High School Moot Court Case
Case prepared by Prof. Richard Gaskins

The Situation in Karkania

Part 1. Historical background. The nation of Karkania achieved independence from colonial rule in 1965, more than 50 years ago. During this time, the country has passed through long periods of internal strife. At first the Karkanian government was led by the Brentanos, an ethnic group tied to Northern districts. But for the last twenty years Karkania has been ruled by a coalition of Southern factions, all united in opposition to the Brentanos. Southern leaders have excluded all Brentanos from government positions, driving them back to their traditional Northern homelands. At one point the Karkanian National Army sent troops to Northern areas, where they clashed with armed "self-defense" groups of Brentanos. To avoid capture, many Brentano fighters sought refuge across the Northern border in neighboring countries, where local sympathies favored the Brentanos.

The Brentano population. Life in Northern Karkania is mostly rural and agricultural. People live in small villages connected by ancient forest pathways, with only a few modern roads built originally for military vehicles. For many years these roads have been poorly maintained, and they are especially bad during the four-month rainy season. Most Brentanos find it difficult to earn a living. At the same time, because of the presence of large mineral deposits in the region, notably gold, coltan, and diamonds, a few enterprising Brentanos have been able to amass large fortunes. Competition to sell these resources in international markets creates further friction between Brentanos and Southern ruling groups.

Cultural context of the Northern conflict. Culturally the Brentanos are an intensely spiritual people. Their beliefs mix some aspects of formal religions (originally introduced by colonial-period missionaries) along with centuries-old traditions. Belief in supernatural forces is a part of everyday life. But not all Brentanos think the same way. In 2002 there arose within Brentano society a powerful movement known as the Army of Salvation ("AOS"). Although vague in its political goals, the AOS challenged the spiritual authority of current Brentano elders, accusing them of breaking faith with traditional Brentano practices. According to the AOS, the current generation of leaders, soon after independence, invented a new blend of religion and politics,

turning their backs on more ancient customs. Led by the charismatic Brentano figure Gregorius Tamm, the AOS declared holy war on the existing Brentano power structure. Ordinary Brentano citizens who refused to join the AOS found themselves targeted as well, including many local leaders. After waves of extreme violence directed by the AOS against Brentano villagers, the region was visited by several International NGO's ("non-governmental organizations"). NGO reporters documented many instances of mass murder, torture, sexual violence, and destruction of property, as entire villages were burned to the ground, reportedly by the AOS. The national Karkanian government tried to defend Brentano villagers against some of these raids, but with little effect.

Goals of the AOS. The AOS did not operate like a conventional army. It did not seek to conquer territory or advance some known political agenda. It wanted rather to destroy the new leaders and symbols of post-independence Brentano society. In its place they offered a hazy vision of a purified future, returning to ancient Brentano cultural practices. Tamm remained a mysterious figure. He surrounded himself with just a few trusted allies, moving about the remote forest areas with no fixed base of operations—sometimes crossing the Northern border into safe territory. The government of Karkania's northern neighbor has actively protected Tamm's group from trans-border capture attempts; it has also provided funding for the AOS, as well as financial and communications links to the outside world. While Karkanian national forces have tried to capture Tamm and his associates, they were especially cautious to avoid direct armed conflict with their northern neighbor.

Part 2. Karkania and the International Criminal Court (ICC). The Karkanian national army had little patience for settling the Brentano conflicts. Unwilling to put military lives at further risk, Karkanian leaders soon gave up pursuing Tamm. The Karkanian government, dominated by Southerners, was most concerned about lost revenue from sales of natural resources coming from Northern districts.

Karkania refers itself to the ICC. Karkania became a State Party of the ICC in early 2003, soon after the Court opened its doors. In late 2008, Karkanian leaders invited the ICC Prosecutor to investigate the violence in Northern Karkania, hoping to stop the wave of AOS violence.

Without delay the ICC Prosecutor sent a team of investigators. He consulted widely with local and global organizations familiar with the tangled history of violence in the Brentano districts.

Arrest warrants issued. Although it was never clear exactly how the AOS was organized, in early 2009 the ICC Prosecutor asked a Pre-Trial Chamber of ICC judges in The Hague to issue arrest warrants against Gregorius Tamm, along with three associates whose names were presented to ICC investigators. The Pre-Trial Chamber issued these warrants under seal in June 2009, at first keeping them secret, in hopes that Tamm could still be lured into capture. But without a police force of its own, the ICC was no more able to capture Tamm than the Karkanian army. As it happened, extreme violence in Northern Karkania seemed to diminish at about this time. The AOS became less active, and international organizations turned their attention to more practical causes. The ICC shifted its own resources to other situations. Word of the arrest warrants leaked out and soon became public knowledge, even in the remote forests where the AOS sought refuge.

An unexpected surrender. In August 2015 a young man emerged from the deep forests of Brentano. He crossed the border into neighboring Centralia, identifying himself as a defector from Gregorius Tamm's Army of Salvation. This man, now 25-years-old, was Sonny Bill Webster, whose name appeared on one of the 2009 ICC warrants issued in the Karkanian situation. In his first interview with Centralian police, Sonny Bill said he was the leader of a special youth brigade, a little-known part of the AOS, funded and guided by Tamm's associates. He described the youth brigade as a kind of training ground for future AOS fighters. Sonny Bill expressed personal relief at breaking away from the AOS, saying that Tamm had threatened his life. ("I don't want to die in the forest, even if it means going to The Hague to answer legal charges.") He gave Centralian police useful tips about a leading AOS member, the movement's senior financier and Director of Operations, Jason Carter, who was named in yet another 2009 ICC warrant. Carter was quickly captured in a cross-border raid on an illegal mining operation, and taken to The Hague to face charges.

Sonny Bill's activities. Faced with this sudden arrival of two fugitives from Karkania, the ICC Prosecutor went back to examine the 2009 arrest warrants. The charges against Gregorius Tamm were many: murder, torture, sexual crimes, among others. But the first ICC investigators had found relatively little trustworthy evidence about Tamm's associates. The only charges in Sonny

Bill's arrest warrant were related to child soldiers, based on sketchy reports about the existence of the youth brigade, which ICC investigators assumed was just a first stop for Brentano youth on their way to becoming AOS fighters.

How the youth brigade worked. Known by the name "Little Sabres," Sonny Bill's youth brigade occupied a camp some distance from Tamm's multiple raids against Brentano villages. It was more like a training school, where Brentano youths learned military discipline and orderly behavior—tied to the strict religious and spiritual beliefs of the AOS. Some had arrived voluntarily, while others were abducted or coerced into joining the camp. But however they got there, the treatment was the same. First they were stripped and anointed with special oil, which they were told would protect them from "evil" forces in current Brentano society—including enemy bullets in the event of armed struggle. Given crisp new uniforms, they marched in columns carrying rifles and sticks, singing traditional Brentano songs, and vowing to "defeat the enemy." From time to time Tamm and his closest lieutenants would show up and take some older children off to the battlefield. Old videos were found showing Tamm at the youth camp, dressed in camouflage, leading the Little Sabres in songs, while obviously keeping a close eye on Sonny Bill. Tamm and his lieutenants also came looking for "wives" among the female youth, who were taken from the camp and never returned. Based on the images from this video footage, there seemed little doubt that many boys and girls were under the age of 15, during their time with Sonny Bill.

The Little Sabres in action. Sonny Bill was not a battlefield commander in the usual sense. His particular role, investigators said, was to provide strict training sessions for the youth under his control. In keeping with the radical teachings of Gregorius Tamm, he taught the Little Sabres to disrespect the spiritual practices and symbols used by the current generation of Brentano elders.

For these current Brentano leaders, among the most cherished cultural symbols was a rare tree called the Tiger-tail Pine. A tree of towering height, the Tiger-tail Pine gained entirely new cultural meaning after Karkanian independence, treated as a fresh symbol of Northern piety and resolve. Worship of the Tiger-tail Pine had been encouraged by Brentano leaders who were now the targets of Tamm's murderous raids. While the Little Sabres did not participate in Tamm's raids, they managed to apply their machetes to most of the Tiger-tail Pines in the region,

including the single, most imposing stand of such trees: a magnificent natural formation known as the Tiger-tail Circle—considered by current Brentano elders as a holy site. Sonny Bill himself led the slashing assault on the Tiger-tail Circle, leveling it to the ground in the year 2010. These destructive operations pleased Tamm, who saw them as striking another blow against the corrupt values introduced by Brentano elders.

Part 3. Next Steps at the ICC. In early 2016 the ICC Prosecutor decided to proceed toward the Confirmation of Charges hearing. She has asked the Pre-Trial Chamber to confirm the following charges against Sonny Bill Webster:

1. based on his leading role in the Little Sabres youth brigade, charges under Article 8(e)(vii) Article 8(e)(vii); *Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities*; and

2. based on the destruction of the famous Tiger-tail Circle, charges under Article 8(e)(iv): *Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives*; and also under Article 8(b)(iv) *Intentionally launching an attack in the knowledge that such attack will cause…widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*

[Although it is not part of this moot court exercise, the Prosecutor also asserted that Sonny Bill's mode of criminal responsible was that of a "direct perpetrator" under Art. 25(3)(a): *a person who commits such a crime, whether as an individual, jointly with another or through another person*]

New information on the ground. Outside the ICC, some new stories started to circulate about Sonny Bill's particular history with the AOS. These stories were apparently leaked by Centralian police who interviewed Sonny Bill immediately after his surrender. According to the respected international NGO Human Rights International, Sonny Bill told the Centralians that he was himself abducted at the age of 13 by Gregorius Tamm, whose spiritual powers and ability to instill fear made it impossible for Sonny Bill to escape. Early in his captivity, he witnessed the brutal deaths of other abducted youth who tried to escape. Along with other abductees, Sonny

Bill became convinced that Tamm possessed supernatural powers, and could read other people's minds at a distance. Even the mere thought of escaping could be enough to bring down Tamm's wrath. Intrigued by this story, Human Rights International consulted with a Western anthropologist, an expert on Brentano culture, who had interviewed many youths soon after they left the AOS. Her report is included as one of the appendices below.

Sonny Bill's defense team focuses on responsibility:

3. Turning to Article 31(1) of the Rome Statute, the defense team appointed for the Confirmation of Charges hearing seeks to make use of this new information about Sonny Bill's state of mind during his twelve years in the AOS.

Part 4. Guidance for Moot Court Teams

Each competing school will have an opportunity to argue the position for the Prosecution and also for the Defense. For each position, three speakers will address the three numbered points listed above in Part 3. For the **Prosecution**, the first speaker will address the potential charges regarding child soldiers under Rome Statute Article 8(e)(vii). The second speaker will address charges dealing with the destruction of the Tiger-tail Circle, addressing both Art. 8(e)(iv) and Art. 8(b)(4). The third speaker will anticipate arguments to be raised by the Defense team, focusing particularly on Art. 31(1). The Prosecution may need to use part of its time on rebuttal to address fully arguments raised on this matter by the Defense.

The **Defense** team will address the same three issues, choosing the order in which they will be considered. After Prosecution and Defense have completed their arguments, there is time for a brief round of rebuttals from both sides.

The **Confirmation of Charges** proceeding takes place before a Pre-Trial Chamber of ICC Judges. The purpose of this process is described in Rome Statute Art. 61. The Pre-Trial Chamber must hold a hearing to confirm legal charges against a suspect "within a reasonable time after the person's surrender or voluntary appearance before the Court." At the conclusion of the process, "the Pre-Trial Chamber shall…determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."

The drafters of the Rome Statute agreed that the hearing was not intended to be a mini-trial that would pre-judge the question of guilt. Thus the standard of proof is set at a lower level than "proof beyond a reasonable doubt," which would govern an actual trial. At this hearing, the Prosecutor is expected to support each charge, but may rely on summary evidence and need not call live witnesses.

For purposes of this proceeding, both the Prosecution and the Defense teams are limited to the evidence contained in the case summary above, and in the various appendices. The challenge for each team is to analyze the available facts, and to make the respective case for your team, using the relevant Articles of the Rome Statute. It is the Prosecution's burden to persuade the Pre-Trial Chamber that the evidence is sufficient to establish substantial grounds to believe that the person committed the alleged crimes. In interpreting specific language for the crimes charged, it is important for each team to look at the entire text of Article 8, especially contextual points raised in the opening lines of that Article. A useful checklist for each crime can be found in the Elements of Crimes. The context for Article 31(1) may be seen more broadly, in the sequence of Articles 30-33.

Appendix 1. Report on interviews with former child soldiers in Northern Karkania.
Appendix 2. Witness statement of Johnny L
Appendix 3. ICC jurisprudence on child soldiers.
Appendix 4. Announced priorities of the ICC Prosecutor.
Appendix 5. Victim statement from H.L.
Appendix 6. ICC jurisprudence on "destruction of buildings dedicated to religion."
Appendix 7. ICTY jurisprudence on the defense of duress.
Appendix 8. ICRC analysis of "Armed Conflict."
Appendix 9. Distinction between International Armed Conflicts and Non-international Armed Conflicts

Appendix 1. Report on interviews with former child soldiers in Northern Karkania. Author: Jane Clifton, Professor of Anthropology, October 2014

Views of the AOS as an anarchic group with criminal energy are frequently supported by accounts of how it makes use of child soldiers. The narrative of the AOS abducting young, innocent children, brainwashing them and forcing them to fight is common in the media. It evokes the generalized image of a child soldier as a vulnerable innocent without any agency, brutally abducted, drugged, and turned into a monster.

But my observations suggest caution regarding what one might call the discourse of the innocent and victimized child soldier without agency. This discourse is reflected in many child soldier testimonies quoted in NGO campaigns or the media. The period of transition when abductees are mistreated, forced to kill, etc., receives most attention, while the fighter's identification with his new life is either ignored or considered not the individual's active decision.

Cut off from their former lives, my informants had to build up a new life within the AOS, a life dominated by military order and conventions embedded in spiritual beliefs and practices. Some reports from my informants surprised me:

Everything there was done in order. You would be told you are not allowed to break any order. There was just order. We kept on doing these orders.

The rules strengthened me a lot. Because I saw that if I follow the rules, there would be no punishments. I would stay alive, be safe. I did not have fear, was always strong hearted. It kept me living with no fear.

If everything had gone on well, I would not have seen a reason to escape. They promised we would be the ones leading the government and we would have free education by now, everything was fine.

Much of what my informants told me about this transition suggested that their behavior reflected conscious actions of individuals who find themselves facing threats from many sides during times of war, and with no real guarantees for protection and meaning. Turning toward the AOS may not be an act of madness or the result of abduction trauma. The process of becoming part of the AOS evolves around the spiritual space the AOS constitutes.

The AOS belief system itself is a well-functioning system of fear and control. There was a range of "holy rules" that had to be followed closely by AOS recruits, starting with their training camps. Even if no one was around it was believed that the spirits could see everything and would punish disobedient soldiers, often by death from enemy guns. AOS leaders used highly effective threats to deter fighters from defecting. Some fighters were killed if caught escaping, and my informants witnessed several executions of escapees. The threat was as much spiritual as military.

If you thought about escaping, the Holy Spirit could identify you, pick you out and kill you even before you escape. That was our fear.

I had been fighting in the bush for nine years, and I only got a small wound on the chest; all those nine years there was nothing. But this time where I was shot, there was a reason behind it and the reason was my plan to escape.

But once former soldiers succeeded in defecting, their perspectives changed radically. By leaving the AOS, my informants had left behind most of what they connected with their life as a soldier. I asked my informants why they were no longer afraid of being punished by the holy spirits for having escaped. I was told:

Only when you are still in the bush, the Holy Spirit has power over you. When you come back, you are now like a civilian, there's nothing which happens to you.

Establishing themselves as civilians, the returned soldiers are stripped of their former identity for a second time. They experience the destruction of the moral space that provided the framework for their actions as a soldier. As one scholar wrote, "War is a collective experience and perhaps its primary impact on victims is through their witnessing the destruction of a social world embodying their history, identity and living values and roles." For my informants this was true in a double sense: on the one hand they witnessed the destruction of their home communities, and on the other hand they lost part of their identity and living values and roles as they left the AOS.

These examples suggest two very different life conditions, but also two distinct systems of accountability. What is a right and normal thing to do in one might be punished in the other.

Appendix 2. Witness statement of Johnny L.

Note: This statement submitted by the OTP was obtained from the records kept by Prof. Clifton. In preparing for her IHR Report (Appendix 1), she took extensive statements from former AOS combatants, after they returned to protected areas in the Brentano region. In conducting her interviews with former combatants over the age of 18, Prof. Clifton assured her subjects that Karkanian law granted immunity from national prosecution for former AOS soldiers who defected and returned to one of the protected villages. Below are excerpts from Prof. Clifton's interview with "Johnny L," interviewed in 2015 at age 22, as selected by the Prosecution.

JOHNNY L. …They were some of us abducted from [village name redacted], me and Sonny Bill. Then we never see our parents again. In the bush they tell us that [village name redacted] got burned and everyone there inside, and there was no survivors. That first bush camp hit us like a prison. There was two boys running away, then they catch them and tie them up in the middle of camp, and then chop them hard with machetes. They tell us that Mr. Tamm know when you want to run away, even it was only in your own head. He was in your head and would kill you before you gone too far.

…Sonny Bill and I get friendly with Freddy, an older fighter in the camp who knew about [village name redacted]. Freddy get us food and tell us all about our new life. They were all these new rules we need to learn. We sometimes carrying heavy loads on foot, moving on to the next bush camp. We need to prove ourselves to the fighters.

That's when I learn about guns and taken out to fight along with older fighters. Sonny Bill, he was good at singing and learning all the words coming from Commander Tamm, when he come to us during those first months. They liked Sonny Bill and how he following all the rules.

...When I was going off with the fighters, Sonny Bill stay behind. He could say all the rules and had remember all the stuff Tamm talked about. They say he be a good teacher for the next group of kids coming to our army real soon….

…Later on, when I am a field commander I come with Tamm, we come back to Sonny Bill sometimes. He build this whole new training camp, and no kids do escape it. Sonny Bill tell them this be their new life, and teach them good discipline and courtesy. He tell them Tamm is watching them, even when he be off in the bush fighting. Tamm always come back to Sonny Bill, and he find many new fighters there for his bodyguards. The fighters also find new wives to go with them back to the bush….

…I ask Sonny Bill that he know what happen later to these kids, and he say yes, and he think that knowing discipline and courtesy help these kids when they go off to the bush for fighting. He tell me about Freddy who was good to us in those first days, and that it make these kids' lives better to know the discipline. He say knowing the songs help the children forget their suffering. In these years many kids come to join us, and the bravest fighters come with Sonny Bill helping them learn the rules.

Appendix 3. ICC jurisprudence on child soldiers

PROSECUTOR V. THOMAS LUBANGA DYILO, ICC-01/04-01/06 (Situation in the DRC)
Trial Chamber I, 14 March 2012

JUDGMENT PURSUANT TO ARTICLE 74 OF THE STATUTE (excerpts)

Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

Para. 621. The Elements of the Crimes require that "the conduct took place in the context of and was associated with an armed conflict". The *travaux préparatoires* of the Statute suggest that although direct participation is not necessary, a link with combat is nonetheless required. [footnote 1791] The Preparatory Committee's draft Statute had postulated a broader interpretation in one of the footnotes:

> The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology. (emphasis added) [footnote 1792].

[footnote 1791]. UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1, 14 April 1998, page 21 and footnote 12.

[footnote 1792]. Ibid….

Para. 627. The use of the expression "to participate actively in hostilities", as opposed to the expression "direct participation" (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities. It is noted in this regard that Article 4(3)(c) of Additional Protocol II does not include the word "direct". [footnote omitted]. The extent of the potential danger faced by a child soldier will often be unrelated to the precise nature of the role he or she is given [footnote omitted]. Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation,

have an underlying common feature: the child concerned is, at the very least, a potential target [footnote omitted]. The decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target [footnote omitted]. In the judgment of the Chamber these combined factors – the child's support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes "active participation" can only be made on a case-by-case basis.

Para. 820. As set out above, those who actively participated in hostilities included a wide range of individuals, from those on the front line, who participated directly, through to those who were involved in a myriad of roles supporting the combatants. The decisive factor in deciding whether an indirect role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger by becoming a potential target. The ages of the children are dealt with in the Chamber's consideration of the detailed evidence relating to each of them, as set out below.

SEPARATE AND DISSENTING OPINION OF JUDGE ODIO BENITO

Para. 15. I respectfully disagree with the Majority's decision that declines to enter a legal definition of the concept of "use to participate actively in the hostilities", but instead leaves it to a case-by-case determination, which ultimately will be evidence-based and thus limited by the charges and evidence brought by the prosecution against the accused. Additionally, this case-by-case determination can produce a limited and potentially discriminatory assessment of the risks and harms suffered by the child. The Chamber has the responsibility to define the crimes based on the applicable law, and not limited to the charges brought by the prosecution against the accused.

Para. 16. Although the Majority of the Chamber recognises that sexual violence has been referred to in this case, it seems to confuse the factual allegations of this case with the legal concept of the crime, which are independent. By failing to deliberately include within the legal concept of "use to participate actively in the hostilities" the sexual violence and other ill treatment suffered by girls and boys, the Majority of the Chamber is making this critical aspect of the crime invisible. Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group.

Para.17. I thus consider it necessary and a duty of the Chamber to include sexual violence within the legal concept of "use to participate actively in the hostilities", regardless of the impediment of the Chamber to base its decision pursuant to Article 74(2) of the Statute.

Appendix 4. Announced priorities of the ICC Prosecutor

Excerpt from *Policy Paper on Case Selection and Prioritisation*, released by the Office of The Prosecutor on September 15, 2016:

41. The impact of the crimes may be assessed in light of, inter alia, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.

Appendix 5. Victim statement from H.L.

H.L.is one of many villagers displaced by the AOS raids in Brentano districts. He is identified here as a 70-year-old former leader of a village attacked by AOS fighters. He is currently senior advisor to a local NGO called Restoring Justice in Bentanoland (RJB). In this statement he talks about the cultural meaning of the Tiger-tail Circle, which was destroyed by the Little Sabres in 2010, toward the end of the years of conflict.

H.L. The destruction done by the Army of Salvation has buried all our hopes for Brentano culture. Yes, the many killings and savage beatings have left a deep wound in our society, more so because the crimes are committed by Brentanos against their brethren. By attacking not just our people, but also the very symbols of our modern culture, the AOS has set us back fifty years.

After Karkania won its independence, we Brentanos led the way for building a new cultural spirit. The brutal decades of colonial rule meant that Karkanians from all regions had lost their many links to the ancient past. We had to find a new symbols for a new society, making a fresh start. The Tiger-tale Pine is not just any old tree, but something that carries all the majesty and hope that we need for building a new society. This tree grows almost exclusively in Karkania, especially in the North. And there we had the most perfect formation of pines, always known as the Tiger-Tail Circle. When the Brentanos were leading Karkania, they applied to the World Heritage Committee to protect this cultural landmark. Sadly, with our internal wars and other problems, later governments never followed through with World Heritage. Over the years many other natural sites have been listed as cultural treasures under the World Heritage Convention, and the Tiger-Tail Circle missed its moment.

The real meaning of the Tiger-Tail Circle was there for every child growing up in Karkania, not only in the Brentano parts of the North. With the blessing of the gods, the perfection seen in this heavenly shape of tall pines could therefore seem possible for all of us, making a harmonious mix of regions and ethnic groups in the whole of Karkania. As long as the Circle was there in all its glory, we could dream for restoring balance and justice to this war-torn nation. When the Little Sabres chopped them all down, they took away our dream. Today we look in vain for signs and symbols that will bring our nation out of these years of strife. It seems each group now has its own gods with their separate commandments, keeping us divided as a nation. And now all of us in the North, along with suffering this profound loss, must live each day with the shame that it was a criminal group of Brentanos, under this evil leader Gregorius Tamm, who laid us low.

Appendix 6. ICC jurisprudence on "destruction of buildings dedicated to religion"

Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15 (Situation in Mali)
Pre-Trial Chamber I, 24 March 2016

DECISION ON THE CONFIRMATION OF CHARGES (excerpts)

Para 34. The evidence shows that the targeted Buildings/Structures included:
(i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum;
(ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum;
(iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum;
(iv) the Alpha Moya Mausoleum;
(v) the Sheikh Mouhamad El Mikki Mausoleum;
(vi) the Sheikh Abdoul Kassim Attouaty Mausoleum;
(vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum;
(viii) the door of the Sidi Yahia Mosque;
(ix) the Bahaber Babadié Mausoleum and
(x) the Ahmed Fulane Mausoleum, both adjoining the Djingareyber Mosque.

Para. 35. Seven of the mausoleums were situated in four sites, namely the Sidi Mahamoud, Sidi El Mokhtar, Alpha Moya, and *Trois Saints* cemeteries.

Para. 36. The Buildings/Structures were regarded and protected as a significant part of the cultural heritage of Timbuktu and of Mali. The community in Timbuktu was involved in their maintenance and used them for their religious practices. At the time of the destruction, all cemeteries in Timbuktu, including the Buildings/Structures within those cemeteries, were classified as world heritage and thus under the protection of UNESCO, and as many as 16 mausoleums situated in Timbuktu were also themselves protected sites pursuant to the 1972 Convention concerning the protection of the world cultural and natural heritage. Furthermore, as of 28 June 2012, the conflict in Mali as a whole and Timbuktu in particular led UNESCO, upon request of the Malian authorities, to include the city in its entirety on the list of world heritage in danger. It is also apparent from the evidence that the Buildings/ Structures did not constitute military objectives.

…Para. 39. The unanimous outcry of the international community and individuals concerned substantiates the Prosecutor's allegation as to the seriousness of the acts. The evidence submitted by the Prosecutor confirms that the Buildings/ Structures played an important role in the life of the inhabitants of Timbuktu and that their destruction was considered as a serious matter and regarded by the local population as an aggression towards their faith. Some of the Buildings/Structures have since been reconstructed, while in other instances something symbolic was built.

Para. 40. The crime proscribed by article 8(2)(e)(iv) of the Statute, as further elaborated in the Elements of Crimes, requires that the object of the attack be "one or more buildings dedicated to religion, […] historic monuments, […] which were not military objectives".

Para. 41. It is not in dispute that the Buildings/Structures were dedicated to religion and constituted historic monuments because of their origins and significance, and that none of them constituted a military objective.

Para. 42. Further, the evidence is univocal in showing that the Buildings/ Structures were specifically identified, chosen and targeted by the perpetrators as objects of their attack, precisely in light and because of their religious and historical character.

Appendix 7. ICTY jurisprudence on the defense of duress

PROSECUTOR v. DRAZEN ERDEMOVIC (IT 96-22)
ICTY Appeals Chamber, 7 October 1997

A. Separate and Dissenting Opinion of Judge Li (excerpts)

Para. 5. From a study of decisions [of the United States Military Tribunals at Nürnberg in proceedings under the Control Council Law No. 10 and those of Military Tribunals and/or Courts set up by various other allied countries for the same purpose for the same purpose] the following principles can be obtained: as a general rule, duress can be a complete defence if the following requirements are met, (a) the act was done to avoid an immediate danger both serious and irreparable, (b) there was no other adequate means to escape, and (c) the remedy was not disproportionate to evil. To this general rule there is an important exception: if the act was a heinous crime, for instance, the killing of innocent civilians or prisoners of war, duress cannot be a complete defence, but can only be a ground of mitigation of punishment if justice requires.

…Para. 8. In my view, both the rule and the exception are reasonable and sound, and should be applied by this International Tribunal. However, as this appeal case is concerned with the applicability of the exception, a few more words should be said about it. In the first place, the main aim of international humanitarian law is the protection of innocent civilians, prisoners of war and other persons *hors de combat*. As the life of an innocent human being is the *sine qua non* of his existence, so international humanitarian law must strive to ensure its protection and to deter its destruction. Admission of duress as a complete defence or justification in the massacre of innocent persons is tantamount to both encouraging the subordinate under duress to kill such persons with impunity instead of deterring him from committing such a horrendous crime, and also helping the superior in his attempt to kill them. Such an anti-human policy of law the international community can never tolerate, and this International Tribunal can never adopt.

Second, the present municipal laws of various countries regarding the propriety or necessity of recognising the exception to the rule, as shown above, are divergent. On the one hand, the legal systems of the British Commonwealth and some civil-law systems admit the exception. On the other hand, some other civil-law systems do not provide for it. In such circumstances, this International Tribunal cannot but opt for the solution best suited for the protection of innocent persons.

B. Separate and Dissenting Opinion of Judge Cassese (excerpts, footnotes omitted)

…5. The inferences to be drawn from the case-law on duress, with regard to war crimes and crimes against humanity involving the killing of persons:

Para. 40. I referred above to the Prosecution's contention that an exception has evolved in customary international law excluding duress as an admissible defence in offences involving the taking of innocent lives. This contention can only find support in one Canadian case (*Hölzer et*

al., mentioned in paragraph 26, *supra*) as well as the military regulations of the United Kingdom and the United States. With these elements of practice one should contrast the contrary, copious case-law I have just surveyed as well as the legislation to the contrary of so many civil-law countries. In my opinion, this manifest inconsistency of State practice warrants the dismissal of the Prosecution's contention: no special customary rule has evolved in international law on whether or not duress can be admitted as a defence in case of crimes involving the killing of persons.

Para. 41. As I pointed out above, the majority of the Appeals Chamber has reached this same conclusion, although through different arguments. However - and here I disagree with the majority as well – the Appeals Chamber majority does not draw from the absence of that special rule the only conclusion logically warranted: that one must apply, on a case-by-case basis, the general rule on duress to all categories of crime, whether or not they involve killing.

I shall delve below into what I regard - with respect - as the flaws in the majority's view. For now I shall elaborate on the logical conclusion I have just enunciated . This conclusion is that even in case of war crimes and crimes against humanity involving killing, if confronted with the defence of duress, an international criminal court must apply, as a minimum, the four criteria enunciated above, namely (1) a severe threat to life or limb; (2) no adequate means to escape the threat; (3) proportionality in the means taken to avoid the threat ; (4) the situation of duress should not have been self-induced.

Para. 42. The third criterion - proportionality (meaning that the remedy should not be disproportionate to the evil or that the lesser of two evils should be chosen) - will, in practice, be the hardest to satisfy where the underlying offence involves the killing of innocents. Perhaps - although that will be a matter for a Trial Chamber or a Judge to decide - it will never be satisfied where the accused is saving his own life at the expense of his victim, since there are enormous , perhaps insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others in this way: how can a judge satisfy himself that the death of one person is a lesser evil that the death of another? Conversely, however, where it is not a case of a direct choice between the life of the person acting under duress and the life of the victim - in situations , in other words, where there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does - then duress may succeed as a defence. Again, this will be a matter for the judge or court hearing the case to decide in the light of the evidence available in this regard. The court may decide, in a given case, that the accused did not do all he could to save the victims before yielding to duress, or that it is too speculative to assert that they would have died in any event. The important point, however - and this is the fundamental source of my disagreement with the majority - is that this question should be for the Trial Chamber to decide with all the facts before it. The defence should not be cut off absolutely and a priori from invoking the excuse of duress by a ruling of this International Tribunal whereby, in law, the fact of acting under duress can never be a defence to killing innocents. This is altogether too dogmatic and, moreover, it is a stance unsupported by international law, where there is no rule to this effect; in international law there only exists a general rule stating that duress may be a defence when certain requirements are met.

How is the Term "Armed Conflict" Defined in International Humanitarian Law?

International Committee of the Red Cross (ICRC)
Opinion Paper, March 2008

The States parties to the 1949 Geneva Conventions have entrusted the ICRC, through the Statutes of the International Red Cross and Red Crescent Movement, *"to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof"*[1]. It is on this basis that the ICRC takes this opportunity to present the prevailing legal opinion on the definition of "international armed conflict" and "non-international armed conflict" under International Humanitarian Law, the branch of international law which governs armed conflict.

International humanitarian law distinguishes two types of armed conflicts, namely:

- international armed conflicts, opposing two or more States, and
- non-international armed conflicts, between governmental forces and nongovernmental armed groups, or between such groups only. IHL treaty law also establishes a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Art. 1 of Additional Protocol II.

Legally speaking, no other type of armed conflict exists. It is nevertheless important to underline that a situation can evolve from one type of armed conflict to another, depending on the facts prevailing at a certain moment.

I. International Armed Conflict (IAC)

1) IHL Treaties

Common Article 2 to the Geneva Conventions of 1949 states that:

"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".

According to this provision, IACs are those which oppose "High Contracting Parties", meaning States. An IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation. Relevant rules of IHL may be applicable even in the absence of open hostilities. Moreover, no formal declaration of war or recognition of the situation is required. The existence of an IAC, and as a consequence, the

possibility to apply International Humanitarian Law to this situation, depends on what actually happens on the ground. It is based on factual conditions. For example, there may be an IAC, even though one of the belligerents does not recognize the government of the adverse party[2]. The Commentary of the Geneva Conventions of 1949

confirms that *"any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place"*[3].

Apart from regular, inter-state armed conflicts, Additional Protocol I extends the definition of IAC to include armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (wars of national liberation).[4]

2) Jurisprudence

The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a general definition of international armed conflict. In the Tadic case, the Tribunal stated that *"an armed conflict exists whenever there is a resort to armed force between States"*.[5] This definition has been adopted by other international bodies since then.

3) Doctrine

The doctrine gives useful comments concerning the definition of an international armed conflict.

According to D. Schindler, *"the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other. […] Any kind of use of arms between two States brings the Conventions into effect"*[6].

H.-P. Gasser explains that *"any use of armed force by one State against the territory of another, triggers the applicability of the Geneva Conventions between the two States. […] It is also of no concern whether or not the party attacked resists. […] As soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention"*[7].

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1 Statutes of the International Red Cross and Red Crescent Movement, art. 5, para. 2(g). 2 "It is irrelevant to the validity of international humanitarian law whether the States and Governments involved in the conflict recognize each other as States": *Joint Services Regulations (ZDv) 15/2,* in: D.

Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 45.

[3] J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* ICRC, Geneva, 1952, p. 32. [4] Additional Protocol I, art. 1, para. 4: "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of selfdetermination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".
[5] ICTY*, The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.
[6] D. Schindler, *The different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RCADI, Vol. 163, 1979-II, p. 131.
[7] H.P. Gasser, *International Humanitarian Law: an Introduction*, in: *Humanity for All: the International Red Cross and Red Crescent Movement*, H. Haug (ed.), Paul Haupt Publishers, Berne, 1993, p. 510511.
The German Joint Services Regulations (ZDv) 15/2 says that *"an international armed conflict exists if one party uses force of arms against another party. […] The use of military force by individual persons or groups of persons will not suffice"*[8]*.*

Finally, according to E. David, *"tout affrontement armé entre forces des Etats parties aux CG de 1949 (et éventuellement au 1er PA de 1977) relève de ces instruments, quelle que soit l'ampleur de cet affrontement: une escarmouche, un incident de frontière entre les forces armées des Parties suffisent à provoquer l'application des Conventions (et du 1er Protocole, s'il lie les Etats) à cette situation"*[9]*.*

II. Non-International Armed Conflict (NIAC)

1) IHL Treaties

Two main legal sources must be examined in order to determine what a NIAC under international humanitarian law is: a) common Article 3 to the Geneva Conventions of 1949; b) Article 1 of Additional Protocol II:

a) Non-International Armed Conflicts within the Meaning of Common Article 3

Common Article 3 applies to "*armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties*". These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. As the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur "*in the territory of one of the High Contracting Parties*" has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.

In order to distinguish an armed conflict, in the meaning of common Article 3, from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation. It has been generally accepted that the lower threshold found in Article 1(2) of APII, which excludes internal disturbances and tensions from the definition of NIAC, also applies to common Article 3. Two criteria are usually used in this regard:[10]

- First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.[11]
- Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations.[12]

8 D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 40.
9 E. David, *Principes de droit des conflits armés,* ULB, Bruxelles, 2002, p. 109.
10 ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T, 7 May 1997, para. 561-568; see also ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 84. 11 For a detailed analysis of this criteria, see ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-0366-T, 30 November 2005, para. 135-170. 12 See D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RCADI, Vol. 163, 1979-II, p. 147. For a detailed analysis of this criteria, see ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005*,* para. 94-134.

b) Non-International Armed Conflicts in the Meaning of Art. 1 of Additional Protocol II

A more restrictive definition of NIAC was adopted for the specific purpose of Additional Protocol II. This instrument applies to armed conflicts *"which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol"*.[13]

This definition is narrower than the notion of NIAC under common Article 3 in two aspects. Firstly, it introduces a requirement of territorial control, by providing that non-governmental parties must exercise such territorial control *"as to enable them to carry out sustained and concerted military operations and to implement this Protocol"*. Secondly, Additional Protocol II expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organised armed groups. Contrary to common Article 3, the Protocol does not apply to armed conflicts occurring only between non-State armed groups.

In this context, it must be reminded that Additional Protocol II "*develops and supplements*" common Article 3 "*without modifying its existing conditions of application*".[14] This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of NIAC in general. The Statute of the International Criminal Court, in its article 8, para. 2 (f), confirms the existence of a definition of a non-international armed conflict not fulfilling the criteria of Protocol II[15].

2) Jurisprudence

Case law has brought important elements for a definition of an armed conflict, in particular regarding the non-international armed conflicts in the meaning of common Article 3 which are not expressly defined in the Conventions concerned.

Judgments and decisions of the ICTY throw also some light on the definition of NIAC. As mentioned above, the ICTY went on to determine the existence of a NIAC *"whenever there is […] protracted armed violence between governmental authorities and organised armed groups*

or between such groups within a State".[16] The ICTY thus confirmed that the definition of NIAC in the sense of common Article 3 encompasses situations where *"several factions [confront] each other without involvement of the government's armed forces"*[17]. Since that first ruling, each judgment of the ICTY has taken this definition as a starting point.

3) Doctrine

Several recognized authors also commented very clearly on what should be considered as a non-international armed conflict. Their comments are relevant in first place to the conflicts which do not fulfil the strict criteria foreseen in Additional Protocol II and provide useful elements to ensure the application of the guarantees provided in common article 3 to the Geneva Conventions of 1949.

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13 Additional Protocol II, art. 1, para. 1.

14 Additional Protocol II, art. 1, para. 1. 15 Statute of the ICC, art. 8 para. 2 (f): "*It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups*" 16 ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.

17 Y. Sandoz/C.Swinarski/B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* ICRC, Geneva, 1987, para. 4461.

According to H.-P. Gasser, it is generally admitted that *"non-international armed conflicts are armed confrontations that take place within the territory of a State between the government on the one hand and armed insurgent groups on the other hand. […] Another case is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power"*[18]*.*

D. Schindler also proposes a detailed definition: "*The hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, [i.e] they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements*".[19]

M. Sassoli,[20] writes "*common Article 3 refers to conflicts 'occurring in the territory of one of the High Contracting Parties,' whereas Article 1 of Protocol II refers to those 'which take place in the territory of a High Contracting Party.' According to the aim and purpose of IHL, this must be understood as simply recalling that treaties apply only to their state parties. If such wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not 'non• international armed conflicts', there would be a gap in protection, which could not be explained by states' concerns about their sovereignty. Those concerns made the law of non• international armed conflicts more rudimentary. Yet concerns about state sovereignty could not explain why victims of conflicts spilling over the territory of several states should benefit from less protection than those affected by conflicts limited to the territory of only one state.*

Additionally, Articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda extend the jurisdiction of that tribunal called to enforce, inter alia, the law of non• international armed conflicts, to the neighbouring countries. This confirms that even a conflict spreading

across borders remains a non• international armed conflict. In conclusion, 'internal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.'[21]"

III. Conclusion

On the basis of the analysis set out above, the ICRC proposes the following definitions, which reflect the strong prevailing legal opinion:

1. **International armed conflicts** exist whenever there is *resort to armed force between two or more States*.
2. **Non-international armed conflicts** are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organisation*.

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18 H.P. Gasser, *International Humanitarian Law: an Introduction*, in: *Humanity for All: the International Red Cross and Red Crescent Movement*, H. Haug (ed.), Paul Haupt Publishers, Berne, 1993, p. 555. 19

D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RCADI, Vol. 163, 1979-II, p. 147.

20 Sassoli M., "Transnational Armed Groups and International Humanitarian Law", Program on Humanitarian Policy and Conflict Research, Harvard University*, Occasional Paper Series*, Winter 2006, Number 6, p. 8,9. 21 Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge: Cambridge University Press, 2002, p. 136.

Appendix 9. Distinction between International Armed Conflicts and Non-international Armed Conflicts

Academic commentary on the statutory distinction between International Armed Conflicts and Non-international Armed Conflicts (see Rome Statute, Art. 8(2)(b) and Art 8(2)(e)).

Dapo Akanda

CLASSIFICATION OF ARMED CONFLICTS: RELEVANT LEGAL CONCEPTS

in Wilmshurst (ed*), International Law and the Classification of Conflicts*, (2012, Oxford University Press), Chapter 3, excerpts from pp. 4-11 (footnotes omitted).

….3. Consequences of the distinction between international and non-international armed conflicts

It is essential to distinguish between international and non-international armed conflicts for the purposes of the application of international humanitarian law because differences exist between the content of the law applicable to the different types of armed conflicts. As a matter of treaty law, the differences are vast. The entirety of the Geneva Conventions of 1949, the Hague Conventions which preceded them and Additional Protocol I of 1977 apply to international armed conflicts. These treaties contain many hundreds of articles which establish a fairly detailed body of rules relating to the conduct of hostilities (so called 'Hague Law'), as well as elaborate rules relating to the protection of those who do not take part, or who no longer take part, in hostilities (so called 'Geneva Law'). By contrast, the treaty rules applicable specifically to non-international armed conflicts are rather limited. In essence, they are restricted to Common Article 3 of the 1949 Geneva Conventions, the provisions of Additional Protocol II of 1977 and article 8(2)(c) and (e) of the ICC Statute. Common Article 3 is limited to basic protection of those who do not, or who no longer, take part in hostilities. The division can also be seen in the relevant provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

…Notwithstanding this difference in the regulation of international and non-international armed conflicts by the bedrock treaties of international humanitarian law, the distinction between international and non-international armed conflict is being eroded such that there is now greater, though by no means complete, unity in the law applicable to these two forms of conflict. First of all, there are recent treaties that govern the conduct of participants in an armed conflict which apply to all situations of armed conflict, without distinction. The list of such treaties includes the Biological Weapons Convention 1972, the Chemical Weapons Convention 1993, the Convention Prohibiting Anti-Personnel Land Mines 1997, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property 1999 and the 2001 amendment which extends the Convention on Conventional Weapons and its protocols to non-international armed conflicts.

…Secondly, and more importantly, it has been argued that customary international law now provides for a broader set of rules governing non-international armed conflicts and fills the gaps left by treaty law such that the dichotomy between international and non-international armed

conflicts is much less significant today. This was the position taken by the Appeals Chamber of the ICTY in the Tadić (Appeal on Jurisdiction) case when it stated that:

> Notwithstanding ... limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules ... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities. [para 127]

The ICTY also held that: "elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife." [para 119]

…The ICRC, in its comprehensive study of customary international humanitarian law, published in 2005, has taken a similar approach. It found that nearly all the rules identified in the study applied to both international and non-international armed conflicts. It went on to state that: "This study provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and show the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts." [p. xxix]

…However, it also ought to be noted that the provisions of the ICC Statute reflect a reluctance on the part of States to go as far as the ICTY and the ICRC. The Statute was adopted after the Tadić decision and incorporated some elements of that decision (e.g. the definition of non-international armed conflicts). However some of the rules identified by the ICTY and ICRC as customary rules applicable in non-international armed conflicts (e.g. the prohibition of attacks on civilian objects) are not included in the war crimes provisions of the ICC Statute. Although it is possible that the drafters of the Statute were simply more reluctant to criminalize violations of international humanitarian law in non-international armed conflicts than in international armed conflicts, it is nonetheless noteworthy that the Statute includes a significantly longer list of war crimes.

… In conclusion, the distinction between the law applicable in international and non-international armed conflicts is blurring; however, whenever States have been presented with opportunities to abolish the distinction they seem reluctant to do so. Also, it is undeniable that two key parts of international humanitarian law—the law relating to the status of fighters and the rules relating to detention of combatants and civilians—differ depending on the status of the armed conflict. For these reasons, classification of armed conflicts for the purpose of applying international humanitarian law remains important.