II). AP I forbids the 'rape, forced prostitution and any other form of indecent assault' and notes that 'Women shall be the object of special respect'.[123] Likewise, the fundamental guarantees, indicative of a minimum level of protection, of AP II prohibit 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault'[124] and 'slavery and the slave trade in all their forms'.[125]

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[120] GC IV, art 27.
[121] ibid.
[122] Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5 *Hastings Women's Law Journal* 243, 249.
[123] AP I, art 76(1).
[124] AP II, art 4(2)(e).

Though the reception of AP II by the international community has been mixed,[126] the provisions it contains regarding rape and sexual violence represent an important statement that such acts are not tolerated under international law.

The ICTY Statute makes no explicit reference to rape and sexual violence in their provisions relating to war crimes (though reference is made to such acts being crimes against humanity). Article 2 of the ICTY Statute extends the Tribunal's jurisdiction to acts of 'torture or inhuman treatment'[127] and 'wilfully causing great suffering or serious injury to body or health'.[128] These are similar to the provisions of the Geneva Conventions, and wide enough to cover acts of rape. The ICTR Statute goes further and explicitly criminalises 'rape, enforced prostitution and any form of indecent assault' as war crimes.[129] The ICTR Statute was drafted after the ICTY so it is possible that the UN Security Council was conscious of the criticism levelled at the ICTY for not including rape as a war crime in its Statute.[130]

The experiences of the international criminal tribunals led to a greater focus on sexual war crimes when the ICC Statute was drafted in 1998. Article 8(2)(b)(xxii) (relating to international armed conflicts) criminalises 'rape, sexual slavery, enforced prostitution, forced pregnancy'.[131] The latter is defined by the provisions relating to crimes against humanity in Article 7(2)(f). Article 8(2)(e) applies in non-international armed conflicts and criminalises sexual violence including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and 'any other form of sexual violence also constituting a serious violation of Article 3 common to the four

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[125] AP II, art 4(2)(f).
[126] For instance, the United States and India, amongst others, have yet to ratify AP II. The United Kingdom only ratified AP II in 1998.
[127] ICTY Statute, art 2(b).
[128] ICTY Statute, art 2(c).
[129] ICTR Statute, art 4(e).
[130] See Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217, 229.
[131] On Sexual slavery see Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2003) 25 *Michigan Journal of International Law* 605.

Geneva Conventions'.[132] The provisions in the ICC Statute relating to rape as a war crime thus represent a marked awareness of rape and sexual violence on the part of the international community, in addition to the creation of formalised laws which can assist the application of IHL.

Greater clarification of the matter can be found in the Elements of Crimes to the ICC Statute. Although the Elements do not form part of the law binding on the ICC, they nevertheless remain persuasive. The Elements define the war crime of rape, committed in an international armed conflict, as being the invasion of 'the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ'. It is also a requirement that the 'invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power', or that the perpetrator took 'advantage of a coercive environment', or that 'the invasion was committed against a person incapable of giving genuine consent'.[133] Additionally, it is necessary to show that the conduct took place in the context of an international armed conflict and that the perpetrator was aware of this fact.

Several other sections of the Elements are concerned with crimes of a sexual nature, for example sexual slavery[134] and enforced prostitution.[135] There is also a provision relating to the war crime of sexual violence that is worth exploring in more detail. Sexual violence in this context is much broader than rape or the other enumerated sexual crimes as it requires only that 'an act of a sexual nature' is performed against one or more persons subject to the requirements that, as with rape,

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[132] ICC Statute, art 8(2)(e)(vi).
[133] ICC Elements of Crimes, art 8(2)(b)(xxii)-1(2).
[134] ICC Elements of Crimes, art 8(2)(b)(xxii)-2.
[135] ICC Elements of Crimes, art 8(2)(b)(xxii)-3.

the victim was coerced or incapable of giving consent.[136] It is also a requirement that the conduct meets the threshold for it to be a grave breach of the Geneva Conventions and that the perpetrator was aware of the 'factual circumstances that established the gravity of the conduct.'[137] Lastly, the proscribed conduct must be committed in the context of an international armed conflict, the existence of which was known to the perpetrator.[138]

4.2.3 - IHL case law of sexual violence

Several international courts and tribunals have addressed the issue of rape and other acts of sexual violence. In contrast to Nuremberg, the ICTY and ICTR have done much to advance the definition of rape. The difficulties and successes they experienced contributed to the development of the laws concerning rape and sexual violence during the drafting of the ICC Statute. However, much of this case law has developed alongside, and often overlaps with, the case law concerning rape as a crime against humanity and as an act of genocide.[139] There are nevertheless certain aspects of the jurisprudence that are clearly particular to the context of an armed conflict.

At the ICTR several cases have dealt with the issue of rape as a crime against humanity and as genocide.[140] It was for this reason rape as a war crime has been considered to a much lesser extent. The ICTR has itself noted that, in regard to rape as a violation of Common Article 3 and APII, the prosecution '[relied] upon the same underlying conduct and evidence that it led in relation to the allegations of genocide

[136] ICC Elements of Crimes, art 8(2)(b)(xxii)-6(1).
[137] ICC Elements of Crimes, art 8(2)(b)(xxii)-6(2)&(3).
[138] ICC Elements of Crimes, art 8(2)(b)(xxii)-6(4)&(5).
[139] The relevant jurisprudence is to be discussed below in relation to these acts.
[140] e.g. *Prosecutor v. Akayesu* (ICTR-96-4) TC, Judgment 2 September 1998, para.508; *Prosecutor v. Kamuhanda* (ICTR-99-54) TC, Judgment, 22 January 2004, para.634; *Akayesu* is discussed by Farwell (n 88) 391.

and rape as a crime against humanity.'[141] The only difference between rape as a war crime and rape as genocide or a crime against humanity was the requirement that the former had a 'nexus to the non-international armed conflict between the Rwandan government and the RPF [Rwandan Patriotic Front].'[142] This highlights a common approach to defining rape shared by IHL and ICL.

In *Mucić*, the ICTY held 'There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law'[143] despite recognising that there is no definition of rape in IHL provided by statutes.[144] The Trial Chamber proceeded to consider the definition of rape provided in *Akayesu*, albeit in the context of genocide, and noted that rape constitutes 'a physical invasion of a sexual nature, committed on a person under circumstances that are coercive.'[145] Furthermore, the 'Trial Chamber [considered] the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity.'[146] It recognised the 'severe pain and suffering, both physical and psychological' that rape can cause, and emphasised the 'psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.'[147]

4.2.4 - Conclusion on sexual violence and IHL

There are several elements comprising the definition of sexual violence under IHL, with the aspect most considered being rape. It is prudent to begin by noting that rape and sexual violence is prohibited under customary IHL and by treaty law, whether

[141] *Prosecutor v. Bizimungu* (ICTR-00-56) TC, Judgment, 17 May 2011, para.1907.
[142] ibid para.2160.
[143] *Mucić et al* (IT-96-21) TC, Judgment, 9 October 2001, para.476.
[144] ibid para.476 & para.478.
[145] ibid para.479.
[146] ibid para.476 & para.495.
[147] ibid para.495.

such acts occur in an international or non-international armed conflict. Defining the physical acts of sexual violence can be discerned from the case law regarding genocide and crimes against humanity.[148] Such a shared definition is similar to how torture is defined across the three regimes of IHRL, IHL and ICL. The issue of coercion rather than a victim's lack of consent has been considered in *Mucic* (drawing on *Akayesu*). This is an area that has been considered in several cases by the ICL regime and there is little evidence to suggest that the IHL regime has diverged from this element of the definition.

The IHL regime has struggled against the historic background that saw sexual violence as a by-product and inevitable feature of armed conflict.[149] Despite such historical inevitability, women in particular were almost routinely targeted with it being seen by some as a 'fundamental and accepted military tactic.'[150] Even when rape is not used a weapon of war it can be used to terrorise the populace.[151] None of this detracts from the suffering that sexual violence inflicts on the victims of such acts.[152] The suffering does not necessarily end with the cessation of hostilities, with the harm continuing during post-conflict reconstruction.[153] Further damage occurs post-conflict due to such acts sometimes being committed to dissolve the social structure of the attacked group.[154]

Despite this historical background the IHL regime has taken steps to increase the protection afforded to women during times of armed conflict. One of the ways in

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[148] Considered in the next section, Part 4.3.1.
[149] Bedont (n 88) 65.
[150] Brook Moshan, 'Women, War and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes against Humanity' (1998) 22 *Fordham International Law Journal* 154, 157.
[151] ibid 159.
[152] Susan McKay, 'The effects of armed conflict on girls and women' (1998) 4 *Peace and Conflict: Journal of Peace Psychology* 381.
[153] Lori Handrahan, 'Conflict, Gender, Ethnicity and Post-Conflict Reconstruction' (2004) 35 *Security Dialogue* 429.
[154] Bulent Diken and Carsten Bagge Laustsen, 'Becoming Abject: Rape as a Weapon of War' (2005) 11 *Body and Society* 111, 117.

which this has occurred is by the greater use of formally recognised laws that explicitly prohibit rape and sexual violence. By moving towards such a system it is possible to combine the desires of feminist writers who believe that 'the oppression of women is a systemic condition, and it comes in a range of individualized and institutionalized forms that affect women's life opportunities, or lack of them'[155] with a formal understanding of international law as advocated by scholars such as d'Aspremont. Nevertheless, the fact remains that 'No treaty or court judgment can remedy the suffering of wartime victims of rape' but the inclusion of sexual crimes can help to curb impunity and to a cessation of the idea that rape is an 'inevitable' by-product of war.[156]

4.3 - Sexual Violence and ICL

Many, if not all, domestic legal systems criminalise rape and sexual violence committed against women.[157] Unsurprisingly, perhaps, ICL also prohibits sexual violence.[158] As with the inclusion of such offences in IHL, the ICL regime has for many years struggled to criminalise sexual violence. At the ICTY and ICTR this was perhaps due to the uncertainty faced over the content of ICL. Even now, with the inclusion of several sexual offences as crimes against humanity in the ICC, commentators such as Moshan remain sceptical as to the efficacy of the Statute's provisions.[159] Despite such scepticism, the effectiveness of the ICL regime in addressing sexual violence remains to be thoroughly tested. The following section examines these prohibitions and the definitions of such offences as they relate to

[155] Gillian Youngs, 'Private Pain/Public Peace: Women's Rights as Human Rights and Amnesty International's Report on Violence against Women' (2003) 28 *Signs* 1209, 1218.
[156] Bedont (n 88) 80.
[157] See generally Clare McGlynn and Vanessa E. Munro 'Rethinking rape law: an introduction' *in* Clare McGlynn and Vanessa E. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2011) 1-2.
[158] ICC Statute, art 7(1)(g).
[159] Moshan (n 150) 155 and 179.

genocide and crimes against humanity. Care has been taken to distinguish between war crimes on the one hand, and genocide and crimes against humanity on the other.

4.3.1 - ICL treaty law and sexual violence

The IMT Statute provided that 'inhumane acts' were to be classed as crimes against humanity though no further definition was given.[160] Meron has highlighted that, despite the use of rape and forced prostitution, rape was not specifically mentioned in the IMT Statute.[161] Control Order No.10, forming the basis of subsequent Nuremberg Trials, made reference to acts of rape as crimes against humanity but there is no evidence that individuals were ever prosecuted for such acts.[162]

The classification of sexual violence as genocide has been advanced under Article 2(b) of the Genocide Convention, namely that the perpetrator intended to destroy in whole or in part a national, ethnical, racial or religious group as such by 'Causing serious bodily or mental harm to members of the group'.[163] This point has subsequently been clarified by case law that 'serious bodily or mental harm' does include rape and sexual violence.[164] As the Statutes of the ICTY and ICTR both incorporate Article 2 of the Genocide Convention in an unmodified form neither makes specific mention to rape as an act of genocide. The wording of the Genocide Convention is also included in the Statute of the ICC,[165] and expanded further in the Elements of Crimes.[166] Neither provision adds much to what has already been considered, although the Elements recognise that 'causing serious bodily or mental harm' 'may include, but is not necessarily restricted to, acts of torture, rape, sexual

[160] IMT Statute, art 6(c).
[161] Theodor Meron, 'Rape as a Crime under International Humanitarian Law' (1993) 87 *AJIL* 424, 425.
[162] Hayes (n 119) 134.
[163] See *Akayesu* (140) para.508.
[164] *Prosecutor v. Kajelijeli* (ICTR-98-44) TC, Judgment, 1 December 2003, paras.815-816; *Prosecutor v. Stakić* (IT-97-24) TC, Judgment, 31 Jul 2003, para.516; *Prosecutor v. Krstić* (IT-98-33) TC, Judgment, 2 August 2001, para.513.
[165] ICC Statute, art 6(b).
[166] ICC Elements of Crimes, art 6(b).

violence or inhuman or degrading treatment.'[167] The inclusion of rape as an act of genocide is part of the structuralist account of sexual violence meaning that the victims are targeted because of their membership of an ethnic or racial group rather than because they are women.[168]

The Statutes of the ICTY/R reflect international condemnation of acts of rape as crimes against humanity,[169] while the SCSL Statute widens the category further by including 'Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence'.[170] This latter court, created by UN Security Council Resolution 1315 (2000),[171] reflects the developments of international criminal law caused by creation of the ICC Statute in 1998. The negotiation of the ICC Statute was seen as an 'historic opportunity' to correct the deficiencies of the international legal system's response to sexual violence.[172] This has been attributed to a large degree because of the atrocities committed in Bosnia and Rwanda had brought sexual violence during conflict into the open, ensuring that by the time of the Rome Diplomatic Conference (at which the ICC Statute was negotiated) such conduct had received much attention in the media.[173] Despite the achievement of the drafters by including several sexual crimes in the ICC Statute, some commentators have noted that the Statute fails to meet the expectations of women's rights advocates.[174] One problem identified is the requirement that an accused commit an offence with intent 'because intent is often particularly difficult to prove in cases of sexual violence'.[175] However, such an approach would see the creation of strict liability offences for

[167] ICC Elements of Crimes, art 6(b), fn.3.
[168] Skjelsbæk (n 2) 221.
[169] ICTY Statute, art 5(g); ICTR Statute, art 3(g).
[170] SCSL Statute, art 2(g).
[171] UNSC Res 1315, 14 August 2000, UN Doc S/RES/1315.
[172] Bedont (n 88) 66.
[173] ibid 67.
[174] Moshan (n 150) 179.
[175] ibid 178.

sexual crimes under international law, an idea that would deny the offender basic fair trial rights.

There is wide recognition in the ICC Statute that sexual violence can amount to a crime against humanity. Article 7(1)(g) prohibits 'Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'. Only 'forced pregnancy' receives statutory clarification in Article 7(2)(f):

> the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

The Elements offer further clarification of the acts prohibited by Article 7(1)(g). On the whole, the Elements relating to sexual crimes as crimes against humanity closely follow those relating to war crimes. Rape is defined as when the perpetrator invades 'the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ' or 'of the anal or genital opening of the victim with any object or any other part of the body'.[176] The other requirements are a lack of consent, and the common crimes against humanity requirement that the conduct was part of a widespread or systematic attack directed against a civilian population and that the perpetrator knew that his conduct was part of such an attack.[177] This, except for the requirement that the conduct is part of a widespread or systematic attack against a civilian population, is identical to the provisions relating to rape as a war crime.

Other Elements define acts such as 'sexual slavery',[178] 'enforced prostitution'[179] and more broadly 'sexual violence'.[180] This latter category is worth

[176] ICC Elements of Crimes, art 7(1)(g)-1.
[177] ibid.
[178] ICC Elements of Crimes, art 7(1)(g)-2.

further exploration as it serves as broad type of criminal offence, defined as being the commission of 'an act of a sexual nature against one or more persons or caus[ing] such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion' providing that such acts are 'of a gravity comparable to the other offences' in Article 7(1)(g) of the Statute. It is necessary under this provision for the perpetrator to know that such acts were sufficiently grave, and that the conduct was part of a widespread or systematic attack on a civilian population. While this does appear to grant the judiciary of the ICC a wide discretionary power, the inclusion of the phrase 'of a gravity comparable to the other offences' offers a degree of demarcation but, as with other broadly worded provisions of the ICC Statute e.g. 'other inhumane acts' as a crime against humanity under Article 7(1)(k), is open to a degree of criticism especially that it allows for the introduction of *ex post facto law* into international criminal law.[181]

4.3.2 - ICL case law of sexual violence

The international criminal tribunals have been responsible for some of the greatest developments in the prosecution of individuals for violence against women. In turn this has prompted greater awareness of the violence suffered by women in times of armed conflict as well as during genocides and the commission of crimes against humanity. Given the lack of definition provided by the ICTY and ICTR Statutes, there was a need to develop and clarify definitions of rape and other acts of sexual violence. Several different Trial and Appeal Chambers at both tribunals have approached this task with varying degrees of success and criticism in the literature. This section

[179] ICC Elements of Crimes, art 7(1)(g)-3.
[180] ICC Elements of Crimes, art 7(1)(g)-6.
[181] This point was considered in the *Kupreškić* case before the ICTY: *Prosecutor v. Kupreškić* (IT-95-16-T) TC, Judgment, 14 January 2000, para.563; see also Beth van Schaack, 'Crimen Sine Lege: Judicial Law Making at the Intersection of Law and Morals' (2008) 97 *The Georgetown Law Journal* 119; George A. Finch, 'The Nuremberg Trial and International Law' (1947) 41 *AJIL* 20, 24.

therefore traces these developments in the law of rape and other acts of sexual violence beginning with the *Akayesu* case before the ICTR.

The original indictment in *Akayesu* failed to make reference to rape as either an act of genocide or as a crime against humanity.[182] It was only with the intervention of one of the judges that the prosecution amended the indictment so as to include acts of rape.[183] Due to the lack of a definition of rape in international law at the time, a point recognised by the ICTR,[184] the Court was left with no choice but to engage in an 'innovative progressive interpretation' of international law.[185] This has been described as an 'archetypal example of judicial creativity'.[186] While the judgment has been criticised by scholars,[187] the ICTY[188] and, impliedly, an ICTR Trial Chamber,[189] it remains the starting point for any analysis concerning the definition of rape in ICL. It was the first judgment to engage with the issues and recognise the necessity to provide a definition of rape. Furthermore, it also discusses rape and sexual violence as genocide and a crime against humanity.[190]

The Trial Chamber began by noting 'rape is a form of aggression' and a 'violation of personal dignity',[191] while at the same time stating 'the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.'[192] The Court did, however, attempt to give a superficial definition of

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[182] Catherine MacKinnon, 'Rape, Genocide and Women's Human Rights' (1994) 17 *Harvard Women's Law Journal* 6, 9.
[183] ibid.
[184] *Akayesu* (n 140); see also Navanethem Pillay, 'Equal Justice for Women: A Personal Journey' 50 *Arizona Law Review* 657, 666; and Wolfgang Schomberg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 *AJIL* 121, 123.
[185] Hayes (n 119) 134.
[186] ibid.
[187] William Schabas, 'Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda' (1999) 6 *ILSA Journal of International and Comparative Law* 375.
[188] *Prosecutor v. Furundžija* (IT-95-17/1) TC, Judgment, 10 December 1998, para.177.
[189] *Prosecutor v. Semanza* (ICTR-97-20) TC, Judgment, 15 May 2003, para.345.
[190] Discussed below, 230.
[191] *Akayesu* (n140) para.597.
[192] ibid.

rape. It was described as a 'physical invasion of a sexual nature, committed on a person under circumstances which are coercive.'[193] For Schomberg and Peterson, *Akayesu* not only represents the criminalisation of rape but also of sexualised violence as it is more broadly conceived,[194] including penetration by means of an instrument or object.[195]

The *Akayesu* judgment was a pivotal case for rape as an act of genocide,[196] with the Court noting that rape 'can be a measure intended to prevent births when the person raped refuses subsequently to procreate.'[197] Such acts therefore are aimed at the long-term destruction of a given Convention Group because they are prevented from procreating by the psychological and physical effects of rape. However, as rape is not a specifically enumerated act of genocide,[198] the Court had to include it as an act which caused 'serious bodily or mental harm'.[199] In itself this is not problematic given the serious harm that acts of rape have on the victims, even if the Tribunal's findings of genocide are open to doubt.[200] As with other acts of genocide, care must be taken in ensuring that the necessary elements of the offence specified in Article 1 of the Genocide Convention are present, namely the intent to destroy in whole or in part a national, ethnical, racial or religious group. MacKinnon makes such a mistake when she mischaracterises acts of rape as genocide because 'rape [is] directed toward women because they are Muslim or Croatian.'[201] While such a definition meets the standard of persecutory acts as crimes against humanity, simply targeting individuals

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[193] ibid.
[194] Schomberg (n 184) 127.
[195] *Akayesu* (n 140) para.686.
[196] Askin (n 12); Jose E. Alvarez, 'Lessons from the Akayesu Judgment' (1998) 5 *ILSA Journal of International and Comparative Law* 359.
[197] *Akayesu* (n 140) para.508.
[198] Convention on the Prevention and Prohibition of Genocide, 9 December 1948, A/RES/260, art 2.
[199] *Akayesu* (140) para.706.
[200] See Peter Quayle 'Unimaginable Evil: The Legislative Limitations of the Genocide Convention' 5 *International Criminal Law Review* (2005) 363.
[201] MacKinnon (182) 9.

because they are Muslim or Croatian is not in itself sufficient for a finding of genocide, what is required is the *intent* to destroy a Convention Group.

It is not, however, the 'mechanical definition' of rape,[202] or its inclusion as an act of genocide that has proved to be problematic but rather the issue of consent and coercion. As the *Akayesu* judgment noted, 'sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.'[203] It developed this point further by stating there was no need for coercive circumstances to be evidenced by a show of physical force. Rather, intimidation, threats and duress preying on the victim's fear could constitute coercion, which itself could be 'inherent in certain circumstances, such as armed conflict or the military presence of *Interahamwe* [Hutu militia] among refugee Tutsi women'.[204] Reference was made to other acts such as where a female student was forced to dance naked before a crowd which, the Court concluded, constituted an act of sexual violence, in coercive circumstances.[205] Before examining this issue further it is necessary to introduce additional cases from the ICTY that adopted a different approach to defining rape.

The cases of *Furundžija*, *Kunarac* and *Kvočka* at the ICTY stand out in their contribution to defining sexual crimes and how their differences to the ICTR's jurisprudence point to a tension within the ICL regime itself. The *Furundžija* case is seminal to the jurisprudence of torture and makes an important contribution to sexual violence. The Trial Chamber heard from a witness how she was forced to undress

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[202] The 'mechanical definition' is adopted by a UN Report which states: '"Rape" should be understood to be the insertion, under conditions of force, coercion, or duress, of any object, including but not limited to a penis, into a victim's vagina or anus; or the insertion, under conditions of force, coercion, or duress, of a penis into the mouth of the victim.' Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc.E/CN.4/Sub.2/1998/13, 22 June 1998, para.24; see also Farwell (n88) 392.

[203] *Akayesu* (n 140).

[204] ibid para.686.

[205] ibid para.688.

before a group of forty soldiers and sit naked while she was interrogated and subsequently raped multiple times.[206] Further evidence included a soldier known as 'Accused B' telling another soldier not to hit female detainees as he had 'other methods' for women including rape and sexual assault.[207] A substantial amount of evidence was also heard by the Court detailing the psychiatric harm suffered by the victims including post-traumatic stress disorder and suicidal thoughts.[208]

The Trial Chamber turned to the legal definition of rape and, after considering the definition of rape provided in *Akayesu*,[209] implied the definition in that case lacked specifity to the extent that it does not conform to the principle of certainty required by the criminal law.[210] It was noted where international law does not define a notion of criminal law, recourse to domestic legal provisions is acceptable providing that such reference does not draw from just one jurisdiction and that general principles and concepts can be discerned.[211] On this basis, there exists a general trend in national legislation towards a broadening of the definition of rape to include acts previously considered less serious provided that they meet minimum requirements particularly that of forced penetration.[212] This broadening includes anal and vaginal rape, though it was recognised that forced oral penetration is rape in some national criminal codes while in others it is not.[213] In response, the Trial Chamber held international law safeguards human dignity, and because forced oral penetration is a

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[206] *Furundžija* (n 188) paras.80-83.
[207] ibid para.87.
[208] ibid para.96-106; on the harm caused by such acts see Susan McKay, 'The effects of armed conflict on girls and women' (1998) 4 *Peace and Conflict: Journal of Peace Psychology* 381.
[209] *Akayesu* (n140) para.597-598.
[210] *Furundžija* (n188) para.177.
[211] ibid para.178.
[212] ibid para.179.
[213] ibid para.182.

'most humiliating and degrading attack' on dignity it was bound to find that such forcible oral sex constitute rape.[214]

A definition of the *actus reus* of rape was given by the Trial Chamber which was broken down into two elements with the first being the sexual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object, or the penetration of the victim's mouth by the perpetrator's penis. The second element was that the penetration occurs by coercion, force or the threat of force against the victim or third party.[215] Curiously, despite the Court's requirement for the strict definition of crimes, the judgment does not identify the necessary mental elements of rape that are required to be proven against an accused, a point subsequently correct in the *Kunarac* judgment.[216]

In *Kunarac*, although essentially in agreement with the *Furundžija* definition of rape, the Trial Chamber considered it necessary to develop the element of coercion because the definition given was 'more narrowly stated than is required by international law.'[217] This was chiefly because it does make reference to the issue of conduct which would render the act non-consensual.[218] The principal issue was the existence of detention centres run by the defendants operating essentially as rape camps.[219] As a result there was a question mark as to whether one of the defendants, Dragoljub Kunarac, had forced a victim to have sexual intercourse with him. Kunarac maintained he believed the victim had freely consented to sex even though she had previously been threatened by another soldier who said he would kill her if she did

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[214] ibid para.183.
[215] ibid para.185.
[216] *Prosecutor v. Kunarac et al* (IT-96-23 & 23/1) TC, Judgment, 22 February 2001, para.460.
[217] ibid para.438.
[218] ibid para.438.
[219] ibid para.30; see also para.35 where soldiers and policemen would call at the camps and select female victims to rape.

not have sex with Kunarac.[220] Other evidence relating to the operation of 'rape camps' suggests such camps allowed the accused to 'act out their sexual fantasies'.[221] Some victims were repeatedly raped until they became pregnant, suggesting the aim of the sexual violence was to ensure victims would give birth to the perpetrators' children.[222]

In determining the definition of rape the Court engaged in an analysis of the issue of the consent in rape legislation of several domestic jurisdictions around the world.[223] It was concluded a principle common to these jurisdictions was that serious violations of sexual autonomy were to be regarded as rape, including acts where the victim does not freely agree to sexual acts. Consequently the Court modified the definition of rape to be:

> the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.[224]

Consent in such cases is to be given voluntarily as a consequence of the victim's own freewill, assessed in light of the surrounding circumstances.[225] Consequently, Kunarac's belief that the victim had consensually engaged in sexual intercourse with him was no defence to the charge of rape. The Court stressed that the fact the victim was being held in captivity and acting under duress rendered her acts non-consensual and therefore Kunarac was guilty of rape.[226]

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[220] ibid para.645.
[221] Skjelsbæk (n 2) 217.
[222] ibid 220.
[223] ibid paras.443-457.
[224] ibid para.460.
[225] ibid.
[226] ibid para.646.

In *Kvočka* the Court heard evidence of sexual violence committed against the 36 detainees at the Omarska concentration camp.[227] These included acts of rape, including gang rape or multiple rapes,[228] sexual violence such as sexual mutilation,[229] and sexual assault.[230] The Court also heard evidence of the effects such violence had on the victims, how they would appear 'absent-minded' and 'withdrawn', and how they would return from interrogations showing signs of 'physical abuse'.[231] The sexual violence was evidently an important component in the 'standard operating procedure' in place at Omarska where the operators made 'extensive efforts to ensure that the detainees were tormented relentlessly.'[232] Having considered the evidence, the Court turned to the legal basis of the indictments. The judgment largely conforms to the definitions set down in *Kunarac*, holding rape to be a violation of sexual autonomy.[233] It emphasises the *mens rea* of rape is the intent to sexually penetrate the victim in the knowledge that the victim does not consent.[234]

Subsequent cases at the ICTR remained largely faithful to the definitions provided by the *Akayesu* judgment, while the ICTY made substantial changes to the definition of rape and sexual violence. The ICTR Trial Chamber in *Musema* heard evidence of horrific sexual violence including sexual mutilation[235] and rape.[236] It made reference to *Furundzija*[237] but declined to follow the definition, noting the 'essence of rape is not the particular details of the body parts and objects involved, but

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[227] *Prosecutor v. Kvočka et al* (IT-98-30/1) TC, Judgment, 2 November 2001, paras.98-109; See Richard Barrett and Laura Little, 'Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals' (2003) 88 *Minnesota Law Review* 30.
[228] ibid para.103.
[229] ibid para.98.
[230] ibid para.99.
[231] ibid para.107.
[232] ibid para.116 .
[233] ibid para.177.
[234] ibid para.179.
[235] *Prosecutor v. Musema* (ICTR-96-13) TC, Judgment, 27 January 2000, para.811.
[236] ibid para.851.
[237] ibid paras.224-225.

rather the aggression that is expressed in a sexual manner under conditions of coercion.'[238] The Court continued that it took a 'conceptual definition' of rape rather than what it describes as a 'mechanical definition' of rape.[239] It concludes that the conceptual definition will 'better accommodate evolving norms of criminal justice.'[240]

The ICTR, in the later case of *Semanza*, categorically rejected the *Akayesu* definition of rape in favour of that laid down by the Appeals Chamber in *Kunarac*.[241] *Semanza* also shed light on the expansive styling of the definition adopted by *Akayesu* when it noted that acts of sexual violence that do not meet the narrow definition provided by the *Kunarac* definition could still be prosecuted, *inter alia*, as other inhumane acts.[242] *Gacumbitsi* seemed to approve both *Akayesu* and the *Kunarac* judgments;[243] however it is the latter approach to defining rape that has prevailed in subsequent judgments.

In later cases such as in *Stakić*, the Trial Chamber relied upon the definition of rape provided by the Appeals Chamber in *Kunarac*.[244] In *Krstic*, the ICTY Trial Chamber noted that the accused was responsible for acts which included rape which were deemed by the Court to be a 'natural and foreseeable consequence' of ethnic cleansing operations which he oversaw.[245] Other cases have held that the age and vulnerability[246] of the victims are aggravating factors relevant to sentencing, which while not strictly relevant to the actual definition of the offence serve to illustrate the seriousness with which the Court treats rape and other acts of sexual violence.

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[238] ibid para.226.
[239] ibid para.228.
[240] ibid para.228.
[241] *Semanza* (n 189) para.345.
[242] ibid para.345.
[243] *Prosecutor v. Gacumbitsi* (ICTR-01-64) TC, Judgment, 17 June 2004, para.321, fn.293.
[244] *Stakić* (n 164), para.755.
[245] *Krstić* (n 164) para.616.
[246] *Prosecutor v. Rajić* (IT-95-12) TC, Judgment, 8 May 2006, para.117.

As with enforced disappearance, the BWCC has made reference to the jurisprudence of the ICTY, serving to illustrate how the definitions established by the ICTY have come to be used in a wider context. For example, both the cases of *Pincić* and *Novalić* utilise the definition of rape that emerged from the ICTY.[247] They define the *actus reus* of rape as being the penetration of the vagina, anus or mouth of the victim with the perpetrator's penis or as the penetration of the victim's vagina or anus with another object.[248] Furthermore, the *Pincić* judgment makes reference to the forced nature of the act of rape, thereby underlining the link between the Bosnian Court's jurisprudence and the case law of the ICTY concerning the violation of the victim's sexual autonomy.[249] Additionally, the Court made reference to the ICC Elements of Crimes, in particular when defining rape and indeed it has been indicated that this is the preferred definition because the definition of rape at the ICTY/R is a 'more restrictive and less accurate description of the *actus reus* of the crime'.[250] The final point linking the two jurisdictions is that rape and other serious sexual assaults are both prohibited conduct and the main distinction between the two lies at the sentencing phase.[251]

Having now considered the case law it would appear that there is a degree of disagreement as to how rape and other acts of sexual violence are to be defined. This disagreement appears to stem from the coercive or consensual elements of the offence, and to what extent they ought to be applied in cases of rape committed in the context of an armed conflict, genocide or crimes against humanity. Relevant to the

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[247] *Kvočka* (n 227); *Kunarac* (n 216); *Kupreskić* (n 181).
[248] *Prosecutor v. Pincić* (No. X-KR-08/502) Trial Judgment of the Court of Bosnia and Herzegovina, 28 November 2008, p.30; *Prosecutor v. Novalić* (No. X-KR-09/847) Trial Judgment of the Court of Bosnia and Herzegovina, 21 May 2010, p.24. (although the latter case makes the definition in the context of war crimes, the definition of the substantive elements of the *actus reus* do not vary).
[249] *Kunarac* (n 216).
[250] *Prosecutor v. Nikacević* (No. X-KR—08/500) Trial Judgment of the Court of Bosnia and Herzegovina, 19 February 2009) at fn.15.
[251] *Novalic* (n248) p.25.

issue of consent is whether it should be seen as an element of the crime itself, or if the victim's consent should be a defence. Schomberg and Peterson highlight this problem when they note that the difference is the difference between the prosecution having to prove non-consent beyond reasonable doubt (if non-consent is an element of the offence) and the defendant having to prove consent on the balance of probabilities (if it is to be regarded as a defence).[252] Given the wording of the ICC Elements of Crimes, it is apparent that coercion or non-consent is indeed an element of the offence rather than being considered a defence to an allegation of rape.[253]

Pillay has acknowledged that the definition of rape adopted by the ICTR in *Akayesu* was a 'conceptual definition' which was 'broadly formulated' and not limited to 'conventional' notions of rape.[254] Continuing with a liberal approach to interpretation, she noted that a lack of consent was not required; instead, the *Akayesu* judgment defined rape as acts of sexual violence taking place in coercive circumstances.[255] These 'coercive circumstances' could include instances where the victim has been detained in a prison camp,[256] paraded in front of a group of soldiers or where the victim has been otherwise threatened. The *Akayesu* judgment relied solely on the concept of coercion rather than the consent 'paradigm'.[257] However, *Akayesu* does not actually exclude consent as a requirement. Instead, on the facts of the case and the overwhelming evidence present, it is apparent that the sexual acts performed could not be construed as being consensual sexual acts.[258] Kalosieh recognises that the consent defence was never raised in *Akayesu* because the acts of

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[252] Schomberg (n 184) 124.
[253] ICC Elements of Crimes, art 7(1)(g)-1.
[254] Pillay (n184) 666.
[255] ibid 666.
[256] *Prosecutor v. Mucić et al* (IT-96-21) TC, Judgment, 9 October 2001.
[257] Kalosieh (n 10) 128.
[258] ibid 126.

sexual violence were 'so egregious as to nullify [its] availability'.[259] As such, it can be suggested that the ICTR ought to have made reference to the issue of consent instead of relying on the lack of consent being implicit in its judgment. Expressed another way, the failure of the ICTR to mention consent does not automatically mean coercion rather than consent is a relevant factor.

Consent and coercion in rape cases has been the subject of much academic debate both at the international[260] and domestic level.[261] From this it emerges that one of the fundamental principles at stake is sexual autonomy. This was recognised in *Kunarac*[262] and *Kvočka.*[263] The prohibition of rape is itself intrinsically bound to the preservation of a woman's sexual autonomy[264] and where a woman is '*forced* to engage in sexual or reproductive acts, their autonomy is circumscribed [emphasis added].'[265] Boon discusses the nature of another sexual crime, that of forced pregnancy, and makes reference to the way in which the commission of such a crime both violates a woman's sexual autonomy in addition to her reproductive freedom.[266] Sexual autonomy becomes, therefore, an element of a woman's right to self-determination. A woman can consent to engage in sexual activity, and it is the consensual nature of such acts that renders it an act of her own will. Conversely, a woman's lack of consent to sexual activity is a violation of her autonomy.

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[259] ibid 126.
[260] e.g. Dianne Lupig, 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court' (2009) 17 *American University Journal of Gender, Social Policy and the Law* 431; Kalosieh ibid.
[261] Donald A. Dripps, 'Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent' (1992) 92 *Columbia Law Review* 7.
[262] *Kunarac* (n 216) 440 .
[263] *Kvočka* (n 227) 176-7.
[264] Kristen Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent' (2000) 32 *Columbia Human Rights Law Review* 625, 634.
[265] ibid 641.
[266] ibid 655.

Coercion is one way in which a woman's ability to consent is removed,[267] and a means by which a woman's sexual autonomy can be violated. Coercion can take place, for example, by means of the use of force against a woman or third party, the threat of force either against the woman herself or a third party, or by a pervasive atmosphere of violence short of threats.[268] Other means by which a woman's consent can be violated include intoxication by alcohol or drugs,[269] and fraud or deceit.[270] A further issue is whether the woman is actually capable of consenting. For instance she may have a mental or physical incapacity which renders her unable to consent, or indeed she may be deemed too young, in the eyes of the relevant law, to be able to exercise her sexual autonomy and thus consent to the sexual acts.[271] If this is accepted, then the judgment in *Furundžija* which lists the use of force, threat, coercion *or* the lack of consent as a prerequisite of rape[272] appears to be incorrect. Instead, force, threat and coercion are *means* by which a sexual act becomes non-consensual. Consent itself can be seen as the medium through which a woman's sexual autonomy is exercised.

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[267] Lucy Reed Harris, 'Towards a Consent Standard in the Law of Rape' (1976) 43 *The University of Chicago Law Review* 613.

[268] ICTY Rules of Procedure and Evidence, rule 96; ICTR Rules of Procedure and Evidence, rule 96 ; ICC Rules of Procedure and Evidence, rule 70.

[269] ICC Rules of Procedure and Evidence, rule 70(b) provides that consent cannot be given where a victim is 'incapable of giving genuine consent'. Interestingly, the ICTY RPE does not mention such 'incapacity' but rather the defendant's belief that the victim 'did not submit' which could be construed as permitting an incapacity provision, although the express lack of such a provision is regrettable.

[270] As example of this at the international level the ICC Rules of Procedure and Evidence relating to consent relating to 'genuine consent' (rule 70(b)) could be construed as including consent obtained by fraud or deceit which by its very nature is not 'genuine'.

[271] Although, at what age a female (to distinguish between woman/girl) gains her sexual autonomy is itself a thorny question and not one to be answered here. For an introduction to this matter see Kate Sutherland, 'From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities' (2003) 9 *William and Mary Journal of Women and the Law* 313. Curiously, an age of consent is not specified in the ICC Statute, its Rules of Procedure and Evidence, or the Elements of Crimes. One reason for this might be that the age of consent varies from State to State and differs depending on cultural context. However, it appears to be a strange omission because the Rules of Procedure and Evidence refer to a victim 'being incapable of giving genuine consent' which on the face of it would appear to include a minor. One solution could be to base the age of consent on the given local practices. Of course, this would not matter if one believes that 'consent' is an irrelevant element of sexual violence.

[272] *Furundžija* (n 188) para.174.

Other writers have criticised the requirement that consent be an element of the offence of rape, particularly in the context of armed conflict or other atrocities.[273] This can be seen as a 'contextual' approach to sexual violence. For instance, Pillay, in her discussion of rape, describes acts of sexual violence taking place in 'circumstances which are coercive'.[274] In *Akayesu*, a case in which Pillay was a judge, the ICTR indictment specified how victims lived in a constant state of fear.[275] Kalosieh notes the context can 'drain all meaning from the term "consent"'.[276] Meanwhile, Schomberg and Peterson comment that often the 'international' nature of the alleged offences is enough to establish circumstances that are 'intrinsically coercive.'[277] They highlight the case of *Gacumbitsi* in which non-consent was established by proving coercive circumstances without having to introduce evidence of the victim's non-consent.[278] For Boon, the fundamental question is how sexual autonomy and the issue of consent are addressed in the context of armed conflict or other atrocity.[279] Kalosieh answers this by suggesting that the idea of consent is 'inappropriate' where rape is used as a weapon of war.[280] As a consequence of this the *Kunarac* judgment which centred upon the issue of a victim's consent, or lack thereof, can be criticised because 'it fail[ed] to recognise the factual predicate of violence and torture that is its context.'[281] The issue of consent remains controversial in domestic law, for example over whether drunken consent to sexual intercourse can be sufficient for consent.[282] In contrast, cases concerning international criminal law more

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[273] Kalosieh (n 10) 121.
[274] Pillay (n 184) 666.
[275] *Prosecutor v. Akayesu*, Indictment (Amended) ICTR-96-4-I, 12A.
[276] Kalosieh (n 10) 129.
[277] Schomberg (n 184) 138.
[278] ibid.
[279] Boon (n 264) 655.
[280] Kalosieh (n10) 121.
[281] ibid 131.
[282] See Georgina Firth, 'Not an Invitation to Rape: The Sexual Offences Act 2003, Consent and the Case of the "Drunken" Victim' (2011) 62 *Northern Ireland Law Quarterly* 99.

frequently involve instances of rape where the victim's consent is *prima facie* absent.[283]

The contextual element is indeed important when prosecuting an individual for alleged crimes before international criminal courts. MacKinnon notes that basing definitions of rape on 'body parts and consent' results in 'rape definitions being utterly decontextualized'.[284] Likewise, Kalosieh calls for a contextual element to rape and sexual violence stating that while domestic laws do not have the need for a contextual element for rape, such an element *is* required at the international level to 'account for the types of atrocities committed as [for example] part of an ethnic cleansing campaign'.[285] However, the contextual element is already present, albeit at a higher level of operation; it is automatically implied by the crime being prosecuted as an act of genocide, a crime against humanity or a war crime. Thus, the additional requirement advocated by writers such as MacKinnon appears to be superfluous and redundant from the perspective of the law.

Joint criminal enterprise (JCE) and command responsibility have played an important role in the prosecutions of several individuals before the ICTY and ICTR.[286] For example, there was no evidence offered against Jean-Paul Akayesu to suggest that he had personally committed acts of rape or other acts of sexual violence.[287] While a full discussion of the nature of joint criminal enterprise is outside the scope of this present study it is necessary briefly to examine JCE as it relates to

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[283] e.g. where a victim is held in a concentration camp.
[284] Catherine MacKinnon, 'Defining Rape Internationally: A Comment on *Akayesu*' (2006) 44 *Columbia Journal of Transnational Law* 940, 955.
[285] Kalosieh (n 10) 135.
[286] See Verena Haan, 'The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the former-Yugoslavia' (2005) *5 International Criminal Law Review* 167.
[287] *Akayesu*, Indictment (Amended) ICTR-96-4-I.

rape and sexual violence.[288] As has been noted high-level prosecutions, particularly in Rwanda, have been problematic because of a lack of evidence linking the accused to the immediate perpetrators of the acts.[289] An additional burden in proving JCE is proving that the accused and the perpetrator shared a common intent. For example, in *Kajelijeli* the prosecution failed to prove that there was the necessary connection between the accused, Juvenal Kajelijeli, and acts of the Interahamwe in his district.[290]

The 'mechanical definition' of rape has been adopted in the ICC Elements of Crimes,[291] albeit combined by the conceptual definition which suggests the two approaches are not in fact mutually exclusive. The mechanical definition centres upon the word penetration, while the conceptual definition prefers the word invasion. The ICC Elements of Crimes defines rape as being where the perpetrator 'invaded the body of a person by conduct resulting in penetration, however slight'.[292] The term 'invasion' was preferred because it was seen as 'neutral' and 'de-emphasizes' the precise physical act.[293] However, this in itself raises questions as to how precise international criminal law should be and to what extent precision is necessary or desirable. The idea of de-emphasising the precise physical act appears on the face of it designed to retain a broad-based definition that can better accommodate emerging norms of criminal justice, as highlighted in *Musema.*[294] Yet, it is difficult to imagine how a mechanical definition of rape may change in the future. It appears that in their attempt to be 'neutral' the drafters of the Elements of Crimes missed an opportunity to

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[288] For further discussion of JCE see Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 *JICJ* 159; Stefano Manacorda and Chantal Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise' (2011) 9 *JICJ* 159; Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5 *JICJ* 109.
[289] Rebecca L. Haffajee, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Enterprise Theory' (2007) 29 *Harvard Journal of Law and Gender* 201, 202.
[290] *Kajelijeli* (n 164).
[291] ICC Elements of Crimes.
[292] ICC Elements of Crimes, art 7(1)(g)-2 (1).
[293] Boon (n 264) 649.
[294] *Musema* (n 235) para.228.

ensure that there is sufficient clarity in the law relating to a serious category of crime.[295]

As noted above, the ICTR led the way in its approach to defining rape, amongst other international crimes,[296] with Niamh Hayes commenting that the 'range and breadth of sexual violence case law which has been articulated by the judges of [the ICTY/R] is a tremendous achievement in and of itself.'[297] One cause of this achievement is the fact that the *Akayesu* judgment is an 'archetypal example of judicial creativity' which can in part be explained by the almost total lack of established case law relevant to this area of ICL.[298] However, Hayes also believes that the *Akayesu* judgment also demonstrates an 'innovative progressive interpretation' of international law,[299] a statement indicative of an instrumentalist approach to international law.

Criticism has been levelled at the decision by the ICTY in *Kunarac* where the Tribunal apparently failed to follow a 'liberal and broad' interpretation of the ICTY Statute in relation to sexual crimes.[300] Indeed, a seemingly strictly legal approach to this field of law appears beyond the comprehension of writers such as Kalosieh who has described the ICTY's Rules of Procedure and Evidence on consent as 'misogynistic formalism'.[301] However, Kalosieh's criticism fails to take into account the requirement that certainty based upon a degree of formalism is required for the fair and effective operation of criminal law. Her views are also reminiscent of the policy-orientated approaches to law, examined in Chapter 1, where formal approaches

[295] How this will play out in practice is uncertain, and it is unlikely that having such a wide definition of rape in this context will prove to be problematic. However, from the more abstract perspective of demanding clarity in the law the definition offered is far from ideal.
[296] It was also instrumental in challenging formally defined concepts of genocide, although that is outside the bounds of the present inquiry.
[297] Hayes (n 119) 132.
[298] ibid 134.
[299] ibid.
[300] Kalosieh (n 10) 135.
[301] ibid 134.

to the law are to be replaced with a more flexible policy-focused approach to legal interpretation in order to achieve certain specified ends. To counter such an approach, the ICC Statute provides 'The definition of a crime shall be strictly construed and shall not be extended by analogy' and, importantly, 'In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'[302] The adoption of such an approach in the ICC Statute suggests that the policy-approach has been abandoned in favour of a formalistic approach to ICL.

4.3.3 - Conclusion on ICL and sexual violence

International criminal law has been responsible for some of the greatest advances in the protection of women in international law. As with other substantive areas studied, the creation of the ICC Statute (alongside its supporting Elements of Crimes and Rules of Procedure and Evidence) has provided new, formally identified, definitions of international criminal offences. While the jurisprudence of the ICTY and ICTR may appear to contradict the provisions of the ICC Statute, leading to an assumption that this is evidence of conflict, it is important to remember the three courts within the ICL regime are functionally and jurisdictionally separate. The ICTY was established to prosecute individuals for crimes committed in the former-Yugoslavia and thus its jurisdiction is limited to these events. The ICTR was created to prosecute those who committed atrocities during 1994 in Rwanda.[303] Meanwhile, the ICC Statute is potentially wide-ranging though its limitations have been widely discussed in the preceding section. Therefore, it would seem that even within a legal regime there is separation enough to give the appearance of conflict yet on closer inspection from the perspective of jurisdiction it is readily apparent that any 'conflict' can be resolved by

[302] ICC Statute, art 22(2).
[303] ICTR Statute, art 1 specifies the temporal jurisdiction of the Tribunal is limited to between acts committed between 1 January 1994 and 31 December 1994.

examining the jurisdiction of a particular sub-regime.[304] However, only time will tell if the ICC Statute will be effective in prosecuting the perpetrators of sexual violence.[305]

As was noted at the beginning of this section, the ICL regime has had to overcome some initial hurdles when criminalising acts of sexual violence. The drafting of the ICC Statute was based on the experiences of the ICTY and ICTR in prosecuting heinous acts of sexual violence, in addition to being informed by the lack of an adequate response by the IHRL regime.[306] Chinkin has condemned the international legal system for its failure to address violence against women, attributing this, at least in part, to the state-centric nature of the international legal system.[307] However, the ICL regime contains provisions to attribute responsibility to individuals not States. Another advance in this area is the inclusion of separate offences of sexual violence, meaning that prosecutors and judges are not forced to stretch pre-existing law concerning torture, inhuman and degrading treatment.[308] It has been previously mentioned that no law will completely prevent acts such as rape but the formal criminalisation of such acts by the ICL regime represents an important step towards ensuring victims receive a measure of justice.

Sexual violence is an emotive issue and discussions about the definition of sexual violence tend to pale into insignificance when compared to the harm caused by such acts. However, the ICTY, ICTR and ICC Statute and Elements of Crimes have devoted considerable space to discussing how such acts are to be defined. The first

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[304] This point applies equally to the workings of the Inter-American Court and ECtHR which exist in the broad regime of international human rights law but have quite separate jurisdictions.
[305] Rana Lehr-Lehnardt, 'One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court' (2001) 19 *BYU Journal of Public Law* 317.
[306] See generally Sally Merry, 'Rights, Religion, and Community: Approaches to Violence against Women in the Context of Globalization' (2001) 35 *Law and Society Review* 39; Sally Merry, 'Constructing a Global Law - Violence against Women and the Human Rights System' (2003) 28 *Law and Social Inquiry* 941.
[307] Chinkin (n 17) 24.
[308] Moshan (n 150) 181.

part of the definition is contextual. The acts must take place either in the context of genocide or amount to a crime against humanity.[309] The next stage is the level of harm caused to the victim. The law surveyed makes it clear that rape and sexual violence are capable of causing serious physical or mental harm to the victim. Developing this from the jurisprudence of torture it would appear that the standard of harm is identical between it and sexual violence. Rape can be viewed as a form of torture.[310]

Much of the difficulty regarding the definition of sexual violence in ICL revolves around the debate concerning the 'mechanical' versus 'conceptual' approaches to rape. The mechanical version of rape can be found in several places throughout the jurisprudence and related law. For example, in *Furundžija* the ICTY outlined the definition of rape as being the penetration of the victim's vagina, anus or mouth with the perpetrator's penis.[311] In response, the ICTR declined to follow this noting that rape was more than a description of the body parts involved.[312] Thus, the conceptual understanding of rape is broader in scope and seemingly permits a wider range of conduct to be considered rape. This echoes the definition of torture given in UNCAT which is noticeably wide so as to encompass a broad range of conduct. It is notable that while rape is not defined in the ICC Statute, a definition is presented in the Elements of Crimes. This appears to follow a mechanical, albeit broad, definition of rape, suggesting that the ICC favours a mechanical understanding of rape.[313]

Fragmentation has caused a degree of consternation in the international community but its effects on the actual operation of international law studied in this

[309] Of course, war crimes can also be a violation of ICL but these have been considered in this thesis as violations of IHL.
[310] *Aydin* (n 40).
[311] *Furundžija* (n 188) para.185.
[312] Musema (n 235) para.226.
[313] This could be due to several reasons, chiefly so as to ensure that crimes are sufficiently precise for the successful prosecution of perpetrators.

thesis can be viewed as marginal. The ICL regime itself is placed in a difficult position regarding rape and sexual violence. On the one hand it has to be seen to provide justice both to the victims and more generally to the international community. On the other, is the strict requirement that an accused receives a fair trial. Balancing the two can prove to be difficult. The adoption of formally recognised rules as opposed to drawing from a wide-range of sources is important for ICL in order for an accused to receive a fair trial. In a sense, this requirement can counter some of the negative effects of fragmentation.

Conclusion to Chapter Four

This chapter has considered the prohibition of sexual violence by the three regimes studied throughout this thesis. It is worth noting that each does in fact prohibit acts such as rape and sexual assault but in very different ways. Of the three, the IHRL regime now has, perhaps surprisingly, the weakest provisions relating to sexual violence. In part this is because of the almost total lack of specific elements that prohibit sexual violence, leading the courts to develop the law within the framework of torture, inhuman or degrading treatment. In contrast, the IHL and ICL regimes now contain specific provisions relating to the criminalisation of acts of sexual violence coupled with the punishment of those found guilty of such offences. These formalised aspects of the IHL and ICL regimes have not pleased some commentators who, as was seen, believe that they do not go far enough towards preventing sexual violence. However, such critics could be said to be unrealistic, or too idealistic, in their aims. IHL and ICL, like most legal systems, are imperfect but have to be made to work in the real world.

The close nature of the relationship between torture and sexual violence is readily apparent, and indeed often rape and other forms of sexual violence have been

considered to be acts of torture under IHRL, IHL and ICL. As with torture, rape is universally condemned and prohibited by each of the three regimes studied yet differences between the regimes remain. These are most apparent when considering the definition of rape and sexual violence as a crime against humanity, as genocide and as a war crime. For example the definition of rape and other acts of sexual violence necessarily includes as part of the *actus reus* of the offence the requirement that the acts be perpetrated in a widespread or systematic fashion as part of an attack against a civilian population, while the *mens rea* of the offence includes the requirement that an accused be aware of this contextual element. Rape as an act of genocide can only be committed if the intention of the perpetrator is to destroy in whole or in part a national, ethnical, racial or religious group. In similar fashion, rape or sexual violence can only constitute a war crime if the acts were committed in the course of an international or non-international armed conflict.

Though it might be possible to establish a core definition of rape across each of the three regimes for example the penetration of the vagina, anus or mouth of the victim with the perpetrator's penis, each definition also includes the elements listed above with the contextual elements being highly relevant to any given definition. Likewise, rape as a violation of international human rights law might share the core definition but given the nature of the IHRL regime it can only apply if the perpetrator's actions are attributable to the State concerned or if the State is somehow negligent in providing criminal sanction for acts of rape as seen in *X&Y v. Netherlands*.[314]

Ultimately, while the section above on ICL highlighted the difficulties that have existed between the various judicial bodies operating within that regime, the

[314] *X&Y* (n 54).

important point for the purposes of this thesis is that there exist differences in how sexual violence is defined between the regimes. The difference between IHL and ICL is relatively minor and hinges largely upon the context in which the offence takes place. Yet, as with other substantive violations such as torture and enforced disappearance, it is apparent that despite the differences in definition each of the legal regimes does indeed function despite the differences, a fact which suggests that much hinges on the jurisdiction of a given regime. This serves to support the idea that while fragmentation is indeed real its effects can possibly be mitigated by the use of formally established rules inherent to each given regime.

Chapter Five – The Destruction of Property

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Introduction

The destruction of property in its widest sense can potentially take many forms, ranging from destroying buildings outright to the looting or pillage of goods. It can affect all types of property: public, cultural and private. The purpose of this chapter is to examine how the three regimes define the destruction of property and locate within the framework of the thesis. In doing this it is possible to identify how the regimes of IHRL, IHL and ICL consider the protection of property and afford a measure of justice to the owners. The three regimes are markedly different in their approaches but retain an attachment to formally identifiable rules of law. In this sense, the regimes do offer some protection; albeit to a lesser extent than torture, enforced disappearance and sexual violence. In part this is because of the qualified nature of the right which can be violated in certain instances if it is necessary and proportionate to do so. Despite such qualifications it is important to recognise that the protections afforded can be applied by each of the regimes.

The protection of property is intrinsically linked to the right to property and its definition. The first step is to consider what the term property means in this context. Defining property has proven to be a difficult task to undertake. While the idea of property is a fundamental concept to law and politics, there is marked uncertainty as to what property can be said to be.[1] In the first instance, property can be broadly classified as 'real' or 'personal' with the former relating to land and buildings, and the latter other items such as vehicles, goods, etc.[2] Property can also be said to include intellectual property such as patents. It can be held by private individuals, public

[1] Laura Underkuffler, *The Idea of Property: Its Meaning and Power* (OUP 2003) 1-4.
[2] Charles Harpum et al, *Megarry and Wade: The Law of Real Property* (Sweet Maxwell 2012) 7.

bodies or viewed as cultural property. This tripartite view of property adds a further layer of complexity when defining property.

Cultural property fits into neither the public nor the private category of property. Whereas public property could be defined as ownership by the State or sub-State authority, and private property by the ownership of the property by a private individual, organisation or corporation, the definition of cultural property appears to be different. Rather than focusing on the owner of the property, definitions found in international law concern themselves with the intrinsic value such property has to be of 'great importance' to the 'national cultural heritage' of a given people.[3] This could include museums, art galleries and libraries in addition to their contents.[4] A wider definition of cultural property includes items of 'artistic, archaeological, ethnological or historical interest'.[5] Problems also emerge when differentiating between cultural property on the one hand and cultural heritage on the other. Cultural property can be briefly described as being tangible, while cultural heritage can be described as being intangible.[6] Such a definition is far from perfect as many tangible items of culture might also have an intangible element to them. Cultural property and heritage also have an important role in the formation of a culturally diverse international society, something which the international community has been keen to protect and promote.[7] Damage to cultural property has been described as 'cultural aggression', the aim of

[3] Roger O'Keefe, 'Protection of Cultural Property' *in* Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (OUP 2008) 437.
[4] ibid 438; The contents of such buildings is probably more important that the buildings themselves and quite rightly receives protection.
[5] John Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 *AJIL* 831, 831.
[6] Peter Stone, 'Human rights and cultural property protection in times of conflict' 18 *International Journal of Heritage Studies* 271, 281.
[7] William Logan, 'Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice' 18 *International Journal of Heritage Studies* 231, 234-235.

which is to 'erase the manifestation of the adversary's identity.'[8] This chapter focuses mostly on the protection of property as a tangible object but some overlap with cultural heritage is inevitable.

The idea of property itself has become loaded down with political and ideological baggage.[9] This could suggest that any attempt to define 'property' will inevitably have to discuss the political and ideological aspects of the term. The three regimes do manage to adjudicate violations concerning property although in different ways. In part this is due to the distinctions between the three regimes. The IHRL regime, and particularly the ECHR, takes a wide and expansive definition of property including *inter alia* real property, and non-tangible items such as intellectual property and shares.[10] In contrast, the IHL and ICL regimes, perhaps because of their nature and the limits of their law, are restricted to real and personal property. In this way, the definition of property is dependant on the regime in which it is found.

Similar to the multiple definition of property, the right to property can be viewed not as a singular right but rather as a 'bundle of rights'.[11] It has been noted that contemporary conceptions of property rights rest on the political works of writers such as John Locke, Adam Smith and Karl Marx.[12] Thomas Hobbes saw property as the consequence of a sovereign power when, in a famous passage in Leviathan, he notes that in the state of nature there is 'no place for industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth', nor buildings or

[8] Hirad Abtahi, 'The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the former-Yugoslavia' (2001) 14 *Harvard Human Rights Journal* 1, 1.
[9] Franz von Benda-Beckmann et al, 'The Properties of Property' *in* Franz von Benda-Beckmann et al (eds) *Changing Properties of Property* (Berghahn Books 2009) 3.
[10] This will be examined in more detail below, 230 (n 32).
[11] James Penner, *The Idea of Property in Law* (OUP 1997) 1.
[12] Benda-Beckmann (n 9) 4.

commodities.[13] For Hobbes, the right to private property becomes a cooperative practice dependant on community norms respectful of the sovereign power.[14] Hobbes' position can be contrasted with that of Locke who believed it was 'labour, in the beginning, [that] gave a right of property wherever anyone was pleased to employ it upon what was common'.[15] For Locke, sovereign power is instituted for 'the preservation of the property of all the members of...society'.[16] Thus the position of Hobbes and Locke stand in contrast to each other. For Hobbes, sovereign power permits the creation of property while for Locke that same power is created because of private property.

Other theories of the right to property are based around several rights such as the right to possess, the right to use and the right to exclude.[17] The latter concept of exclusion has been described by Penner as a 'gate not a wall' suggesting that the possessor of the property can exclude some and include others as he or she wishes.[18] Thus there is a 'social use'[19] of property reminiscent of Hobbes' sense of property being a cooperative practice: the respect for the gate is underpinned by community norms backed by sovereign power. Linked to this is the idea that the right to property is a negative right meaning that it is not a right dependent on State action but rather a right dependent on the State refraining from exercising its power. In this sense, the right to property is similar to the other rights examined in this thesis: the right not to be tortured, the right not to be forcibly disappeared and the right not to be subjected to sexual violence.

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[13] Thomas Hobbes, *Leviathan* (Penguin 1985) 186.
[14] Jean Hampton, *Thomas Hobbes and the Social Contract Tradition* (CUP 1988) 240-243.
[15] John Locke, *Two Treatises on Government* (Norton 2005) 36.
[16] ibid 54.
[17] Penner (n 11) 1-2.
[18] ibid 74.
[19] ibid.

In this chapter the term 'destruction of property' is given the widest possible meaning so as to include both the outright destruction of property and its unlawful appropriation. The reason for the adoption of this approach is because both actions deprive the lawful right holder to the property of its use or benefit. Both involve the assumption by the perpetrator of some or all of the rights normally conferred upon the lawful owner. Care should be taken to distinguish between the destruction of property on the one hand and looting and pillage on the other. The latter acts are prohibited outright under IHL and in certain IHRL regimes as amounting to a violation of the right to enjoy property. The ICL regime is weaker with regard to outright prohibition but the widespread or systematic deprivation of property could amount to a persecutory act under the ICC Statute. In contrast, the destruction of property is permitted in certain instances under the IHL and IHRL regimes albeit in limited circumstances. IHL recognises that in certain circumstances it might be necessary and proportionate to destroy property in order to accomplish a military objective. Likewise, the IHRL regime, and in particular the ECHR,[20] recognises that the right to property is not an absolute right unlike the right not to be tortured. Such qualifications to the rights differentiate the destruction of property (but not looting which is always forbidden) from the other rights studied in this thesis.

In this chapter the relevant provisions of the three regimes (IHRL, IHL and ICL) are studied and placed into the context of the overall thesis. In the first section it looks at the protection of property under the IHRL regime with particular reference to the UN system, the ECHR and the Inter-American system. The second section on IHL examines the restrictions placed on belligerents in the course of an armed conflict (international and non-international). It does this by first examining the relevant

[20] ECHR, Protocol 1, art 1.

customary provisions, followed by treaty law and the case law of international courts and tribunals. The third section considers the ICL provisions relating to the protection of property. As in other chapters this section focuses on crimes against humanity and genocide rather than war crimes provisions that are considered in the IHL section.

The protection of property is approached differently by the three regimes but a number of similarities remain, particularly with regard to IHRL and IHL. Fragmentation however provides sufficient differences between the regimes to allow for the emergence of identifiable and formally ascertainable rules. Therefore, the effects of fragmentation can be mitigated by their existence.

5.1 - Destruction of property and IHRL

Protection of property in the IHRL regime is, in places, limited. The relative lack of measures in the UN human rights system is largely reflective of the political struggles that took place in the second half of the 20th Century. In the ECHR system the protection of property is not to be found in the text of the original Convention but rather in Additional Protocol 1. Of the IHRL sub-regimes studied, only the Inter-American system provides a specific measure in the original text of the Convention. However, as will be seen, the actual use of Article 21 of the IACHR has been limited.

Several difficulties arise when considering the right to property as a human right. The first two relate to the contested notions of the meaning of property and of property rights. The UN and Inter-American systems have not been as active in this area as the ECHR. This latter system has made the largest contribution of the three towards the development of the notion of a human right to property. In part this could be attributed to the strong notions of property ownership prevalent in the Western States Parties to the Council of Europe coupled with the rapid privatisation that has taken place in Eastern Europe. Despite such advancement in the ECHR, the IHRL

regime remains wedded to the idea of limiting State power *vis-à-vis* the individual rather than the regulation of conduct between individuals. As such acts of theft by private citizens would not in themselves amount to a violation of Protocol 1, Article 1 of the ECHR. The potential for State liability would be limited to the State's failure to ensure the protection of property rather than for the deprivation itself. In this sense, there are clear parallels to the other acts examined in this thesis. For example, acts of physical cruelty committed by a private citizen would not amount to torture.

The protection of private property by the IHRL regime is comparatively limited and does not receive as much attention from human rights scholars as torture, sexual violence and enforced disappearance. Despite this, there remain formally enumerated rules that protect property from the exercise of arbitrary State power, particularly in the ECHR and Inter-American system. These rules assist the courts by establishing a framework within which they can develop their jurisprudence. The ECHR and Inter-American provisions are noticeably vague but this allows the courts to develop the law in light of changing of circumstances; for instance, intangible electronic property was inconceivable when the ECHR was first established.

5.1.1 - Destruction of property and the UN system

The right to property is listed as a human right in Article 17 of the UDHR. It provides 'Everyone has the right to property alone as well as in association with others';[21] and 'No one shall be arbitrarily deprived of his property'.[22] The purpose of Article 17 is, according to Jacobs, unclear because of different conceptions of property and property rights.[23] This is echoed by Golay and Cismas who note that the definition of property differs between the different legal instruments leaving no 'clear-cut' definition of

[21] UDHR, art 17(1).
[22] ibid art 17(2).
[23] Harvey Jacobs, 'Private Property and Human Rights: a Mismatch in the 21st Century?' (2013) 22 *International Journal of Social Welfare* 85, 97.

property.[24] However, such concerns are reminiscent of the desire to establish unified definitions that fail to take into account the subtleties and context of the regime in which they are found. Instead, the formalised account of international law could take into account such differences, tailoring the legal definition to a particular regime.

In comparison to the UDHR, neither the ICCPR nor the ICESCR explicitly protect an individual's right to property. The lack of specific provisions relating to the protection of private property in these treaties substantially limits the contribution UN law makes to the protection of the right to property. One final point to make with respect to international treaties concluded under the auspices of the UN is that CEDAW grants women the right to conclude contracts and to administer property, tacitly recognising a woman's right to own property.[25] This potentially strengthens the protection of property, at least for women.

The lack of recognition afforded to the right to private property, and the prohibition of its arbitrary destruction, under the UN human rights instruments stems in large part from the historical and ideological context in which the ICCPR and ICESCR are rooted. Both Covenants were adopted during the Cold War in 1966. For the communist members of the UN the protection of private property was inevitably anathema to the very basis of their governments. Private property in Marxist thought is seen as the axiomatic foundation of the capitalist system.[26] Consequently, it would be contrary to the ideological beliefs of communists to enshrine in international law a right for an individual to own private property. The exclusion of the right to property

[24] Christophe Golay and Ioana Cismas, 'Legal Opinion on the Right to Property from a Human Rights' Perspective'. Available at http://www.geneva-academy.ch/docs/publications/ESCR/humanright-en.pdf (last accessed 15th July 2013) 11.
[25] Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'), 18 December 1979, 1249 UNTS 13, art 15(1).
[26] Karl Marx and Friedrich Engels, *The Communist Manifesto* (Penguin 1985) 84-85.

from the ICCPR or ICESCR can be seen as an example of how international instruments are frequently the product of political compromise.

5.1.2 - Destruction of property and the ECHR system

In the ECHR regime such protection is primarily to be found under Protocol 1, Article 1.[27] It provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Of particular relevance to this section is the first paragraph of Protocol 1, Article 1. It affords an individual the right to both own and enjoy his or her possession, in addition to protecting those possessions from state-sanctioned deprivation, except 'where provided for by law and by the general principles of international law.'[28] Also of note is Article 15 of the ECHR which does not include Protocol 1, Article 1 in the list of non-derogable rights.[29] Consequently, rights guaranteed under Protocol 1, Article 1 are not absolute because a State Party may derogate from it in times of war or other public emergency.[30] Such derogation from the ECHR would not, however, automatically affect any other relevant provisions of international humanitarian law or international criminal law as they are entirely separate legal instruments.

Several cases concerning the destruction of property have been heard by the ECtHR in recent years. The Court's approach has focused upon the idea that an

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[27] Protocol 1, art 1.
[28] Protocol 1, art 1.
[29] ECHR, art 15(2).
[30] ibid.

individual has been deprived of a right to possession.[31] Therefore, the appropriate starting point is to consider in brief the definitions of possession and deprivation. In successive cases, the Court has provided a very broad definition of the word 'possession'. In addition to protecting what one may classify as being 'traditional' items of property, for example personal or real property, the Court has also deemed several other rights and interests that have economic value to be protected by Protocol 1, Article 1, for instance intellectual property.[32] These have been said to include internet domain names,[33] company shares[34] and patents.[35] 'Deprivation' covers a range of actions where an individual's right of ownership is extinguished.[36] This can include not only the destruction of a person's property but also cases in which property has been transferred from one party to another such as an expropriation,[37] or where control of property is subject to undue interference.[38]

The area of specific concern in this chapter is the destruction of property by State security forces or in the context of a conflict.[39] The majority of such cases concern the use of force by Russian and Turkish security and military forces respectively in Chechnya and Eastern Turkey. In *Sadykov*[40] the ECtHR heard complaints that the applicant's property had been looted and destroyed by State agents

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[31] Robin White and Clare Ovey, *The European Convention on Human Rights* (OUP 2010) 477; see also the wording of ECHR Protocol 1, art 1.
[32] Laurence Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49 *Harvard International Law Journal* 1.
[33] *Paeffgen GmbH v. Germany* (Application nos. 25379/02, 21688/05, 21722/05, 21770/05) Judgment, 18 September 2007.
[34] *Bramelid v. Sweden* (1983) 5 EHRR 249.
[35] *Smith Kline and French Laboratories v. Netherlands* (Application no.12633/87) Judgment, 4 October 1990.
[36] White (n 31) 488.
[37] *Sporrong and Lönnroth v. Sweden* (Application nos. 7151/75 and 7152/75) Judgment, 23 September 1982.
[38] *Ghigo v. Malta* (Application no. 31122/05) Judgment, 26 September 2006.
[39] In this context 'conflict' is used in its widest possible sense and does not imply that particular acts were committed during an armed conflict as understood by IHL or ICL.
[40] *Sadykov v. Russia* (Application no. 41840/02) Judgment, 7 October 2010.

while he was detained, and that two of his vehicles had been stolen by State agents.[41] In its judgment, the Court noted the existence of what it termed a 'violent confrontation' between the armed forces of the Russian Federation and rebel fighters.[42] The Court commented on the violence, noted its two-sided nature, and concluded 'it cannot be said that the State may or should be presumed responsible for any damage inflicted during military attacks, or that the State's responsibility is engaged by the mere fact that the applicant's property was destroyed.'[43] Thus, it was not possible for the Court to find that there had been a violation of the applicant's Protocol 1, Article 1 rights with respect to the property,[44] although it did find that the two vehicles taken by State agents amounted to such a violation of the applicant's rights because their actions were not justified.[45]

There exists a string of further cases where the ECtHR has been unable to determine that there had been a violation of Protocol 1, Article 1. For example, in *Akkum* the Court heard allegations concerning how the applicants' livestock had been destroyed by Turkish soldiers.[46] Without evidence of their loss, the Court was unable to sustain the applicants' allegations.[47] The bar was apparently raised further in *Soylu* where the Court determined that the correct evidential standard of proof was 'beyond reasonable doubt'.[48] A further factor in the Court's judgment was that the applicants had apparently delayed making a claim.[49] Taken together, these cases are indicative of

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[41] ibid paras.253-255.
[42] ibid para.260.
[43] ibid.
[44] ibid para.261.
[45] ibid para.266-7.
[46] *Akkum and Others v. Turkey* (Application no. 21894/93) Judgment, 24 March 2005, paras.274-276.
[47] ibid para.277.
[48] *Soylu v. Turkey* (Application no. 43854/98) Judgment, 15 February 2007, para.42; see also *Mentese v. Turkey* (Application no. 36217/97) Judgment, 18 January 2005, para.72; *Sirin Yilmaz v. Turkey* (Application no. 35875/97) Judgment, 29 July 2004, para.99.
[49] *Soylu* ibid para.46; See also *Cacan v. Turkey* (Application no. 33646/96) Judgment, 26 October 2004.

reluctance on the part of the Court to recognise serious property rights violations in situations where the State uses force.

In contrast with the above cases, there are several cases in which the Court has found that the applicants' Protocol 1, Article 1 rights have been violated. For instance, in *Isayeva* the applicants were fleeing heavy fighting in Chechnya by driving their vehicles through a 'safe exit' created by Russian forces for civilian use. In the course of their escape they were attacked by Russian military aircraft, and their vehicles destroyed.[50] Russia argued that the destruction of the applicants' property was 'in the public interest'.[51] The Court disagreed, concluding 'There is no doubt that these acts...constituted grave and unjustified interferences with the [third] applicant's peaceful enjoyment of her possessions.'[52] However, as Kaye notes, the Court did hold that an air strike could be a legitimate response to certain acts by the Chechen rebels.[53] In doing this the Court recognises that in some circumstances, particularly in situations amounting to armed conflict, the destruction of property might be permissible and indeed proportionate. Lastly, in *Bilgin* the applicant's house was destroyed by Turkish security forces, alongside possessions necessary for his livelihood. This destruction amounted to a 'grave and unjustified interference' with the applicant's Protocol 1, Article 1 rights.[54] The introduction of terms such as 'deliberate destruction' and 'unjustified interference' in the above cases suggests, to a greater or lesser extent, that in certain instances destruction of property and interference with property rights could be permissible.

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[50] *Isayeva, Yusupova and Bazayeva v. Russia* (Application nos. 57947/00, 57948/00, 57949/00) Judgment, 24 February 2005; see David Kaye, 'Khashiyev & Akayeva v. Russia; Isayeva, Yusupova & Basayeva v. Russia; Isayeva v. Russia' (2005) 99 *AJIL* 873.
[51] *Isayeva* ibid para.232.
[52] ibid para.233.
[53] Kaye (n 50) 876.
[54] *Bilgin v. Turkey* (Application no. 23819) Judgment, 16 November 2000, para.108.

5.1.3 - Destruction of property and the Inter-American system

Protection of the right to property can be found in Article 21 of the IACHR. It is drafted along similar, though not identical, lines to the Protocol 1, Article 1 of the ECHR. It provides that everyone 'has the right to the use and enjoyment of his property' though it recognises that the law 'may subordinate such use and enjoyment to the interest of society'.[55] Depriving a person of his or her property is prohibited 'except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.'[56] The right to privacy protected under Article 11 may also provide a degree of protection for a person's property, particularly: 'No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence'.[57] While this provision offers little more protection than Article 21 it does establish that, in principle at least, the destruction of a person's home may be construed as 'arbitrary or abusive' and thus constitute a violation of Article 11 in addition to Article 21.

The Inter-American Court's jurisprudence, unlike that of the ECtHR, has paid little attention to the destruction of an individual's property. Instead, the Court has focused more on the rights of indigenous people's rights to property, particularly their right to land.[58] In the *Awas Tingni* case, the Nicaraguan government had granted a logging concession to a company without the consent of the Awas Tingni

[55] IACHR, art 21(1).
[56] IACHR, art 21(2).
[57] IACHR, art 11(2).
[58] Gillian Triggs, 'The Rights of Indigenous Peoples to Participate in Resource Development: An International Legal Perspective' in Donald Zillman et al (eds) *Human Rights in Natural Resource Development* (OUP 2002); and Lila Barrea-Hernandez, 'The Legal Framework for Indigenous Peoples' and Other Public's Participation in Latin America: the Cases of Argentina, Colombia and Peru' *in* Donald Zillman et al (eds) *Human Rights in Natural Resource Development* (OUP 2002); Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27; S. James Anaya and Robert Williams, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System' (2001) 14 *Harvard Human Rights Journal* 33.

community.[59] The Court held Article 21 upholds the right of a person to use and enjoy his or her property including movable and immovable property, corporeal and incorporeal elements and 'any other intangible object capable of having value'.[60] The communitarian nature of indigenous societies was highlighted,[61] and, because of the concept of title to property was lacking in their culture, it was possible to say that possession of the land by the Awas Tingni was sufficient for them to obtain official and legal recognition of that property.[62] Consequently, by granting a concession to a logging company, the Nicaraguan State had violated the Article 21 rights of the Awas Tingni. Furthermore, Nicaragua should have taken precautions to delimit, demarcate and title the Awas Tingni community's land.[63]

There have been several other cases before the Court concerning the property rights of indigenous people. In *Yakye Axa* it was recognised that indigenous people had a close relationship with the land, a relationship that is fundamental for their 'culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations.'[64] Consequently, the rights of indigenous people to maintain close ties with the land and the natural resources found therein must be protected by Article 21.[65] In *Moiwana Village*,[66] the Court assessed whether the

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[59] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001); see Leonardo Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua' (2007) 24 *Arizona Journal of International and Comparative Law* 609; Jonathan Vuotto, 'Awas Tingni v. Nicaragua: International Precedent for Indigenous Land Rights' (2004) 22 *Boston University International Law Journal* 219.

[60] *Awas Tingni*, ibid para.143.

[61] ibid para.149.

[62] ibid para.151.

[63] ibid para.153.

[64] *Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay*, Case 12.313, Report No. 2/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 387 (2002), para.131.

[65] ibid para.137.

[66] *Moiwana Village v. Suriname*, Judgment of June 15, 2005, Inter-Am Ct. H.R., (Ser. C) No. 145 (2005); see Pablo Ormachea, 'Moiwana Village: The Inter-American Court and the "Continuing Violation" Doctrine' (2006) 19 *Harvard Human Rights Journal* 283; Claudia Martin, 'The Moiwana Village Case: A New Trend in Approaching the Rights of Ethnic Groups in the Inter-American System' (2006) 19 *LJIL* 491.

village belonged to the Moiwana community given their lack of formal legal title.[67] The Court concluded, affirming the *Awas Tingni* judgment, the Moiwana community had an 'all-encompassing relationship' to the land they traditionally inhabited.[68] Importantly, it was emphasised that the ownership of the land did not lie with individuals but instead with the community as a whole.[69] Consequently, the Suriname government had violated the Moiwana community's rights guaranteed under Article 21. Although these cases do not correspond to the destruction of property, they do serve to illustrate how the Inter-American Court has concerned itself with property rights guaranteed under Article 21.

5.1.4 - Conclusion on the destruction of property in IHRL

The right to property in IHRL has proven to be a contested concept. In part this is because of uncertainty surrounding the very idea of property itself and the content of the rights to property. Such issues have been evident in the cases of the ECHR where the Court has taken an expansive definition of property. The case law from the Inter-American Court has focused predominantly on the property rights of indigenous people, a fact that reflects growing concern with the possible exploitation of indigenous communities by both corporations and governments.

A further problem arises from the qualified nature of the right to property. Unlike the other substantive areas considered in this thesis it is not an absolute right. The State retains power to curtail an individual's right to property for instance through the levying of taxes or lawful expropriation. Of particular note is the qualification that the right may be violated in 'the public interest' or under 'the

[67] ibid para.130.
[68] ibid para.133.
[69] ibid .

general principles of international law.'[70] From the jurisprudence of the ECtHR, it is unclear as to what this latter provision in particular means. For instance, it could be an implicit recognition of the specialised nature of the IHL regime in situations where property is destroyed in the context of an armed conflict.[71] However, it is apparent from the evidence provided above that in certain situations, particularly where the destruction of property can be deemed 'wanton' or where its removal by state agents amounts to 'pillage', the violation of property rights can amount to a violation of the ECHR.

Defining the protection of property in IHRL is framed by reference to the relevant provisions of human rights conventions. This largely takes place at the regional rather than international level due to the latter's relative lack of provisions. As with other human rights considered in this thesis, the violation of property rights under IHRL can be committed only by State officials. This is evident from the jurisprudence of the ECtHR which has considered the destruction of property by Russian and Turkish security forces. A wide-range of private property is protected under IHRL from real property to personal property and intangible property such as trademarks and patents.[72] Due to the nature of IHRL it is unlikely that the protection of property would extend to publically owned property, but it would apply to cultural or indigenous property as evidenced by the Inter-American Court.[73] Proportionality is a major component in the protection of property in IHRL, with the extent to which property destruction is permitted being an important consideration. The ECtHR did

[70] ECHR, Protocol 1, art 1.
[71] Thereby making Protocol 1, art 1 one instance where the *lex specialis* nature of the IHL regime is recognised.
[72] E.g. *Smith Kline* (n 35).
[73] E.g. *Yakye Axa* (n 64).

recognise that, in certain cases, the destruction of property could be proportionate to the threat faced by security forces.[74]

Fragmentation can potentially pose a number of challenges to international law and the adjudication of disputes. However, the emergence of formally recognised rules unique to each regime could assist in limiting its effects. This can be seen with the IHRL regime wherein certain human rights systems, notably the ECHR, have developed their own conceptions of both property and how rights to it can be violated.

5.2 - Destruction of property and IHL

In contrast to IHRL, IHL contains several prohibitions related to the destruction of property. IHL is particularly concerned with the unjustified destruction of property by excessive or disproportionate force. This section draws from custom, treaty law (such as the Geneva Conventions) and case law – particularly that which emerged from the Nuremberg IMT and ICTY/R. It will be seen that the destruction of property under IHL is prohibited in a different fashion than it is prohibited under IHRL. While both regimes start at the same point in recognising that the destruction of civilian property is *prima facie* unlawful, the IHL regime goes further and adds several qualifiers which can legitimise acts which would otherwise be unlawful. As in other chapters, this section considers first customary law, followed by treaty law and then an examination of the relevant case law.

Two major issues surrounding the destruction of property under IHL are proportionality and the principle of distinction between civilian and combatant objects. Proportionality is not a concept unique to IHL and can be found in many other areas of law.[75] A distinction is made between proportionality as *ius ad bellum*

[74] *Isayeva* (n 50) para.232.
[75] Eric Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10 Dartmouth Law Journal 1, 10; Kai Moller, 'Proportionality: Challenging the Critics' 10 International Journal of Constitutional Law 709, 710; Steven Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' 63 (2004) Cambridge Law Journal 412, 416.

(wherein the use of force should be proportionate to the perceived threat) and proportionality as *ius in bello*. This latter category is the subject of the present section and broadly refers to the balance between achieving an objective and the cost of achieving it.[76] In practice this means collateral damage to civilians and civilian objects is to be minimised relative to the military advantage gained.[77] Excessive civilian casualties are prohibited regardless of the military advantage gained.[78] Despite this, the issue of proportionality in attack can be seen as a subjective standard, leaving the exact point at which an attack becomes disproportionate dependent on the context and circumstances.[79]

The principle of distinction is the concept whereby civilian objects and military objectives are to be distinguished from one another. The purpose of this is to protect the civilian populace from attack by enemy forces. Attacks which fail to distinguish between civilian and military targets, such as the carpet bombing of a town, are considered indiscriminate and thus prohibited.[80] In contrast to the protection civilians receive, military forces are considered legitimate targets and can be subjected to attack.[81] This can be viewed as a principle of customary IHL.[82]

5.2.1 - Customary IHL and the destruction of property

The first point to note with regard to customary law relating to the destruction of property is that the prohibition is spread across several different rules. The starting

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[76] Judith Gardam, 'Proportionality and Force in International Law' 87 *AJIL* 391, 391.
[77] William J. Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 *Military Law Review* 91, 94.
[78] ibid 126.
[79] ibid.
[80] Lesley C. Green, *The Contemporary Law of Armed Conflict* (Manchester University Press 2008) 390.
[81] Mark D. Maxwell & Richard V. Meyer, 'The Principle of Distinction: Probing the Limits of its Customariness' (2007) *Army Lawyer* 1; Asa Kasher, 'The Principle of Distinction' (2007) 6 *Journal of Military Ethics* 152, 153.
[82] Jean-Marie Henckaerts & Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol 1 CUP 2005) 3.

point is the principle known as 'the principle of distinction' between civilian and military objects. This principle means that only military targets may be attacked, thereby sparing civilian objects from attack.[83] The rule applies in non-international armed conflicts as does in international armed conflicts although the exact legal framework does appear to differ.[84] The content of the rule is further explained in Rule 9 where the definition of 'civilian object' is considered. All objects that are not military objects are to be deemed 'civilian'.[85] State practice identifies several objects that are considered to be, *prima facie*, civilian objects, including residential areas, houses, schools, hospitals, monuments and places of worship.[86] Such objects *may* become military in nature, and thus subject to attack, if they are used for a military purpose.[87]

None of these totally prevent the use of force against civilian objects. Instead, Rule 14 is formulated so as to prohibit the launching of attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof' that 'would be excessive in relation to the concrete and direct military advantage anticipated'.[88] The conduct of military operations must be conducted with 'constant care...to spare the civilian population' and that all feasible precautions must be taken to avoid and minimise incidental loss of civilian life and damage to civilian objects.[89] More specific rules relating to the destruction of property are also considered in the ICRC Study. Rule 50 prohibits the destruction of

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[83] Henckaerts (n 82) 28.
[84] ibid 26-27.
[85] ibid 32; This is part of the principle of distinction, see *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep 1996, p. 226, para.78.
[86] ibid 34.
[87] ibid.
[88] Henckaerts (n 82) Rule 14.
[89] Henckaerts (n82) 51; Schmitt suggests that such consequences can be minimised by the increased use of precision munitions: Michael Schmitt, 'Precision Attack and International Humanitarian Law' (2010) 87 *ICRC* 445, 453.

the adversary's property unless required by imperative military necessity.[90] Private property must be respected and may not be confiscated *except* where the destruction or seizure of property is required by 'imperative military necessity'.[91] Furthermore, the property rights of displaced persons are to be respected.[92] Rules 14 and 50 highlight the prohibition of the use of force leading to the unnecessary destruction of property.

A relevant provision relating to the destruction of property is the customary prohibition of pillage and looting.[93] Several international instruments have prohibited pillage. For example, the Lieber Code, Oxford Manual and the Hague Regulations all outlaw pillage. A definition of pillage is provided in the Australian Commanders' Guide which defines the act as being the 'violent acquisition of property for private purposes'.[94] The Canadian Code of Conduct for its military states although a 'battlefield and destroyed civilian areas offer attractive objects for the curiosity seeker' the taking of souvenirs is prohibited because looting is theft.[95] The duty to prevent pillage could also extend to the forces of an occupying power. For instance, following the US-led invasion of Iraq in 2003 there was widespread looting by Iraqi nationals. This was linked to a more widespread breakdown in civil order following the invasion.[96]

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[90] Henckaerts (n82) 176.
[91] ibid .
[92] ibid 473; see *Loizidou v. Turkey* (Application no. 15318/89) Judgment, 18 December 1998, para.64
[93] Henckaerts (n 82) 182.
[94] Australian Commanders' Guide available at http://www.icrc.org/customary-ihl/eng/docs/v2_cou_au_rule52 (Accessed 17 March 2014).
[95] Canadian Code of Conduct available at http://www.icrc.org/customary-ihl/eng/docs/v2_cou_ca_rule52 (Accessed 17 March 2014).
[96] Knut Dormann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict' (2004) 47 *German Yearbook of International Law* 293, 308; Matthew Thurlow, 'Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law' (2005) 8 *Yale Human Rights and Development Law Journal* 153, 153.

5.2.2 - IHL treaty law and the destruction of property

Since the Hague Convention 1907, there has been a trend towards prohibiting the wanton destruction of civilian property. Article 25 of the Hague Convention prohibits attacks against undefended towns. Brilmayer and Chepiga explain such a prohibition as being to counter scorched earth tactics adopted by armies throughout history.[97] AP I offers the most detailed provisions relating to the destruction of property. Article 48 of AP I codifies the principle of distinction between combatants and non-combatants (e.g. civilians and combatants *hors de combat*). Under this provision, military operations are to be only directed against military objectives.[98]

The principle of distinction and the related concept of causing unnecessary suffering is discussed in the ICJ *Advisory Opinion on the Threat or Use of Nuclear Weapons*. The ICJ held that IHL has long prohibited certain types of weapons because of their discriminatory effects of the amount of suffering they caused.[99] The Court also noted that the principle of distinction has broad acceptance amongst States and thus would bind even non-States Parties.[100] Indiscriminate attacks are prohibited by Article 51(4) and (5). Article 51(4)(a-c) defines an indiscriminate attack as being attacks not directed against a military objective; an attack conducted by a method or means of attack which cannot be directed at a military objective; or by using a method or means of attack whose effect cannot be limited. The lack of limitations on the effects increases the likelihood that the attack will affect objects without distinction.

Articles 50 and 51 clarify the protection afforded to civilians and the civilian population in general. Articles 52-54 protect civilian objects. Article 52(2) specifies

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[97] Lea Brilmayer and Geoffrey Chepiga, 'Ownership or Use? Civilian Property Interests in International Humanitarian Law' (2008) 49 *Harvard International Law Journal* 413, 414.
[98] AP I, art 48.
[99] *Legality of the Threat or Use of Nuclear Weapons* (n 85) para.78.
[100] ibid para.79; see David Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law' (2005) 99 *AJIL* 88, 93-94; Ardi Imseis, 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion' (2005) 99 *AJIL* 102.

that attacks shall be limited to military objectives, namely objects 'which by their nature, location, purpose or use make an effective contribution to military action'. Article 53 protects cultural objects and places of worship, and Article 54 protects 'objects indispensable to the survival of the civilian population'. Taken as a whole, the above provisions of AP I offer a clear exposition of the law surrounding the targeting, and destruction, of property.

A further issue relating to the destruction of property is that of the proportionality of an attack.[101] It has been noted that proportionality is not in itself a rule of conduct but rather a rule requiring the balancing of 'antagonistic values'.[102] Article 51(5)(b) prohibits attacks which, inter alia, may be expected to damage civilian objects where the damage 'would be excessive in relation to the concrete and direct military advantage anticipated.'[103] The significance of Article 51(5)(b) is that it recognises harm to civilians and damage to civilian property is frequently an unavoidable consequence of military attacks.[104] Schmitt concludes his analysis by noting that the rule imposes an objective and subjective standard on military commanders. It is objective because a commander 'will be charged with the knowledge that he should have possessed had he taken reasonable steps' to make an assessment of the situation. On the other hand, it is subjective because it is conducted in light of the information available. In essence, the working standard is 'more likely than not'.[105] IHL therefore recognises that civilian casualties and the destruction of civilian property is unavoidable in times of armed conflict, be the conflict international or non-international in nature.

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[101] Gardem (n 76) 404.
[102] Enzo Cannizzaro 'Contextualizing proportionality: jus ad bellum and jus in bello in the Lebanese War' (2000) 864 *IRRC* 779 (2000) 787.
[103] AP I, art 51(5)(b).
[104] Michael N. Schmitt, 'Targeting in Operational Law' *in* Dieter Fleck and Terry D. Gill (eds) *The Handbook of the International Law of Military Operations* (OUP 2010) 257.
[105] ibid 258.

Article 50 of GC I specifies that the 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' is to be considered a grave breach. Those who violate Article 50 are liable to arrest, trial and imprisonment.[106] GC IV prohibits the destruction of real or personal property belonging, *inter alia*, to private persons unless the destruction is absolutely necessary for the conduct of military operations.[107] It makes the 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' a grave breach and thus a serious criminal offence.[108]

The Statutes of the international criminal tribunals and courts offer some further guidance on the prohibition of the destruction of property in treaty law. The Nuremberg IMT Statute criminalised as war crimes acts of plunder and 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity.'[109] In similar fashion, Allied Control Council Law no.10 copied the wording of Article 6(b) of the IMT Statute, making such acts an offence at the subsequent Nuremberg tribunals. Nuremberg also considered the plunder of works of art and other cultural property. The targeting of cultural property has been a feature of many historical invasions. This has been attributed to a desire for wealth and dominance of the populace.[110] By condemning such acts of looting the international community effectively recognised the cultural value of items such as works of art.

The ICTY Statute recognises the destruction of property in Article 2. This criminalises grave breaches of the Geneva Conventions and thus prohibits 'extensive

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[106] see GC I, art 49.
[107] GC IV, art 53.
[108] GC IV, art 147.
[109] IMT Statute, art 6(b).
[110] Matthew Lippman, 'Art and Ideology in the Third Reich: The Protection of Cultural Property and Humanitarian Law of War' (1998) 17 *Dickinson Journal of International Law* 1, 1.

destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly',[111] and Article 3(e) prohibits plunder and pillage of property. The ICTR Statute criminalises pillage (as a violation of common Article 3 to the Geneva Conventions)[112] but does not criminalise the destruction of property recognised as a grave breach or as in Article 2 of the ICTY Statute. The Statute of the ICC criminalises grave breaches of the Geneva Conventions,[113] 'intentionally directing attacks against civilian objects, that is, objects which are not military objectives'[114] and pillage.[115] Protection is extended to non-international armed conflicts in Article 8 by the prohibition of pillage,[116] although the protection otherwise afforded to civilian property is limited more than if the acts took place in the context of an international armed conflict.[117]

5.2.3 - IHL case law and the destruction of property

The international tribunals have been particularly active when discussing whether a given instance of property destruction was proportionate in the circumstances and whether or not it conformed to the principle of distinction as provided for in the relevant international instruments. Similarly, the courts have paid some attention to the crimes of pillage and the taking of plunder by soldiers or paramilitaries. The various courts have developed the statutory prohibitions against property contained in

[111] ICTY Statute, art 2(d).
[112] ICTR Statute, art 4(f).
[113] ICC Statute, art 8(2)(a)(iv).
[114] ICC Statute, art 8(2)(b)(ii).
[115] ICC Statute, art 8(2)(b)(xvi); see Yaron Gottlieb, 'Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC' (2004) 23 *Penn State International Law Review* 857, 874.
[116] ICC Statute, art 8(2)(e)(v).
[117] The protection afforded by common art 3 concerning the wanton destruction of property has been removed from the relevant provisions of the ICC Statute. However, art 8(2)(e)(xii) does prohibit the 'Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict'.

the treaties. The ICTY has also considered instances in which cultural property was damaged during armed conflict.[118]

At Nuremberg, the behaviour of the Nazis towards the plundering and looting of property was described by the prosecution as 'premeditated and systematic'.[119] The Tribunal noted private art collections were robbed, libraries emptied of valuable stock and private houses were pillaged by elements of the Nazi German State.[120] Attempts to prosecute Nazis for the extensive destruction of civilian property were abandoned because the Allies had themselves undertaken policies that led to the widespread destruction of Axis property.[121]

Subsequent tribunals at Nuremberg also considered property damage and pillage as war crimes. In *Pohl et al* the defendants were charged with looting and plunder. The Court noted the 'ruthless depravity' of such actions was not confined to individuals or isolated units but used as part of a 'general military policy'.[122] This general policy was ultimately focused on winning the war at whatever cost to the civilian populations of occupied Europe as was deemed expedient and necessary. In *Von Leeb*, the destruction of property and pillage were examined in greater detail. In this case, all the defendants were charged with unjustified devastation, wanton destruction and plunder of both public and private property. The Court reaffirmed the point made in *Pohl* and at Nuremberg that such measures took place 'pursuant to a deliberate design and policy of the German Armed Forces.'[123] Evidence was cited to demonstrate the effects of such policy. When Russia was invaded by the Germans, an

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[118] See Hirad Abtahi (n 8) 1.
[119] *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 *AJIL* 172,237.
[120] ibid 238.
[121] Richard Overy, 'The Nuremberg trials: international law in the making' in Philippe Sands (ed) *From Nuremberg to the Hague: The Future of International Criminal Justice* (CUP 2003).
[122] *US v. Pohl et al*, Judgment of 3 November 1947, vol. V (United States Government Printing Office: Washington) 976.
[123] *US v. Leeb et al* 'The High *Command Case*', Judgment of 27-28 October 1948, vol. X (United States Government Printing Office: Washington) 39.

order was promulgated permitting the pillage of any goods that could not be supplied by the Wehrmacht 'without regard for the local population'.[124] The implementation of such a policy would inevitably lead to the unnecessary suffering of the civilian population particularly in the Russian winter. Further military orders included that issued by Manstein that provided, *inter alia*, any land to be surrendered to the enemy was to be rendered unusable.[125] Likewise, any village was to be destroyed without regard for the civilian population.[126] Similar orders related to the destruction of livestock and crops. For instance, one order saw the seizure of 40,000 tons of corn, a tenth of which was destroyed by throwing it into the Dnepr River.[127] Orders destroying such foodstuffs could potentially be viewed as justified if the destruction would impact on the ability of the military to wage war. However, if it was to affect the civilian population it could lead to increased suffering of civilians. Thus the proportionality and effect of such actions would have to be considered.

Several cases before the ICTY have considered the destruction of civilian property and its definition. These have taken place within the framework provided by either Article 2(d) or Article 3 of the ICTY Statute.[128] This section begins by firstly examining the *actus reus* of the offence. It is thus necessary to consider how the term 'civilian' has been construed by the Court, followed by 'destruction' and the 'property'. Further elements considered will be those of proportionality and the principle of distinction. Secondly, the two elements of *mens rea* are considered, namely intentionally destroying civilian property or being reckless as to its destruction.

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[124] ibid.
[125] ibid 40.
[126] ibid.
[127] ibid.
[128] As discussed above, 274.

Fundamental to any discussion of the relevant law relating to the destruction of property is the definition of property itself. In *Kordić and Čerkez*, the Court adopted a wide definition of property stating that it included both public and private property. Thus, the destruction of an individual's house would be seen as comparable to the destruction of a publicly owned building, for example a school.[129] In addition to recognising a distinction between public and private property, IHL acknowledges that real property and personal property can be destroyed. For instance, destroying a house may amount to unlawful destruction but so might the destruction of farm machinery or vehicles.[130] By drawing the law as wide as possible, IHL provides the greatest range of protection that can be offered within the existing framework. An additional point to highlight here is the role civilian property plays in IHL. Given the focus of IHL on the protection of civilians from acts such as torture, enforced disappearance and sexual violence, the protection of property might seem trivial. However, in *Strugar* the ICTY noted that the protection of civilian objects is a necessary complement to the protection of the civilian population.[131]

In *Galić*, the Trial Chamber examined the definition of a 'civilian' as set out in several international instruments such as Additional Protocol I and the Third Geneva Convention. It held a civilian is any individual not a member of the armed forces or an organised military group party to the conflict.[132] This is an important definition because it serves to distinguish one category of people (civilians) from another (military), and while the latter may be directly targeted, the former cannot. The judgment contains several caveats to this prohibition, recognising that in certain situations civilians might themselves be the victims of an attack for which the attacker

[129] *Prosecutor v. Kordić & Čerkez* (IT-95-14/2) TC, Judgment, 26 February 2001, para.331.
[130] ibid para.331.
[131] *Prosecutor v. Strugar* (IT-01-40) TC, Judgment, 31 January 2005, para.225.
[132] *Prosecutor v. Galić* (IT-98-29) TC, Judgment, 5 December 2003, para.47.

may not be held liable.[133] For example, if civilians take up arms against the opposing military force he loses his protection because it is deemed he abused his rights and thus can be considered legitimate military targets.[134] Other circumstances in which civilians *may* lose their protection under IHL are set out in *Kupreskic*. These include when they are victims of collateral damage and when they are subjected to reprisals.[135] On this point, the Court was far from certain as to whether this constituted a valid ground.[136] However, the idea that reprisals are now an historic curiosity remains questionable. The British military manual published after *Kupreškić* states that reprisals are permissible in certain circumstances.[137] The idea that reprisals are prohibited under customary IHL is also questionable.[138]

The second ground of *Kupreškic* concerns collateral damage. This is important because it recognises the principle that in certain situations the destruction of civilian property and civilian casualties are unavoidable, even if the attacking party takes the utmost care. Such collateral damage should be distinguished from deliberate attacks against civilians which the ICJ in the *Nuclear Weapons Advisory Opinion* deemed were absolutely prohibited by IHL.[139] In *Blaskić*, the ICTY stressed that an offence is committed when civilians or civilian property are targeted when such targeting is not justified by military necessity.[140] In *Martić*, the Court again recognised that civilian casualties 'incidental to an attack aimed at military targets' may be unavoidable in the

[133] It worth highlighting the point that an 'attack' is defined in Additional Protocol I 51(2).
[134] *Galić* (n 132) para.48.
[135] *Prosecutor v. Kupreškić* (IT-95-16-T) TC, Judgment, 14 January 2000, para.522.
[136] Instead it was added for completeness. Given incidental nature of this point to the present inquiry it will not be considered further. *Kupreškić* ibid paras.527-536.
[137] UK Ministry of Defence, *Manual of the Law of Armed Conflict* (OUP 2004) 421.
[138] Michael Schmitt, 'Military Necessity and Humanity in International Humanitarian Law' (2010) 50 *Virginia Journal of International Law* 795, 820-821.
[139] *Legality of the Threat or Use of Nuclear Weapons* (n85) para.78.
[140] *Prosecutor v. Blaškić* (IT-95-14) TC, Judgment, 3 March 2002, para.180.

circumstances. However, these must not be disproportionate to the ends sought, that is to say they must be deemed necessary to the ends.[141]

Two closely related concepts requiring further explanation are 'military necessity' and 'wanton destruction'. In *Naletilić and Martinović*, the *actus reus* of wanton destruction was determined to be the large scale destruction of property not justified by military necessity.[142] This affirmed the previously established criteria set out in *Kordić and Čerkez*.[143] However, there exists a distinction between wanton destruction as a grave breach of the Geneva Conventions incorporated in Article 2 of the ICTY Statute and wanton destruction as a 'violation of the laws or customs of war' as it is included in Article 3 of the Statute. The second of these relates to the customary norms of IHL rather than the formally enumerated elements of the Geneva Conventions. Despite this difference, the inclusion of the two offences can be seen as evidence for the acceptance of both treaty and customary law as sources for IHL and their equal validity for the prosecution of individuals who violate the norms. The differences between Article 2 and 3 will now be examined in more detail.

The definition of 'military necessity' has not been considered by the ICTY.[144] Hayashi believes the terms 'wanton destruction' and 'not justified by military necessity' are functionally synonymous.[145] There is evidence to support such an assertion. For example, the ICTY has held that the destruction of houses belonging to a particular ethnic or national group for no reason other than to prevent habitation by the target group can never be justified by military necessity.[146] Furthermore, Hayashi

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[141] *Prosecutor v. Martić* (IT-95-11-T) TC Judgment, 12 June 2007, para.69.
[142] *Prosecutor v. Naletilić & Martinović* (IT-98-34) TC, Judgment, 31 March 2003, para.578.
[143] *Kordić* (n 129) para.330.
[144] Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28 *Boston University International Law Journal* 39, 101.
[145] ibid 106.
[146] *Kordić* (n 129) para.332.

notes that the jurisprudence of the ICTY and customary IHL demonstrate that large-scale and unnecessary property destruction amounts to a war crime.[147]

In *Naletilić and Martinović* the Court identified two types of property protected by the grave breaches regime. The first was property that carried a general protection under the Geneva Conventions for instance hospitals, medical aircraft and ambulances.[148] The second is found in Article 53 of GC IV, namely property located in occupied territory whose destruction is not absolutely necessary for the conduct of military operations.[149] This approach limits the protection of property to either vital buildings such as hospitals (limb one of the above test), or to property located in occupied territory (limb two of the above test). The result of this approach is that the destruction of property which is located in territory not occupied by the attacker does not amount to a grave breach as per Article 2. 'Occupation' has been defined as being in administrative control of the relevant area.[150] In situations where fighting was continuing in an area, it was not possible to say that the attacker was in sufficient control of the territory to engage Article 2 of the Statute. This was held to include 'mopping up' operations, in the course of which property was destroyed or damage as forces conducted house clearing operations and searches for enemy combatants.[151]

In contrast, Article 3 of the ICTY Statute is drawn in a wider and more expansive fashion than Article 2. To engage responsibility under Article 3, no proof of occupation of territory is required.[152] Furthermore, Article 3 operates even when the property destroyed is located within enemy territory and thus not under the

[147] Hayashi (n 144) 106-7.
[148] *Naletilić* (n 142) para.575.
[149] ibid para.575.
[150] ibid para.588.
[151] ibid para.588.
[152] ibid para.589.

effective occupation of the attacking force.[153] This follows the reasoning of the Appeal Chamber in *Hadzihasonovic* where it was held that the protection of civilians and civilian property during armed conflict are not to be deemed contingent on the location of the objects. As such, their location was not to deprive them of protection.[154] The Tribunal's reasoning here was based on the criteria set down in *Tadic* where it was held that Article 3 of the Statute confers jurisdiction over any serious offence committed in either an international or non-international armed conflict that is not covered by Articles 2, 4 or 5 of the Statute.[155]

Indiscriminate attacks can themselves amount to a direct attack on civilians.[156] Indiscriminate attacks, by definition, fail to distinguish between military and non-military (i.e. civilian) targets. Such attacks fail to spare civilians 'as much as possible'.[157] The *Galic* judgment highlights the fact that certain, apparently disproportionate, attacks may themselves give rise to the inference that civilians were themselves the actual object attack.[158] When sentencing Jokic for his part in the shelling of Dubrovnik, the Court underscored the 'grave and lasting consequences' that would flow from shelling a populated town.[159] This was seen as an aggravating factor.[160] Other examples of indiscriminate attacks could include attacks against military targets located within civilian areas with so-called 'dumb munitions' e.g. an

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[153] ibid para.580.
[154] *Prosecutor v. Hadzihasonović & Kubura* (IT-01-47) AC, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, 11 March 2005, para.27.
[155] *Prosecutor v. Tadić* (IT-94-1) AC, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para.87: 'Article 3 may be taken to cover *all violations* of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under art 2 (or, for that matter, the violations covered by arts 4 and 5, to the extent that arts 3, 4 and 5 overlap).'
[156] *Prosecutor v.* Perisić (IT-04-81) TC, Judgment, 6 September 2011, para.97.
[157] Galić (n 132) para.58; See Robert Cryer, 'Prosecutor v. Galic and the War Crime of Terror Bombing' (2005) 2 *IDF Law Review* 75; Daniela Kravertz, 'The Protection of Civilians in War: The ICTY's *Galić* Case' (2004) 17 *LJIL* 521.
[158] *Galić* ibid para.60.
[159] *Prosecutor v. Blagojević & Jokić* (IT-02-60) TC, Judgment, 17 January 2005, para.44.
[160] ibid.

unguided bomb.[161] For instance, carpet-bombing a town because a military headquarters is located in the central business district would be indiscriminate. Furthermore, the failure of the opposition to avoid citing military objectives within or proximate to civilian areas does not relieve the attacker from the duty to abide by principles of distinction and proportionality.[162]

The mental element of the targeting of civilians and their property can be fulfilled in one of two ways: either direct intent or recklessness. First, the deliberate and intentional targeting of civilians and property can give rise to liability in the same way that deliberately and intentionally killing a person amounts to murder or wilful killing. The second mental element causes greater, but not insurmountable, problems. In *Kordic and Cerkez* the Trial Chamber analysed the requirements of reckless and held that it amounts to an 'extreme indifference to the substantial likelihood of destruction of protected property' resulting from the conduct in question.[163] The targeting of civilians was a central element in *Galić*. In this case the ICTY found that the grave breach of targeting civilians must be done wilfully, a concept which includes recklessness beyond 'mere negligence'.[164] It would be sufficient for the prosecution to demonstrate that an accused was aware or should have been aware of the civilian status of the persons attacked.[165] Such a reading by the Court introduces a pragmatic element to its decision making, recognising, for example, an accused should realise shelling a city centre would likely result in civilian deaths. Thus, judicial organs have been willing to condemn the wanton destruction of property.

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[161] See William Boothby, *Weapons and the Law of Armed Conflict* (OUP 2009) Chapter 6.
[162] *Galić* (n132), para.61.
[163] *Kordić* (n 129) para.332.
[164] *Galić* (n 132) para.54.
[165] ibid para.55.

5.2.4 - Pillage, plunder and looting under IHL at the ICTY

The terms pillage, plunder and looting have been described as 'war crimes as the more traditional type'.[166] Precisely what this means is unclear but it could suggest recognition by the Trial Chamber that such offences are well-founded in the history of IHL. In *Simic* the court examined the linguistic differences between the terms 'plunder' and 'looting' concluding that they are often as synonyms for the same offence.[167] The differences were also discussed in *Mucić* where the Court held that the term 'plunder' embraced 'all forms of unlawful appropriation of property' committed during an armed conflict, including 'acts traditionally described as pillage'.[168] In *Jelisić* a further definition of plunder, relating to money, was offered where it was defined as 'the fraudulent appropriation of public or private funds belonging to the enemy or opposing party'.[169] Despite the connotations such terms have with the use of violence to expropriate property, the use of violence is not a necessary component although it may be present.[170] In the language of domestic law, it can include acts amounting to both theft and robbery. Plunder is an offence whether it takes place during an international or non-international armed conflict.[171] This section considers the necessary physical elements of the offence before introducing the requisite mental element.

The lawfulness of taking certain items of property has been recognised by the ICTY. For instance, in *Martić* the Court held that one party to the conflict is able to seize battlefield equipment as 'war booty'.[172] Such equipment amounts to *materiel*

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[166] *Prosecutor v. Mucić et al* (IT-96-21) TC, Judgment, 9 October 2001, para.590.
[167] *Prosecutor v. Blagoje Simić* (IT-95-9) TC, Judgment, 17 October 2003 , para.98.
[168] *Mucić* (n 166) para.590-1.
[169] *Prosecutor v. Jelisić* (IT-95-10-T) TC, Judgment, 14 December 1999, para.48.
[170] *Mucić* (n 166) para.591.
[171] Hadzihasonović (n 154) para.125.
[172] *Martić* (n 141), para.102.

such as weapons, vehicles and artillery pieces.[173] The ICTY has however highlighted the point that in a non-international armed conflict the war booty principle is not regulated by IHL but rather by domestic law.[174] In contrast to the legitimacy of the war booty principle is the criminalisation of the illegal acquisition of private property. Such acquisition can be committed either by soldiers acting in a private capacity or by an organised and directed seizure of property.[175] This latter point may amount to 'a systematic economic exploitation of occupied territory.'[176] For example, by allowing State sponsored companies or individuals to extract minerals or energy resources from a territory for the benefit of the occupying power.

Not every act of theft or robbery by a soldier automatically amounts to pillage or plunder. In *Martic*, it was held items taken must be of a sufficiently high monetary value so that its removal will result in 'grave consequences' for the victim.[177] This provision is derived from the principle outlined in *Mucić* where the Court held that for a violation of IHL to be considered 'serious' it must conform to two criteria. First, the alleged offence is one that constitutes a breach of a rule protecting important values. Second, the breach of that rule has grave consequences for the victim.[178] In determining the harm caused the Court should take into account the overall effect such acts have had on civilians and the multitude of offences committed.[179] This latter element restricts the application of the law to widespread acts of plunder rather than isolated and sporadic incidents. The mental element of the offence is relatively simple. All that is required is either that the perpetrator acted with the knowledge and intent to acquire property unlawfully, or that the consequences of his actions were

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[173] *Prosecutor v. Hadzihasonović & Kubura* (IT-01-47) TC, Judgment, 15 March 2006, para.52.
[174] ibid .
[175] *Hadzihasonović* Decision on Motions for Acquittal (n 154) para.127.
[176] ibid.
[177] *Martić* (n 141) para.103.
[178] *Mucić* (n 166) TC, Judgment, 9 October 2001, para.1154.
[179] *Martić* (n 141) TC Judgment, 12 June 2007, para.103.

foreseeable.[180] The qualification of only acts resulting in 'grave consequences' for the victim is ambiguous. For instance, 'grave consequences' could result in a purely financial loss to the victim e.g. where the perpetrator steals goods of monetary value; or a more immediate loss that threatens the victim's survival such as food.

5.2.5 - Conclusion on IHL and the destruction of property

The violation of property during an armed conflict can be divided into two broad categories of offence: the destruction of property and looting, pillage or plunder. The consequences of such acts for the victim are similar in that they will be prohibited from using the item of property in question. One possible distinction between the two is that looting, pillaging and plundering could affect movable items of property while destroying property could equally affect both movable and immovable property such as buildings.

That the IHL regime recognises the value of protecting property serves as a reminder that destroying an individual's means of existence can have the same effects as directly killing him or her. This can be seen in the Nineteenth Century prohibitions against plunder and looting, although such prohibitions could equally be seen as ensuring that military discipline in the attacking force was maintained. The Hague Convention 1907 recognised that reparations would be payable to individuals whose property was damaged during an armed conflict. This could have been intended to have the dual effect of curtailing property damage by ensuring belligerents refrained from targeting civilian property and of providing compensation if property was damaged. This is linked to wider recognition in international law that the damage of property by States grants its owner a right to compensation.[181]

The destruction of property under the IHL regime rests on the principle that the destruction of property is permissible if that property amounts to a military objective. If the object is civilian in nature then it is protected. However, this broad-based principle belies the intricacies explored above. For instance, collateral damage of civilian property is permissible in certain situations providing the amount of force

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[180] *Hadzihasonović* (n 173) para.50.
[181] See Alexander Fachiri, 'Expropriation and International Law' (1925) 6 *BYIL* 159; John Fischer Williams, 'International Law and the Property of Aliens' (1928) 9 *BYIL* 1.

is proportionate and necessary. In this sense, the provisions relating to the destruction of property under the IHL are a lot more flexible than those found under the ECHR regime.[182] This is reflective of the idea that IHL recognises that armed conflict is inevitable and thus seeks to regulate that conflict, whereas IHRL aims to ensure rights at all times.

Identifying a definition of the protection of property in IHL is firstly dependent on the existence of an armed conflict of sufficient intensity to at least trigger the operation of Common Article 3. Protection is afforded in both international and non-international armed conflicts. Two aspects relevant to the protection of property are those of proportionality and the principle of distinction. Both of these concepts operate to protect property to a greater or lesser extent. The principle of distinction firstly requires attacking forces to distinguish between military objectives and civilian objectives. Proportionality operates to ensure that collateral damage is to be expected when attacking military objectives and that these are proportionate to the ends sought. Should the damage outweigh the objective then the acts could be disproportionate. Further considerations concern the applicability of the law to both State and non-State actors. It would appear to be in accordance with other rules of IHL that property be protected from the actions of State forces and non-State actors such as guerrillas. The range of protected property also appears wider than that which is protected under IHRL. Public, private and cultural property receive at least some measure of protection. The emergence of a distinct body of rules within the IHL regime could be seen as evidence for greater formal recognition of law. In turn this can counter the effects of the fragmentation of international law by the establishment of a core set of rules applicable to the IHL regime.

5.3 - Destruction of property and the ICL regime

The ICL regime generally lacks specifically defined crimes relating to property. In part this could be because it is focused largely on immediate threats to human dignity such as torture, enforced disappearance and rape. It can also be said to reflect the concern the ICL regime has with the prosecution of individuals for serious acts of criminal violence rather than the protection and restitution of property. The regime also offers only limited protection of property during widespread or systematic attacks

[182] The ECHR is referred to here because it is the only IHRL regime that offers a developed definition of the destruction of property.

against a civilian population or throughout acts of genocide. The ICL regime is comparatively lacking in provisions relating to the protection of property. However, as will be seen in the following section certain provisions could be used to ensure that property is protected by the ICL regime.

5.3.1 - ICL treaties and the destruction of property

Despite the recent growth of ICL, the regime's protection of property is minimal. There are however a number of crimes which could possibly encompass the destruction of property, pillage and plunder. Article 6(c) of the ICC Statute criminalises acts of genocide which deliberately inflict 'on the group conditions of life calculated to bring about its physical destruction in whole or in part'. The ICTY and ICTR Statutes contain identical provisions,[183] as does the Genocide Convention 1948 on which the provision is originally based.[184] It would be possible to envisage a scenario in which houses were destroyed with the intent to deprive the targeted national, ethnic, racial or religious group of shelter thereby imposing on them conditions calculated to destroy the group.[185]

The laws concerning crimes against humanity that could be utilised to prosecute individuals are the either the umbrella offence of persecution or the 'other inhumane acts' category of crimes. Both offences have been incorporated into the Statutes of the international tribunals and the ICC.[186] Of particular use to any prosecution of an accused under the ICC Statute is the crime of persecution contrary to Article 7(1)(h). Under this Article, persecution can be committed against 'any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law'. Any act which the Statute criminalises can be committed with persecutory intent.[187] The Statutes of the ICTY and ICTR are not as widely drawn as this provision, they merely state that it is an offence to conduct persecutions based on political, racial or religious grounds.[188] Such

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[183] ICTY Statute, art 4(2)(c); ICTR Statute, art 2(2)(c).
[184] Convention on the Prevention and Prohibition of Genocide, 9 December 1948, A/RES/260, art 2(c).
[185] A similar line of reasoning has been used at the ICTY with regard to persecution as a crime against humanity, as discussed below. See *Kordić* (n 129) para.205.
[186] ICTY Statute, arts 5(h) and (i); ICTR Statute, arts 3(h) and (i); ICC Statute, art 7(1)(h) and (k).
[187] ICC Statute, art 7(1)(h).
[188] ICTY Statute, art 5(h); ICTR Statute, art 3(h).

prohibitions do not explicitly make reference to property meaning that should mass appropriation or destruction of property occur the ICC would have to adopt a more creative interpretation of the law if it was to find an accused guilty.

5.3.2 - Case law

The destruction of property within the context of genocide and crimes against humanity has received little judicial attention. However, there are a handful cases which provide some illumination of pertinent legal principles. Firstly, *Kupreskic* established that persecution can be committed through discriminatory attacks against political, social and economic rights.[189] This would include, for example, the appropriation of property belonging to a targeted group. Such a condition could be wide enough to include attacks against the property belonging to a particular group. In *Blaskic*, the Trial Chamber held that for plunder to be considered persecutory it would be necessary for the property to belong to a particular section of the population.[190] Having considered the law surrounding persecution and the destruction or pillage of property, the Court concluded that 'persecution' can relate not only to attacks that result in physical or mental harm to the victims, but also acts which 'appear less serious' such as the targeting of property.[191] Consequently, persecution could occur providing 'the victimised persons were specially selected on grounds linked to their belonging to a particular community.'[192]

In *Kordić and Čerkez* the Trial Chamber outlined a number of acts that could amount to constitute acts of persecution. In addition to murder, deportation and imprisonment, the ICTY recognised 'such attacks on property as would constitute "a destruction of the livelihood of a certain population.'[193] Also included in this list was the plunder of property.[194] Attacking civilian towns and villages would provide the 'factual matrix' for most other acts of persecution because it serves as a precursor to attacks against civilians themselves.[195] Acts of plunder are also recognised as persecution by the *Kordić and Čerkez* case. The Court here held that the provisions

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[189] *Kupreskić* (n 135) para.615.
[190] ibid para.234.
[191] ibid para.233.
[192] ibid para.233.
[193] *Kordić* (n 129) para.198.
[194] ibid.
[195] ibid para.203.

under crimes against humanity were essentially the same as those recognised under the 'violations of the laws of customs of war' category enumerated in Article 3 of the ICTY Statute.[196] Plunder and the destruction of property can be used to 'coerce, intimidate, terrorise and forcibly transfer' civilians from their homes as part of a campaign of ethnic cleansing.[197] Similar reasoning was used in *Simic* where the Court noted that acts of plunder were not charged as violations of IHL but rather as 'underlying acts of persecution'.[198]

5.3.3 - Conclusion on ICL and the destruction of property

The protection of property in ICL is limited and relatively weak if viewed in comparison to the prohibitions of torture, enforced disappearance and sexual violence. In part, this could be with the concern of ICL with the immediate protection of human dignity such as through the criminalisation of torture and rape. The effects of destroying property might not have such an immediate impact on the individual. However, the destruction of property belonging to 'any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender...or other grounds that are universally recognized as impermissible under international law' could be evidence of persecution.[199] It is doubtful whether 'other inhumane acts' under Article 7(1)(k) of the ICC Statute could be used to prosecute the destruction of property due to the requirement that such acts cause 'great suffering, or serious injury to body or to mental or physical health'. ICL appears therefore to lack specific provisions relating to the destruction of property, although such acts could amount to evidence of other criminals acts being committed.

Conclusion to Chapter Five

The destruction of property can amount to a violation of each of the three regimes examined in this chapter. Unlike torture, enforced disappearance and sexual violence which are always prohibited, an individual's right to enjoy property can be limited in certain circumstances. For instance, while the wanton destruction of property is absolutely prohibited in IHL, collateral damage to civilian property is permissible providing that the destruction was proportional and was necessary for the

[196] ibid para.205.
[197] ibid.
[198] *Simić* (167) para.102.
[199] ICC Statute, art 7(1)(h).

achievement of a military objective. The IHRL regime offers varied protection depending on the sub-regime. The Inter-American regime does contain provisions to protect property but until now this has been used mostly to protect the rights of indigenous peoples rather than to advance an individual's property rights. Contrast this with the use of ECHR Protocol 1, Article 1 that has been used in an expansive fashion to protect a range of rights from 'traditional' real property to newer issues such as intellectual property. Of the three regimes, the ICL regime presents the weakest protection of property. Any protection it affords would have to come from a wide reading of crimes against humanity and genocide laws, although the confiscation or destruction of a given group's property could be seen evidence of persecution or imposing on members of the group conditions intended to destroy the group.

The argument advanced through this thesis is that although the three regimes do prohibit the acts they do so by very different means. This reflects the differences between the three regimes with the IHRL regime primarily intended to protect the individual from the actions of States. In contrast, the IHL regime is focused more on the duties of belligerents rather than the rights of individuals but there are provisions for reparations for those whose property is damaged. The ICL regime is particularly concerned with punishing individuals thereby attempting to deter similar conduct in the future.

This chapter has broadly considered two violations of property rights. The first was the outright destruction of the property in question by whatever means. The second, the deprivation of property caused by looting, pillage or plunder (terms used interchangeably throughout both this chapter and the case law of the ICTY). Noticeable is the way in which each regime approaches the destruction of property in a different fashion. The human rights regime offers scant protection at the international level but greater, though not great, protection at the regional level (notably within the ECHR). In contrast, the IHL regime contains several well-defined provisions relating to the destruction of property and when such destruction can be considered legal. The ICL regime is closer to the IHRL regime in that provisions relating to the destruction of property are undeveloped or non-existent. The important point to note from the above chapter is that each regime follows its own legal rules and jurisprudence. This further supports the arguments advanced in this thesis that each regime can and should be viewed as functionally separate, able to exist without

reference to other regimes and, importantly, highlights the idea that the law of each regime is enforceable only within the relevant legal context of that regime.

Considering the definitions of the destruction of property under the three regimes reveals a number of substantial differences. The IHRL regime, as with other violations, is primarily concerned with preventing the violation of human rights relating to the property by the State or its agents. In contrast, the IHL and ICL regimes have been more willing to find that violations can be committed by non-State actors as well as those with a closer connection to the State. The IHL and IHRL regimes both appear to rely on the concept of proportionality in deciding if the destruction of property is lawful. The idea that plunder and pillage is prohibited appears to be common to the IHRL and IHL regimes with the relevant courts finding violations have occurred.

The fragmentation of international law can often lead to the emergence of stronger bodies of law. This has been seen in the law relating to torture, enforced disappearance and sexual violence. The protection of property does not receive comparable consideration across the three regimes. These differences could be taken as evidence that the fragmentation of international law is real, and that the formally recognised distinctions between the regimes maintain a degree of separation between them. However, as the three regimes are concerned with three different areas of law, the potential harm caused by fragmentation can be minimised by referring to the specific aims and objectives of each particular regime.

Conclusion

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The fragmentation of international law undoubtedly presents several theoretical problems to the international legal system. The purpose of this thesis has been to examine how the theoretical elements relate to the practical aspects of international law, with regard to four substantive issues of torture, enforced disappearance, sexual violence and the destruction of property. These four violations were then examined from the perspective of the three regimes of international human rights law, international humanitarian law and international criminal law. The violations were chosen because each finds condemnation and prohibition by each of the three regimes. Each regime also has a different approach to how these violations are defined. Such divergence between the regimes could be seen as *prima facie* evidence for the effects of fragmentation and the shift towards a more heterogeneous international legal system. It could then be suggested that this would lead to competition between the three definitions, leading to a loss of legal certainty and confusion as to which definition ought to be applied. However, these concerns do not consider the functional differences of the three regimes nor the fact that, while they ought not to be regarded as 'self-contained', they can and do operate independently from one another.

The aim of this final chapter is to draw together the arguments advanced in this thesis, summarise its analysis and state how the thesis contributes to advancing understanding of the fragmentation of international law and its effects. It begins by summarising the position adopted in Chapter One of the thesis alongside the content of the substantive chapters (Two to Five). It then proceeds to review the implications of fragmentation for international law, followed by consideration of some alternative

approaches to that adopted in this thesis. The final section considers the future implications for international law caused by fragmentation and the contribution this thesis makes to the field of study.

The thesis in summary

The fragmentation of international law covers a wide-range of issues from international trade law to international environmental law. The areas chosen for study in this thesis were international human rights law, international humanitarian law and international criminal law. These were chosen because each addresses the substantive issues of torture, enforced disappearance, sexual violence and the destruction of property. Before considering the focus of Chapters Two to Five, it is necessary to first reflect on the fragmentation of international law itself which was the subject of the first chapter.

Fragmentation has emerged, according to one account, to address particular areas problematic to the operation of general international law.[1] Thus one definition of fragmentation could be that it means the emergence of various regimes, termed 'exotic' by the International Law Commission,[2] aimed at addressing different issues. This can be seen, for example, in the existence of the IHRL, IHL and ICL regimes despite apparent *prima facie* similarities such as the protection of human dignity. These separately functional regimes inevitably lead to divergence but such divergence does not necessarily lead to a conflict between them.[3] However, in certain instances the potential exists for the separate regimes to address the same similar fact conduct, leading to concern that the international legal system is being weakened by the

[1] Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197, 205.
[2] *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 13April 2006, UN Doc. A/CN.4/L.682 ('ILC Report on Fragmentation') para.8.
[3] Wilfred Jenks, 'The Conflict of Law Making Treaties' (1953) 30 *BYIL* 425, 425.

proliferation of regimes.[4] Such concern sees the debate on fragmentation being framed in the language of conflict and collision, reinforcing the notion that the fragmentation of international law is inherently negative and to be avoided at all costs. Despite such views being prevalent it is possible to speculate that they are driven by a desire to fashion a concept of international law with universal definitions. This view is recognisable in the attempts to 'constitutionalise' international law, an issue which is beyond the scope of the present enquiry but reveals the trend towards the universilisation of international law.

One possible response to fragmentation is to adopt a more formalised account of international law. This can be said to combat the vagueness and uncertainty promoted by a policy-orientated approach to international law. In the policy-orientated approach 'law' and 'non-law' are seen as identical, with no formal distinction between legal instruments and policy instruments; in essence, law becomes 'everything'.[5] Accordingly, there is scope for the inclusion of contradictory positions to be adopted in the same body of law, a point akin to the conflict of legal regimes postulated because of fragmentation. However, the policy-orientated approach, despite its 'societal goals',[6] potentially exacerbates the effects of fragmentation by permitting the free-exchange of definitions between legally discrete regimes without recognition of each regime's legal traditions, procedure and rules. Such instrumentalism, it has been argued, leads to legal uncertainty because the formal existence of legal rules becomes nebulous, preventing those rules from giving meaningful commands.[7] Consequently, the fragmentation of international law has the

[4] Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2003) 25 *Michigan Journal of International Law* 849, 856.
[5] Anthony D'Amato, 'Is International Law Really "Law"?' (1984) 79 *North Western University Law Review* 1293, 1302.
[6] Jean d'Aspremont, *Formalism and the Sources of International Law* (OUP 2012) 105.
[7] ibid 29-30.

potential to lead to a loss of clarity because of the sheer number of possible definitions available to any given regime. This point can be seen in reference to torture, enforced disappearance, sexual violence and the destruction of property in the IHRL, IHL and ICL regimes. These were chosen to highlight the different approaches of the three regimes.

The IHRL, IHL and ICL regimes conform to Ratner's definition of a regime in that they aim to regulate certain types of conduct, albeit by different methods.[8] For example, the IHRL regime is primarily focused on State liability for human rights violations,[9] while the IHL and ICL regime consider individual culpability for violations of their rules. The IHL regime can engage both individual and State liability for violations as can be seen through the case law of the ICTY in respect of the former and the ICJ in the case of the latter.[10] Individual responsibility in the IHL regime has led to some of the greatest advancements in the field of sexual violence and command responsibility for instance. The ICL regime is particularly focused on individual criminal responsibility, a factor underscored in the Nuremberg judgment in which the IMT held that crimes against international law are committed by individuals and not the abstract entity of the State or other political organisations.[11]

The substantive chapters (Two to Five) provide evidence to support the assertion that the three regimes are different from one another. While there are

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[8] Steven R. Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 *AJIL* 475, 485.

[9] This can be seen through the state-centric nature of various human rights mechanisms such as the UN Human Rights Council, ECHR and Inter-American system.

[10] e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Jurisdiction and Admissibility) [1986] ICJ Rep 392 (27 June) para.115; *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, (A/56/10) art 8; In a different context see also Markus Rau, 'State Liability for Violations of International Humanitarian Law - The *Distomo* Case Before the German Federal Constitutional Court' (2005) 7 *German Law Journal* 701.

[11] *Trial of the Major War Criminals before the International Military Tribunal*, Nürnberg, 14 November 1945-1 October 1946, published at Nürnberg, Germany, 1947, p. 223, ; see also Andre Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 *ICLQ* 615, 619.

similarities between them, such as the definition of the physical act of torture, there are also sufficient differences to support Koskenniemi's view that several institutional projects are being carved out within the international legal system.[12] Thus differences between these can, to an extent, be overcome by reference to law rather than policy.[13]

Torture was chosen as the subject of the second chapter because it helps to clarify the differences between the three regimes. These differences lend themselves as support for the idea that a formal approach to international law can help relieve some of the tensions between the three regimes. The IHRL regime is focused on the protection of the individual from torture, inhuman or degrading treatment committed by State officials or with the complicity of State officials. Over time, the IHRL regime has expanded the definition of torture, inhuman and degrading treatment. This is particularly noticeable at the ECtHR which has termed the ECHR a 'living instrument'.[14] As a consequence, the ECHR can be interpreted so as to reflect the changing needs of society.

The IHL and ICL regimes have both drawn from the jurisprudence of the IHRL regime with regard to the definition of torture. This has been particularly noticeable in respect of defining the physical acts of torture as in *Aleksovski* where reference was made to the definition given in *Selmouni* at the ECtHR.[15] Such interaction between the regimes could be viewed as evidence for the idea that they are slowly fusing together, a position advocated by some who believe this is the best means of ensuring the continued protection of individuals in times of armed conflict

[12] Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *EJIL* 7, 9.
[13] ILC Report on Fragmentation (n 2) para.487.
[14] *Tyrer v.UK* (Application no. 5856/77) Judgment, 25 April 1978, para.31; *Selmouni v.France* (Application no. 25803/94) Judgment, 28 July 1999, para.101.
[15] *Prosecutor v. Aleksovski* (IT-95-14/1) TC, Judgment, 25 June 1999, para.56; *Selmouni* ibid, para.103.

or mass atrocity.[16] Importantly, however, the IHL and ICL regimes have not felt obliged to remain rigidly wedded to the definitions of the IHLR regime. For instance, in *Kunarac* the ICTY concluded that acts of torture could be committed by non-State actors thereby deviating from the IHRL definition of torture.[17] While this small change might appear insignificant, it can be viewed as evidence for the recognition of the IHL and ICL regimes that they are formally distinct from the IHRL regime and not bound by the latter regime's rules or definitions.

The third chapter examined the contemporary issue of enforced disappearance. This offence has a long history in international law stretching back to the Nuremberg IMT with the prosecution of individuals for the *Nacht und Nebel* decree that saw thousands of people disappear without a trace or recognition by the authorities. Since 1945 enforced disappearances have been used by regimes across the world from Argentina to contemporary Syria.[18] The regimes have had different responses to such acts. The IHRL regime has perhaps been most active in this regard, particularly in the Inter-American and ECHR sub-regimes. This has led to the creation of a substantial body of jurisprudence concerning such acts. The Inter-American and ECHR regimes have also recognised that the rights of relatives can also be violated in certain circumstances meaning that they themselves are indirect victims of human rights atrocities. Such jurisprudence has emerged despite the fact that the ECHR and Inter-American regimes both lack specific human rights violations of enforced disappearance. Instead, the Courts have approached the matter via a range of existing

[16] Francoise Hampson and Ibrahim Salama (2005) 'Working paper by Ms Hampson and Mr Salama on the relationship between human rights law and international humanitarian law' UN Doc: E/CN.4/sub.2/2005/14, para.31.
[17] *Prosecutor v. Kunarac et al* (IT-96-23 & 23/1) TC, Judgment, 22 February 2001, para.496.
[18] On Syria see Human Rights Watch, 'We've Never Seen Such Horror: Crimes against Humanity by Syrian Security Forces' (2011) Available at: http://www.hrw.org/sites/default/files/reports/syria0611webwcover.pdf (Last accessed 20 July 2013).

measures, for instance the right to life, the right not to suffer torture, inhuman or degrading treatment and the right not to be arbitrarily detained.

In contrast to the IHRL regime, the IHL and ICL regimes have been slower to respond to instances of enforced disappearance even though such acts are now prohibited by each of the regimes.[19] This disparity is noticeable because many acts of enforced disappearance occur in situations that could amount to armed conflict, for instance in Chechnya and Turkey. In these situations the victims' families have only had recourse to redress via IHRL. In part this could be because the acts of disappearance are committed by State agents and therefore military justice (one of the key methods of enforcing IHL rules) is potentially unavailable. Likewise, the ICL regime lacks the temporal jurisdiction to prosecute individuals for such offences, although in respect to new incidents the ICC could be able to prosecute an accused for the crime against humanity of enforced disappearance contrary to the ICC Statute. However, the definition of the offence given in both the Statute and the Elements of Crimes is incredibly complicated and rests upon the presence of several elements plus the requirement that such acts be committed within the context of a widespread or systematic attack on a civilian population. Together, these problems are not insurmountable but stand in contrast to the relatively easy approach taken by the IHRL regime even though it has in several cases declined to find that rights have been violated.

Sexual violence was chosen as the subject of the fourth chapter because of its importance in current international law and the wide-range of academic and judicial discourse related to it. As with enforced disappearance, the IHRL regime by and large lacks specific provisions relating to sexual violence. Instead, the ECHR and Inter-

[19] e.g. ICC Statute, Article 8(1)(k).

American regimes have developed their provisions through the lens of torture, inhuman or degrading treatment. In effect this has little practical consequence for the application of the law because rape and other acts of sexual violence would almost certainly meet the threshold for torture, inhuman or degrading treatment. Difficulties arise however when considering whether the acts of private individuals constitute torture, inhuman or degrading treatment. As was seen in Chapter Four, numerous writers view the lack of human rights protection afforded to women in the private sphere as deplorable.[20] They see all such acts as human rights violations because such acts understandably violate the victim's dignity. However, this viewpoint does not take into account the idea of human rights regulating the State-citizen relationship rather than the citizen-citizen relationship. Furthermore, in many States sexual violence is prohibited by the criminal law which can offer greater penalties and deterrent effect than can human rights law. That the criminal law is frequently found to be inadequate does not automatically mean that the best solution is to resort to human rights. Rather a stronger framework of protection could be developed by utilising domestic criminal law.

In contrast to the IHRL regime, the IHL and ICL regimes both contain much stronger overt prohibitions against sexual violence. While the wording of the Geneva Conventions has been criticised for referring to the 'dignity' of women rather than explicitly prohibiting sexual violence, [21] such wording could arguably be said to reflect the language prevalent at the time the Conventions were drafted. Additional evidence for the prohibition of sexual violence during armed conflict comes from customary IHL, particularly States' military manuals. In addition, cases before the

[20] Pamela Goldberg and Nancy Kelly, 'International Human Rights and Violence against Women' (1993) 6 *Harvard Human Rights Journal* 195, 195-196.
[21] Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5 *Hastings Women's Law Journal* 243, 249.

ICTY and ICTR have seen individuals prosecuted for rape,[22] sexual violence[23] and other sexualised crimes.[24] The ICTY Statute did not explicitly criminalise acts of sexual violence as violations of IHL, but instead as a crime against humanity.[25] Since the intervention of the judges in *Akayesu* there has arguably been greater awareness of sexual violence in both IHL and ICL. It will be recalled that it was a judicial intervention which led to the inclusion of rape on the indictment of Jean-Paul Akayesu. His subsequent conviction confirmed the notion that rape could amount to an act of genocide. The experiences of the ICTR have now been reflected in the ICC Statute which contains several provisions relating to sexual violence committed in times of armed conflict and as a crime against humanity. Similarly, genocide can be committed by acts of rape and other acts of sexual violence.[26] Taken together, this suggests that the IHL and ICL regimes recognise sexual violence as legitimate offences and, importantly, have taken considerable measures to make formal changes to the law.

The final chapter examined the means by which property is protected by the three regimes. There is a noticeable difference in the approaches of the three regimes to this subject when compared with the other three substantive areas studied. In the first instance, the right to property is a qualified right meaning that in certain circumstances it can be violated. This contrasts with acts of torture, enforced disappearance and sexual violence which are absolutely prohibited in all circumstances. The only aspect similar to this is the prohibition of looting and pillage under IHL which absolutely prohibits the arbitrary deprivation of property; arguably

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[22] *Prosecutor v. Akayesu* (ICTR-96-4) TC, Judgment, 2 September 1998, para.696.
[23] *Akayesu* ibid para.686.
[24] Including the use of 'rape camps' as in Kunarac (n 17) para.30.
[25] Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc S/RES/827, UN Security Council, 1994, art 5(g).
[26] *Akayesu* (n 22), para.696.

this extends to the IHRL regime when property is looted by State agents as evidenced in *Sadykov*[27] at the ECtHR. IHRL provisions, where they exist, are widely drafted and protect a broad-range of property interests going beyond mere destruction. This can be seen from the ECHR case law protecting intellectual property[28] and corporate assets.[29] The IACtHR has been largely concerned with another type of property rights namely the destruction or deprivation of community interests in property particularly the rights of indigenous people. Such jurisprudence can be seen as a demonstration of the versatility of human rights law when compared with the IHL and ICL regimes.

In times of armed conflict property is frequently destroyed by belligerents. This fact is recognised in the Geneva Conventions. Thus it is permissible to destroy property in certain circumstances where such acts are justified by military necessity and are proportional.[30] Certain classifications of property, for instance hospitals and places of worship are protected at all times.[31] In contrast, the ICL regime affords an individual's right to property relatively little protection. Seemingly the only protection available would come from either the IHL aspects of ICL or through a wide-reading of 'other inhumane acts',[32] persecution[33] or, in the case of genocide, the imposition of measures calculated to destroy a convention group.[34] The differences between the IHL and IHRL regimes on the one hand and ICL on the other could be explained by the fact that the latter is focused more on the need to ensure that individuals are prosecuted for heinous violations such as torture, sexual violence and enforced

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[27] *Sadykov v. Russia* (Application no. 41840/02) Judgment, 7 October 2010.
[28] *Smith Kline and French Laboratories v. Netherlands* (Application no.12633/87) Judgment, 4 October 1990.
[29] *Bramelid v. Sweden* (1983) 5 EHRR 249.
[30] See Chapter Five, 267.
[31] Jean-Marie Henckaerts & Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (vol 1 CUP 2005) 34.
[32] e.g. ICTY Statute (n25) Article 5(i); Rome Statute of the International Criminal Court ('ICC Statute') (17 July 1998) UN Doc A/CONF.183/9, entered into force 1 July 2002, Article 8(1)(k).
[33] e.g. ICC Statute ibid Article 8(1)(h).
[34] e.g. Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 227, entered into force 12 January 1951, art 2(c).

disappearance rather than protecting an individual's property. However, on the face of it, there would be little difference between killing an individual outright and burning his or her house down so that they and their family died of exposure. Indeed, the destruction of a house in such circumstances could constitute the deliberate imposition of conditions calculated to destroy a protected group under the Genocide Convention.[35]

An examination of the definitions peculiar to each regime reveals shared similarities but also differences between the regimes. Each regime appears to demonstrate awareness of the context in which it operates. This could itself be viewed as adherence to formally established rules rather than the adoption of a wider policy-orientated approach to the law. Approaching the law in this restricted fashion could be cited as evidence for the continuing relevance of formally identifiable and applicable rules.

Implications for the fragmentation of international law

Unchecked, fragmentation undoubtedly has the potential to harm international law and the international legal system as a whole. In part this is due to how international law comes to be seen and used by practitioners, academics and activists.[36] One potential means of mitigating such fragmentation is the adoption of more formal and legally rigorous definitions of substantive violations amounting to similar fact conduct such as torture, enforced disappearance, sexual violence and the destruction of property. Having considered the definitions and their application by the three regimes, a number of implications emerge as to how international law operates in an era of fragmentation. These include the idea that fragmentation is not damaging *per se*.

[35] ibid.
[36] This could include, for instance, judges, prosecutors, defence lawyers and NGO staff.

Furthermore, despite the apparent multiplicity of definitions each is clearly identifiable and capable of being applied by the regime in which it is found; and, importantly, each regime continues to operate and function without there being much evidence of regime conflict as postulated by some commentators.

In respect of the areas covered by this thesis, fragmentation appears to have created three separate definitions of each violation. Each of these is peculiar to the regime in which it is found. Fragmentation therefore could be seen as actually strengthening the international legal system because it creates clearly identifiable definitions that are applicable in a clearly identifiable regime. For example, the definition of torture in the IHRL regime is applicable only in that regime. This is because the definition of torture in the IHRL regime contains, *inter alia*, the physical act of torture and the involvement in the commission of those acts of State officials. In contrast, the IHL and ICL regimes do not require that the acts be committed by State officials, thereby extending their law to include the acts of non-State actors.

The existence of multiple, or sometimes overlapping, regimes (as found in the fragmented international legal system) has been referred to as causing inconsistencies,[37] invalidity[38] and incoherence.[39] In essence, the rules of one regime are at variance with the rules of another, leading to 'contradiction, collision and competition'.[40] This is reflective of Kelsen's view of normative conflict where norm is contrary to norm.[41] In such a situation, conformity with one norm leads inevitably

[37] Jaap Haag, 'Rule Consistency' (2000) 19 *Law and Philosophy* 369, 371-372.
[38] Hans Kelsen, *General Theory of Law and the State* (The Lawbook Exchange 1999) 410.
[39] Ole Fauchald and Andre Nollkaemper, 'Introduction' *in* Ole Fauchald and Andre Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 8.
[40] H. Hamner Hill, 'A Functional Taxonomy of Normative Conflict' (1987) 6 *Law and Philosophy* 227, 229.
[41] Hans Kelsen, *Introduction to the Problems of Legal Theory* [The Pure Theory of Law or Reine Rechtslehre] (Clarendon Press 1992) 71.

to the violation of another.[42] This potentially places a judge in an invidious position where she has to choose between applying norm *x* and norm *y*. The creation of this type of scenario could be avoided by the position advocated by this thesis. Rather than viewing the IHRL, IHL and ICL regimes as competing or conflicting with one another, it is instead possible for each regime to be viewed as functionally separate, with each having its own formally identifiable rules. The analysis of each regime's approach to the four substantive topics of torture, enforced disappearance, sexual violence and destruction of property lends some support to this idea.

Keeping the regimes functionally separate can potentially help to minimise conflict and tension between them because the norms and rules of each regime are restricted to that particular regime. Thus, the emergence of separate functional regimes each with its own formally identifiable rules can assist in overcoming the difficulties posed by and associated with the fragmentation of international law. The ICTY's position in *Tadić* and the ICJ's position in *Nicaragua* can both help to demonstrate this viewpoint. Both courts devised different interpretations of 'control' for the purpose of attributing liability. The ICTY's standard was that of 'overall control' while the ICJ's was that of 'effective control'.[43] Both the ICJ and ICTY Appeal Chamber can be regarded as presiding over functionally separate legal regimes, each with its own formally ascertainable rules. Such a position is reflected in the IHRL, IHL and ICL regimes' approaches to torture, enforced disappearance, sexual violence and the destruction of property. In these, although the regimes consider acts which are *prima facie* similar to the idea of 'control' in *Tadić* and *Nicaragua*, they each adopt functionally separate definitions.[44]

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[42] Stephen Munzer, 'Validity and Legal Conflicts' (1972) 82 *Yale Law Journal* 1140, 1151.
[43] See Chapter One, §1.1.2, 34.
[44] *Prosecutor v. Tadić* (IT-94-1) AC, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995; *Military and Paramilitary Activities in and against Nicaragua*

Alternative approaches to a formal approach to international law

There are several theoretical approaches to the study of law generally and to international law in particular. Indeed, the peculiar characteristics of the international legal system such as the lack of a defined legislative body and executive leads potentially to an even greater number of possible interpretations. The approach adopted in this thesis has focused on a formal, positivistic approach to international law. It has argued that the increased use of the policy-orientated approach is too political and can exacerbate the negative features of fragmentation by failing to regard the differences between the individual regimes. Despite this, it remains that there are drawbacks to an overly positivistic and formalist approach to international law. A rigid application of the law allows for no discretion on the part of the judges with the potential consequence that law becomes detached from reality. An element of judicial discretion and even creativity is to be welcomed in any legal system. Evidence for this in the arena of international law is plentiful. The inclusion of sexual violence in genocide indictments before the ICTR could be said to be largely due to the exercise of judicial discretion.[45] So too could the ICTY's approach in *Tadić* where the judges refused to follow the interpretation of control established by the ICJ in *Nicaragua.*[46] The approach adopted in this thesis has been to balance rigid positivism with the overly broad policy-orientated approach to international law.

(Nicaragua v. United States of America), Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986.

[45] Chapter Four, 229.

[46] See Chapter One, §1.1.2

A policy-focused methodology to international law has been said to place human dignity at the forefront of its analysis,[47] a position undermined by 'arbitrary formalism'.[48] As the IHRL, IHL and ICL regimes are variously concerned with the protection of human dignity, the policy-orientated approach would appear, *prima facie*, to be the ideal method of analysing the regimes. This would allow the law to move away from the 'shackles of traditionalism'[49] and embrace a human rather than a legal understanding of international law. Such an approach would find encouragement from some feminist scholars who, writing about sexual violence, have complained of the 'misogynistic formalism' inherent in the current international legal system.[50] These criticisms were perhaps justified at the time ICL re-emerged into the international legal system in the early 1990s. As noted above, it was a judicial intervention which led to the expansion of genocide so that it included acts of rape.

Perhaps inevitably, the approach advocated and taken in this thesis has drawn from relatively narrow sources of international law. These could be termed as 'traditional sources' of international law: or ; namely treaties, customary international law and judicial case law. A wider study of potential, non-traditional, sources such as policy documents and a greater emphasis on practice of international courts and tribunals could have resulted in different conclusions being reached. For instance an empirical study involving interviews with major actors such as judges and lawyers appearing before the various international tribunals could possibly have led to a different outcome than the doctrinal approach adopted.

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[47] Myres S. McDougal and Harold D. Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 *AJIL* 1, 1.
[48] Myres S. McDougal et al, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (Martinus Nijhoff 1994) xvii.
[49] Douglas M. Johnston, *The International Law of Fisheries* (Martinus Nijhoff 1987) xxv.
[50] Adrienne Kalosieh, 'Consent to Genocide?: The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca' (2003) 24 *Women's Rights Law Reporter* 121, 134.

Linked to a concern over the narrowness of the sources adopted is the use of only four substantive issues namely torture, enforced disappearance, sexual violence and the destruction of property. A wider body of law could have revealed different outcomes or given greater strength to the advanced thesis. Further relevant bodies of law could have included the treatment of detainees, the killing of individuals and the denial of fair trial rights. These may have revealed outcomes different to those found in this thesis. However, the present study began by identifying conduct that was conclusively prohibited by all three regimes studied. Many other aspects of IHRL, for example freedom of speech and the right to privacy, are not found in the IHL or ICL regimes, or at least are not specifically mentioned. This effectively limited the potential pool of issues to study.

Similarly, the thesis draws on the law relating to just three regimes of international law, namely IHRL, IHL and ICL. This could be considered too narrow a basis for the drawing of conclusions concerning fragmentation and its impact more generally on the operation of international law. For instance, studying the international trade and international environmental law regimes could lead to different outcomes whereby a less formalistic and more policy-orientated approach to sources could be welcomed.

The role of a formal approach to international law and fragmentation

In Chapter One and subsequent chapters, the role of formal rule ascertainment was analysed and applied in the context of the IHRL, IHL and ICL regimes. This was contrasted with the more open-faced, policy-orientated approach to rule ascertainment in which 'everything is law'.[51] One difficulty associated with such an approach in the era of fragmentation is that the legal distinctions between the three regimes melt away

[51] Chapter One, §1.2.

giving rise to the potential for inter-regime conflict. This would see, for example, IHL norms used to interpret those of IHRL and vice versa. The extra-legal use of norms in this way could result in the application of norms 'without reference to the legal system they originally set out to interpret.'[52] Consequently there is the possibility that the law ceases to exist as a normative order and instead becomes an issue of politics.[53]

One potential benefit of a formal approach to international law in the era of fragmentation is that it moves the law away from being simply a 'comprehensive process of decision making' to a distinct body of law with defined legal rules as one would expect to find in any developed legal system.[54] The existence of a distinct body of law can help to guide certainty and grants to judges and other decision-making actors in the international legal system a methodology for differentiating between what is law and what is extra-legal.[55] In turn this can help to steer the decision-makers away from the possible perils of a fragmented international legal system. A result of such an approach would be that decision-makers and academics would have to ask themselves 'why bother with rules and forms' approach criticised by Koskenniemi is deemed valid.[56]

The shift towards a formal approach could also limit the ability to construct law from various sources, some of which might be deemed extra-legal. This could, consequently, avoid the 'fact x policy = law' approach to international law.[57] It could also signify that the international legal system is reaching maturity with the creation of multiple regimes each of which is becoming increasingly well-established with its own body of procedures, case law and academic commentary. It could be seen as

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[52] Stanley V. Anderson, 'A Critique of Professor Myres S. McDougal's Doctrine of Interpretation by Major Purposes' (1963) 57 *AJIL* 378, 380.
[53] ibid.
[54] Jean d'Aspremont, *Formalism and the Sources of International Law* (OUP 2012) 105
[55] F.A. Hayek, *The Constitution of Liberty* (Routledge 1990) 148.
[56] Martti Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2002) 496.
[57] Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 *BYIL* 79, 121.

evidence of a natural, rather than intentional, counterbalance to the potential problems posed by the fragmentation of international law.

The future of fragmentation

Fragmentation will inevitably remain a feature of the international legal system and the subject of future academic commentary and debate. The process might increase further as the individual regimes grow in confidence and become more willing to assert that their own interpretation of a given legal concept is the most appropriate in the circumstances. The prospect of competing, and perhaps contradictory, definitions will unavoidably raise further questions of the unified nature of international law and how such divergences can be remedied. The idea of constitutionalising the international legal system to rectify such problems will continue to be advocated by academics. Despite such concerns and calls for greater centralisation of the international legal system, it remains that at the functional, operational level, the regimes of IHRL, IHL and ICL appear to operate relatively autonomously from one another. It is true that the regimes have borrowed terminology and legal principles from one another. For example, the IHL and ICL regimes share common definitions of the physical act of torture with the IHRL regime. However, the IHRL, IHL and ICL regimes appear to remain wedded to the law peculiar to their own legal systems. One particular manifestation of this is the emergence of formally ascertainable rules.

These formally ascertainable rules can be seen as a means of clearly demarcating the boundaries of any given regime. They specify the limits of each particular legal regime. This often involves the participation of those responsible for determining the content of a given legal rule. Such formal rules therefore permit, for example, the relevant judicial authority to determine whether or not any particular situation can be governed by the regimes' own rules. To take the example of IHL, it is

possible and indeed necessary for a court to establish that there existed an armed conflict of some description (either international or non-international). Without such a condition the regime is unable to operate and unable to adjudicate such matters. Thus, in the instance of torture, acts committed would have to have occurred during an armed conflict. The absence of an armed conflict in a given scenario would mean that the IHL regime would be unable to operate.

Fragmentation has the potential to strengthen international law through the greater use of formally ascertainable rules. Such rules could help to create and develop international legal regimes that are better able to function autonomously of one another while at the same time minimising the potential for inter-regime conflict. Emphasising the formal rules of each regime, including the legal circumstances in which a regime will operate, could avoid the creation of a new internationalised constitutional order aimed at regulating inter-regime conflict.

Fragmentation does undoubtedly pose challenges to the international legal system. This could include situations where those applying the law of one regime are unable to differentiate between their regime and the law of another. Each of the three regimes of IHRL, IHL and ICL in the areas of torture, enforced disappearance, sexual violence and the destruction of property has developed its own interpretations of the four violations studied based on the rules peculiar to the respective regime. This has ensured that despite fragmentation each regime continues to function, and the efficacy of international law is maintained.

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